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The Legal Conception of “Religion”

Aaron R. Petty

The Legal Conception of "Religion"

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INTRODUCTION

Aaron R. Petty[*]

> *It is now critical that the theological assumptions underlying legal theories about religion be made more explicit.*[†]

> *Religion is like law: the more closely we try to define it, the more it slips through our grasp.*[‡]

One problem of law—one may even say *the* problem of law—is that it must be expressed in and is limited by human language. As useful as languages are, they are imperfect means of communication. Sometimes language works well. For example, when I say "bird" or "fire" or "dark" most people will have some frame of reference to understand what I am talking about. But when I say "honor" or "happiness" or "love," the listener cannot be as certain. If the listener shares an experience or background with me, it may be easier to decipher, but context is critical to understanding.

The law, too, exists only as abstract concepts, and concepts are necessarily influenced by, products of, and speak to only certain times and places. As the U.S. Supreme Court recently acknowledged, "The Court, like many institutions, has made assumptions defined by the world and time of which it is a part."[1] Even the most fundamental and elementary ideas describing the human experience are subject to the limitations posed by language and the necessity to find common ground to communicate an idea. Thus, what may initially seem a universal constant that requires neither explanation nor defense can fall flat or simply make no sense when transplanted to other places or other times.

This dissertation is about the relationship between laws and ideas; the limitations that law faces insofar as it can only exist as an agglomeration of abstract concepts—concepts that derive meaning and color only from the individuals who are privy to and share its common meaning—who have the same experience of the same concept. In other words, what the phenomenologist Alfred Schultz calls "universes of discourse."[2]

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[†] Winnifred Fallers Sullivan, *Competing Theories of Religion and Law in the Supreme Court of the United States: An Hasidic Case*, 43 NUMEN 184, 186 (1996).

[‡] Steven D. Jamar, *Book Review*, 16 J.L. & RELIGION 609, 609 (2001).

[1] Obergefell v. Hodges, No. 14-556 (June 26, 2015), slip op. at 11-12.

[2] Martin E. Marty, *Religious Dimensions of Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, Part 1, 1, 7 (John Witte, Jr. & Johan D. van der Vyver, eds., 1996).

Here, I investigate the intersection of two of the most important areas governing how modern society is organized: the law governing religion.[3] I investigate whether the purportedly (or presumptively) secular Western legal understanding of the idea of "religion," as it is understood in court judgments, reflects any religious presuppositions or bias. In other words, to what extent is the idea of "religion," as it is understood by courts, sectarian rather than secular?[4] If a bias exists, what should be done about it in order to bring our understanding, our definitions, and our approach to legal issues involving religion into conformity with broader legal norms concerning formal equality?[5] "Trying to tease out relationships between law and religion is difficult not only because law draws upon many sources for its content, but also because of the variety of approaches to understanding law and to understanding religion."[6] The question is clearly important. "[L]aw has an important function to play not only in reflecting, but also in creating and sustaining, social life and shared values."[7]

To investigate whether such a bias exists I begin by examining two sets of court decisions: one from the United Kingdom and one from Israel, discussing the question "who is a Jew?" in a legal context. There are two significant reasons for this approach to investigating the legal conception of "religion."

First, as I will further elaborate below, how courts understand membership of a religion is a window on how they understand "religion" writ large, and offers a tangible window into an amorphous concept. By addressing only "who is a Jew?" the question of "religion" is narrowed from the entirety of beliefs, practices, institutions, loyalties, and ways of life that might be found in any given religion, to just the question of *membership*. How one acquires and maintains membership in a particular religion, in turn, is a useful means by which religions can be categorized. As Zvi Gitelman has explained, "Relations between religion and ethnicity span a spectrum. At one end are universal religions (Christianity and Islam) that are not specific to any ethnic group. At the other end are ethnically specific or tribal religions (Judaism, Hinduism, Old Order Amish)."[8] With

[3] Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 ECC. L.J. 262, 269 (2008) ("We touch here on one of the most sensitive areas not only in thinking about legal practice but also in interfaith relations.")

[4] "Critical cultural studies of law . . . have contributed to a significant re-examination of modern law's claims to secularity." Winnifred Fallers Sullivan, et al., *Introduction*, *in* AFTER SECULAR LAW 1, 6 (Winnifred Fallers Sullivan et al., eds. 2011).

[5] Rosemary J. Coombe, *Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463, 479 (1998) ("Legal fora are obviously significant sites for practices in which hegemony is constructed and contested-providing institutional venues for struggles to establish and legitimate authoritative meanings.").

[6] Jamar, *supra* note ‡ at 609.

[7] Maleiha Malik, *Faith and the State of Jurisprudence*, *in* FAITH IN LAW: ESSAYS IN LEGAL THEORY 129, 136 (Peter Oliver, et al., eds. 2000).

[8] Zvi Gitelman, *The Decline of the Diaspora Jewish Nation: Boundaries, Content, and Jewish Identity*, 2 JEWISH SOCIAL STUDIES, 112, 115 (1998). In between are religions with some degree of affiliation with a particular ethnicity.

regard to membership, Judaism and Christianity are on opposite ends of the spectrum. Thus, a legal understanding of religion that assumes Judaism defines (or ought to define) its membership in a manner parallel to how Christianity defines its membership may reveal an underlying Christian bias.[9]

Second, in order to assess any religious bias inherent in courts' ideas of "religion" it is necessary to investigate legal treatment of indisputably religious groups to isolate the underlying juridical assumptions and ensure that questions of legitimacy or the bona fides of the claimants are not the driving force behind any court decision. There is no question as to Judaism's status as a particular manifestation of "religion" in the popular sense. Studying legal discourse on Judaism, therefore, avoids the much larger (and more difficult) logically prior question whether the object of study is a religion in the first place. Because no court seriously doubts that in the popular or legal sense Judaism is indeed a religion, contrary to the way that legal status as a religion has sometimes been denied to, for example, the Church of Scientology or Wicca, it makes a useful illustration of courts' approach to the idea of religion, and membership of a religion.

Thus, using legal discourse concerning religious membership in Judaism as a window to courts' conception of "religion" allows for a relatively focused inquiry with relatively broad implications. How courts have addressed "Who is a Jew?" is likely to reveal the factors that courts consider determinative in what makes a religion *a religion*, and an investigation of these factors in the context of Judaism is unlikely to be clouded by suspicion of the sincerity of its adherents, or recent origin.

In Chapter One, published as part of a symposium issue of the *Elon Law Review*, I examine the extent to which the idea of "religion" relied on by the British courts (High Court, Court of Appeal for England and Wales, and the United Kingdom Supreme Court) in the *JFS* case assumed that all religions define membership (or ought to define membership) in ways similar to Christianity, and especially Protestant Christianity, by assuming that at base all religions are (or should be) about the individual's intellectual assent to a set of propositions of faith. In other words, that religion is essentially a matter of supernatural belief, as opposed to anything to do with shared ethnicity, history, culture, or ritual.

Chapter Two, published in the *Yale Journal of Law and the Humanities*, addresses a similar question, but looks at the line of cases in the Supreme Court of Israel beginning with the *Rufeisen (Brother Daniel)* decision, and subsequent cases interpreting the Right of Return. The Supreme Court of Israel has come to a different conclusion on the question "Who is a Jew" than have Jewish religious authorities. For the religious authorities, membership of the Jewish people is a matter of status, determined only by descent or conversion and, once conferred, is inalienable and irrevocable. Personal belief and participation in rites is

[9] For obvious historical reasons, I assume that if Western law has a religious bias at all, it is a broadly Christian bias.

entirely irrelevant, as is conversion to another religion. Neither a sincere belief that Jesus is the Messiah nor Christian baptism will undo one's Jewish status in the eyes of the Orthodox Jewish religious authorities.

Israeli civil courts, in contrast, have consistently held that affiliation with another religion revokes one's Jewish status for purposes of the Law of Return and the automatic Israeli citizenship that comes with it. These courts have insisted that as "secular," civil courts, they must apply a "secular" definition of "religion," and have therefore found that conversion to another religion forfeits one's Jewish status and one's right to make *aliyah*. By (1) accepting that there exists a category called "religion," largely defined by belief; (2) that Judaism is one such "religion" and (3) that this notion of "religion" is "secular," the Israeli courts appear to have departed not only from Jewish orthodoxy, but also from the academic consensus on these issues. This chapter will therefore ask to what extent Israeli law has subsumed the same idea that the British courts have: that "religion" is a trans-historical and trans-cultural concept detached from any particular religious framework or theological motivation.

Having found in the first two chapters that the Western legal conception of "religion" has a tendency to assume a Christian (and, in large part, Protestant) *weltanschauung*, I attempt in Chapters Three and Four to discuss what the implications of those findings are, with particular regard to how "religion" as a legal term of art should be interpreted by courts. How should judicial interpretation of fundamental guarantees of religious freedom take account of the Christian provenance of the criteria governing what it means to be a religion in the first place? What can be done about the law's largely Protestant conception of religion to ensure legal neutrality among religions and between religion and non-religion in multicultural societies? How can this be done when the very language we use to describe religions in court decisions and legal instruments are shot through with anachronisms?

"Religion" is notoriously difficult to define. "In no field of human endeavor has the tool of language proved so inadequate in the communication of ideas."[10] But, because it is so often used in legal documents—constitutions, treaties, statutes, and the like—the need for a *legal* definition of religion (as opposed to one simply for the purpose of delimiting a scholarly field like "anthropology of religion") is sometimes unavoidable. At the very least, a court or other adjudicator may be called to make a determination whether a something is a religion or some action is religious, and therefore entitled to some legal privilege or protection.[11]

[10] United States v. Seeger, 380 U.S. 163, 174 (1975).

[11] Notably, persecution on account of religion is a basis for asylum under the 1951 U.N. Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), and the 1967 U.N. Protocol Relating to the Status of Refugees, opened for signature 31 Jan. 1967, 606 UNTS 267 (entered into force 4 Oct. 1967).

Where religion is employed in this way, how should it be defined or interpreted so as to minimize inherent bias?

Chapter Three, to be published in the *Tennessee Law Review*, discusses these problems in the context of the First Amendment to the U.S. Constitution, and the U.S. Supreme Court's jurisprudence concerning the religion clauses. Chapter Four, to be published in the *George Washington International Law Review*, takes a similar approach in the context of the Article 9 of the European Convention on Human Rights (ECHR).[12] Both will attempt to answer these questions in light of the tension between a definition that can be easily applied by courts and which can provide some measure of predictability for the public on the one hand, and accuracy in how that definition finds commonality among vastly disparate complex systems on the other. Or, as Paul Valéry explained, the dialectic in which "[e]verything simple is false. Everything which is complex is unusable."[13]

The U.S. Supreme Court has famously shied away from defining religion, and there are as many theories about how the Court should (or should not) define religion as there are commentators. How should courts interpret the term "religion" in the First Amendment so as to minimize the effect that the unstated Christian background has on determining what is protected (or not) and prohibited (or not)?

Unlike the First Amendment, Article 9 of the ECHR provides similar protection (broader in some respects, narrower in others) for individual freedom, without placing any limitation on the prerogative of member states to establish, officially or unofficially, a state religion. Additionally, the existing jurisprudence of the ECHR under Article 9 is much less extensive than that of the U.S. Supreme Court. Given this relatively clean slate on which to work, and in the absence of countervailing limitations on establishment, how does the analysis change? Does the difference in the language used in the instruments affect the protection they afford? How does the supranational character of the ECHR affect how "religion" will be understood in national courts?

When judges and courts think of "religion" what are they really thinking of?[14] What are the hallmarks of religion that they look for in separating religion from non-religion in the course of assigning legal benefits and burdens? What are the legal consequences of those ideas, and

[12] Together, the decisions of these courts are of the highest importance because together the United States and the European Union represent the vast majority of "the West," together their laws govern close to one billion people, and each is increasing in cultural diversity.

[13] PAUL VALÉRY, NOSTRE DESTIN ET LES LETTRES (1937). This has also been referred to as "Bonini's Paradox" and "Map-Territory relation."

[14] "Few ask the question, 'What is religion and how is it related to law?' or 'How can we best talk about religion?" Sullivan, *supra* note † at 186. A decade later, James Boyd White took up Sullivan's challenge in HOW SHOULD WE TALK ABOUT RELIGION: PERSPECTIVES, CONTEXTS, PARTICULARITIES (James Boyd White ed., 2006). Later still, Ino Augsburg asked "How can we talk about religion from a legal point of view?" Ino Augsburg, *Taking Religion Seriously: On the Legal Relevance of Religious Self-Concepts*, 1 J. OF LAW, RELIGION & STATE 291, 291 (2012).

do they result in any disparate or unfair treatment of minority religious groups? The answers to these questions are important. Legal judgments on the nature of religion have far-ranging societal consequences, and will continue to do so.[15] I hope that a critical approach to the law's understanding of religion will help to elucidate some of the judiciary's more fundamental preconceptions about religion, and permit a more nuanced and self-reflective legal understanding of what religion is.

[15] This is true not just with respect to the rights in question, but more generally. Alice Donald, *Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?*, 2 OX. J.L. & RELIGION 50, 55 (2013) ("A striking aspect of public discourse about religion or belief is the extent to which it has been shaped by certain legal judgments, in the sense that the judgments are adduced as evidence of wider patterns of experience or behavior.")

"FAITH, HOWEVER DEFINED": REASSESSING *JFS* AND THE JUDICIAL CONCEPTION OF "RELIGION"

AARON R. PETTY*

The idea that religion is creed . . . is so deeply embedded in our legal culture that it can be hard to see it as a particular, debatable view of what religion is.†

I. INTRODUCTION

In 1908, the eminent British legal scholar F.W. Maitland declared that, "Religious liberty and religious equality are complete."[1] More recent scholarship has suggested that Maitland's declaration may have been somewhat premature.[2] But the last hundred years have witnessed the "demise" of Christianity as the "dominant ideology of our academic discourses."[3] And—at least on the surface—the situation in law is much the same. But how does law conceive of "religion" itself? And does that conception reflect any religious bias or tacit suppositions that affect how legal issues involving religion are framed, analyzed, or decided? The questions are hardly idle. Legal conceptions of religion "are not mere abstract intellectual exercises. They are embedded in

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† Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041, 1045 (2010).

[1] F. W. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND 520 (1908).

[2] RUSSELL SANDBERG, LAW AND RELIGION 29 (2011).

[3] JAY GELLER, ON FREUD'S JEWISH BODY: MITIGATING CIRCUMCISIONS 19 (2007).

passionate social disputes on which the law of the state pronounces."[4] It is not, as Arie Molendijk explained, "a harmless affair."[5] Given that the law often singles out religion for special benefits, it falls to the courts to determine who qualifies and who does not. For example, now that the U.S. Supreme Court has definitively held that a "ministerial exception" limits application of employment discrimination law to the clergy,[6] the courts will likely be faced with determining to whom the exception applies. How the courts understand religion, then, is of utmost importance in determining how and to whom those benefits are allocated.

In this paper, I challenge the unspoken assumption that the legal category of "religion" is religiously neutral[7]—that is, that the concept of "religion" employed by courts is essentially "transhistorical and transcultural,"[8] and may, therefore, be uncritically applied without regard to the time, place, and context in which the idea of a thing called "religion" arose. To do so, I examine the series of judicial decisions in the course of litigation between an anonymous student, "M," and JFS (formerly Jews' Free School) regarding the school's admission criteria, which was *ante litem* premised on the Orthodox Jewish definition of who is a Jew.[9] I ask to what extent the idea of "religion"—and specifically the nature of membership in a religious body—on which the *JFS* courts relied, favor religions in which membership is based largely, if not exclusively, on confessing a particular faith at the expense of those where membership is bound up to a significant extent with ethnicity and lineage and where "faith" (in the sense of propositional faith or "belief in" something) is not considered determinative of membership.

Didi Herman has called *JFS* "one of the most comprehensive judicial engagements with Jewishness in English case law in the last 100 or

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[4] Talal Asad, *Reading a Modern Classic: W. C. Smith's "The Meaning and End of Religion"*, 40 HIST. OF RELIGIONS 205, 220 (2001) [hereinafter Asad, *Reading a Modern Classic*].

[5] Arie L. Molendijk, *In Defence of Pragmatism*, *in* THE PRAGMATICS OF DEFINING RELIGION: CONTEXTS, CONCEPTS AND CONTESTS 3, 6 (Jan G. Platvoet & Arie L. Molendijk, eds. 1999) (internal quotation omitted).

[6] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

[7] Stolzenberg, *supra* note †, at 1045.

[8] TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 28 (1993) [hereinafter ASAD, GENEALOGIES OF RELIGION].

[9] R (on the application of E) v. Governing Body of JFS & Others, [2009] UKSC 15 (U.K.).

so years."[10] "Legal judgments, especially those that function as 'precedent,' are authoritative statements of official state discourse."[11] Thus, the *JFS* decision is perceived as defining, to a significant extent, how the U.K. government relates to Jews and how it conceives of Judaism. Indeed, one Jewish leader suggested it was "potentially the biggest case in the British Jewish community's modern history."[12]

Regrettably, however, *JFS* has received minimal academic scrutiny, and the academic response has largely ignored the assumptions underlying the Court's treatment of how membership in a religious group can or ought to be determined. Apart from two chapters in Herman's recent book, little of note has been written about this case. What commentary exists tends simply to agree or disagree with the Court's judgment without significant analysis.[13] The commentary suggests that religion in general should not be granted special protections,[14] or it addresses other, more doctrinal aspects of the decision.[15] No academic commentator has yet challenged at length the assumptions about the nature of "religion" on which the Court relied.[16]

In Part II, I outline the dispute and provide an overview of the findings of Mr. Justice Munby in the High Court, the terse opinion of the Court of Appeals, and finally the 5-2-2 split decision of the U.K. Supreme Court. In Part III, I lay the groundwork for an evaluation of those decisions by framing, as a historical matter, the development of

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[10] DIDI HERMAN, AN UNFORTUNATE COINCIDENCE: JEWS, JEWISHNESS & ENGLISH LAW 160 (2011).

[11] *Id.* at 8.

[12] Sarah Lyall, *Who Is a Jew? Court Ruling in Britain Raises Questions*, N.Y. TIMES, Nov. 8, 2009, http://www.nytimes.com/2009/11/08/world/europe/08britain.html?pagewanted=all#.

[13] Jason Ordene, *Who Is a Jew? An Analytical Examination of the Supreme Court of the United Kingdom's JFS Case: Why the Matrilineal Test for Jewish Identity Is Not in Violation of the Race Relations Act of 1976*, 13 RUTGERS J.L. & RELIGION 479 (2012); Geoffrey Bindman, *When Freedoms Collide*, 160 NEW L.J. 320 (2010).

[14] Aileen McColgan, *Class Wars? Religion and (In)equality in the Workplace*, 38 INDUS. L.J. 1 (2009).

[15] Michael Connolly, *Racial Groups, Sub-Groups, the Demise of the But For Test and the Death of the Benign Motive Defence: R (on the Application of E) v. Governing Body of JFS*, 39 INDUS. L.J. 183 (2010); Molly E. Swartz, *By Birth or By Choice? The Intersection of Racial and Religious Discrimination in School Admissions*, 13 U. PA. J. CONST. L. 229 (2010).

[16] Herman alludes to the underlying assumptions and J. H. H. Weiler discusses them more directly, but briefly, in an online editorial. J. H. H. Weiler, *Discrimination and Identity in London: The Jewish Free School Case*, JEWISH REV. OF BOOKS (2006), http://www.jewishreviewofbooks.com/publications/detail/discrimination-and-identity-in-london-the-jewish-free-school-case.

the idea of "religion" as a category. I suggest both that the idea of "religion" is historically contingent, and that the particular milieu in which it originated suggests that the idea of "religion" takes Christianity as its prototype. In Part IV, I offer a critical analysis of *JFS* in light of the ontological and semantic history of "religion" as a concept. I conclude that the conception of religion reflected in the *JFS* courts' explicit statements and tacit assumptions suggests a bias in favor of Christianity.

II. *JFS*

A. *The Dispute*

JFS is a voluntary aided school under the School Standards and Framework Act 1998.[17] Such schools may, like JFS, have a "religious character" designated by the Secretary of State for Children, Schools, and Families.[18] These schools ("faith schools") are "exempted [by the Schools Standards and Framework Act 1998, §§ 88 and 88C] from the prohibition against religious discrimination [in the Equality Act 2006, §§ 45 and 47] because their purpose is to educate children in what are generally the religious beliefs of their parents."[19] Faith schools are, however, bound by the provisions of the Race Relations Act 1976, which prohibits discrimination on racial grounds in admission of students,[20] and which defines racial grounds to include "ethnic . . . origins."[21]

As Lord Phillips wrote,

> JFS is an outstanding school. For many years far more children have wished to go there than there have been places in the school. In these circumstances it has been the policy of the school to give preference to those whose status as Jews is recognised by the [Office of the Chief Rabbi, hereafter "OCR"].[22]

The issue was whether this policy contravened the Race Relations Act.[23]

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[17] R (E) v. Governing Body of JFS & Another, [2008] EWHC (Admin) 1535, [119] (Eng.).

[18] *Id.* [121].

[19] R (on the application of E) v. Governing Body of JFS & Others, [2009] EWCA (Civ) 626, [10] (Eng.); R (on the application of E) v. Governing Body of JFS & Others, [2009] UKSC 15, [75] (U.K.) (Lord Mance).

[20] Race Relations Act, 1976, c. 74, §§ 17 & 19B(1) (U.K.).

[21] *Id.* at § 3(1); *JFS*, [2008] EWHC (Admin) 1535, [130].

[22] *JFS*, [2009] UKSC 15, [5] (Lord Phillips of Worth Matravers).

[23] *Id.*

M wished to go to JFS but, as the school was oversubscribed, it limited its intake to those students who were recognized as Jewish by the OCR.[24] M's father, E, was Jewish by birth; his mother was raised a Roman Catholic but later converted to Judaism, prior to M's birth, under the auspices of a non-Orthodox synagogue.[25] The OCR rejected the validity of M's mother's conversion by the non-Orthodox synagogue because it did not meet certain religious requirements.[26] Under Orthodox criteria, M's mother never became Jewish and, therefore, she could not have passed on Jewish status to M when he was born.[27] Accordingly, JFS concluded that because M was not Jewish under the OCR's Orthodox standard, he would not be granted preferential standing in admissions.[28] And because JFS was oversubscribed and could fill every seat with a halakhically Jewish student, the chance of M being offered a place was essentially nonexistent.[29]

B. *Before Mr. Justice Munby in the High Court*

E sought judicial review both of JFS's refusal to admit M and of the School Adjudicator's decision upholding the school's admissions policy.[30] Justice Munby (hereinafter Munby J) delivered an exhaustive judgment of 301 paragraphs that detailed the evidence put before him, the parties' arguments, and his own conclusions.[31]

Munby J began by reviewing evidence of how Jewish religious groups define their own membership.[32] Munby J received uncontroverted evidence from the OCR and the London Beth Din that "attendance at the services of a synagogue has no bearing on a person's status, under Jewish religious law," and that Jewish status "is thus different from the notion of belonging to a faith in proselytizing religions such as Christianity and Islam."[33] Moreover, it is incumbent upon observant Orthodox Jews to teach the tenets of Judaism to Jews, even—and perhaps especially—to those Jews who are not particularly observant. This

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[24] *JFS*, [2009] EWCA (Civ) 626, [15].
[25] *JFS*, [2008] EWHC (Admin) 1535, [34]; *JFS*, [2009] UKSC 15, [66] (Lady Hale of Richmond).
[26] *JFS*, [2008] EWHC (Admin) 1535, [38]-[40]; *JFS*, [2009] UKSC 15, [74] (Lord Mance).
[27] *JFS*, [2008] EWHC (Admin) 1535, [35]; *JFS*, [2009] UKSC 15, [6] (Lord Phillips).
[28] *JFS*, [2008] EWHC (Admin) 1535, [60].
[29] *Id.*
[30] *Id.* [73].
[31] *JFS*, [2008] EWHC (Admin) 1535.
[32] *Id.* [15], [20]-[21].
[33] *Id.* [14].

is the *raison d'être* of JFS, and the basis of its admissions policy that favors students who are halakhically Jewish, regardless of their level of commitment or observance.[34]

Munby J rejected E's claims of both direct and indirect discrimination.[35] With regard to direct discrimination, Munby J found that,

> [b]eing Jewish can be a matter of race, but it can also be purely a matter of religion. One can be Jewish as a matter of religion (for example by conversion) but not by racial [*i.e.*, ethnic] origin. Conversely, one can be Jewish as a matter of ethnicity on account of a Jewish ancestor but, unless that ancestor is in the direct maternal line or the individual converts in a way recognized by the OCR, not Jewish as a matter of religion.[36]

The second scenario is the case of M, who is ethnically Jewish (through his father), but not religiously Jewish according to the OCR because his mother's conversion is not recognized and he has not himself converted.[37] Munby J concluded that,

> [t]he simple fact, in my judgment, is that JFS's admissions policy is, as the School Adjudicator correctly found, based on religious and not on racial (ethnic) grounds, reflecting, as it does, a religious and not an ethnic view as to who, in the eyes of the OCR and JFS, is or is not a Jew. Such an analysis . . . fits comfortably within the distinction drawn in *Seide* between actions by or in relation to Jews based on religious grounds and actions by or in relation to Jews based on racial (ethnic) grounds.[38]

With regard to indirect discrimination, Munby J found that JFS's admission policy did put those students who were not of Jewish ethnicity at a disadvantage because such students were less likely to be Jewish under the religious definition employed by the OCR.[39] However, the judge found that the admission policy had a legitimate aim that justified the policy, in part because "a policy which permitted preferences based only on the basis of religious practice would prejudice religions, such as Judaism, which define membership exclusively by status and not by practice or observance."[40] Ms. Dinah Rose QC, for E, objected that it would be absurd to think that the school could advance its religious character by giving preference to those students who were halakhically Jewish (*i.e.*, by maternal descent), but also were practicing Christians or atheists, over a practicing and pious Masorti or Reform

[34] *Id.* [13].
[35] *Id.* [177], [203].
[36] *Id.* [157].
[37] *Id.* [167].
[38] *Id.* [168].
[39] *Id.* [166].
[40] *Id.* [190].

Jew, not considered Jewish by the OCR.[41] Munby J explained why "religion" must mean more than belief and practice:

> The irrationality or absurdity to which Ms. Rose refers appears only if one assumes that religion is necessarily a matter of belief, practice and observance and that it is only on those grounds that a faith-based school can properly base its admissions policy. But that . . . is simply not so; not so in relation to Judaism, and not so in relation to other religions. Moreover, it gives a seriously limited and inadequate recognition to what may properly—rationally and sensibly—be implicated in the concept of being a member of a religious community.[42]

Munby J further found that the policy was a proportionate means of achieving that aim, and noted that it was not "materially different" from a Muslim school giving preference to those born of a Muslim father, or a Roman Catholic school giving preference to those who were baptized in infancy.[43] Moreover,

> some alternative policy based on such factors as adherence or commitment to Judaism (even assuming that such a concept has any meaning for this purpose in Jewish religious law) would not be a means of achieving JFS's aims and objectives; on the contrary it would produce a different school ethos.[44]

Thus, Munby J found that E's claim for indirect discrimination failed as well.[45] The school's admissions policy, although it disadvantaged students who were not ethnically Jewish, was a proportionate means of achieving a legitimate aim.[46]

C. *Before the Court of Appeal*

E's appeal was heard before Lord Justice Sedley (hereinafter Sedley LJ), Lady Justice Smith, and Lord Justice Rymer in May 2009.[47] Sedley LJ, writing for a unanimous Court, began by noting that a faith school, when oversubscribed, may restrict entry "to children whom, or whose parents, it regards as sharing the school's faith. . . . [N]o school, however, is permitted to discriminate in its admissions policy on racial grounds."[48] The Court of Appeal appeared to have some difficulty in accepting, as Munby J did, that one could be Jewish for ethnic pur-

41 *Id.* [196].
42 *Id.* [197].
43 *Id.* [200].
44 *Id.* [201].
45 *Id.* [203].
46 *Id.* [202].
47 R (on the application of E) v. Governing Body of JFS & Others, [2009] EWCA (Civ) 626 (Eng.).
48 *Id.* [12]-[13].

poses, but not for religious purposes, and vice versa. For example, Sedley LJ held that "[o]ne of the great evils against which the successive Race Relations Acts have been directed is the evil of antisemitism. None of the parties to these proceedings want or can afford to put up a case which would result in discrimination against Jews not being discrimination on racial grounds."[49]

The Court of Appeal summarized its decision in three points: explaining that Jews constitute a racial group; discrimination on the basis of Jewish status is racial discrimination; and the motive for the discrimination, regardless of any religious character, is irrelevant.[50] The Court then analogized Jewish status to membership in the Christian Church. The Court explained that "[i]f for theological reasons a fully subscribed Christian faith school refused to admit a child on the ground that, albeit practicing Christians, the child's family were of Jewish origin, it is hard to see what answer there could be to a claim for race discrimination."[51] Finally, the Court suggested that Jewish faith schools could still give preference to Jewish children in admissions, but that "as one would expect, eligibility must depend on faith, however defined . . . ."[52]

D. *Before the Supreme Court*

The Supreme Court split three ways: Lord Philips, Lady Hale, Lord Mance, Lord Kerr, and Lord Clarke upheld the judgment of the Court of Appeal, concluding that JFS's admissions policy based on the OCR guidance and *halakha* constituted direct racial discrimination.[53] Lords Hope and Walker concluded that although there was no direct racial discrimination, there was indirect discrimination because the school failed to prove that its admissions policy was a proportionate means of achieving a legitimate aim.[54] Lords Rodger and Brown agreed with Munby J, that there was no unlawful discrimination, direct or indirect, and would have found for the school in all respects.[55]

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[49] *Id.* [25].

[50] *Id.* [32].

[51] *Id.*

[52] *Id.* [33].

[53] R (on the application of E) v. Governing Body of JFS & Others, [2009] UKSC 15 (U.K.).

[54] *Id.* [210]-[211], [218], [235].

[55] *Id.* [232], [255]-[277].

1. Lord Phillips of Worth Matravers

Lord Phillips began by explaining that although the phrase "grounds for discrimination" is ambiguous, it has been interpreted to mean the factual criteria applied by the discriminator, rather than the discriminator's subjective motivation for relying on those criteria.[56] He then noted that the Orthodox test for determining Jewish status focuses on matrilineal descent.[57] He suggested that it is possible to identify a group who is Jewish according to the OCR standards and a group who is Jewish according to the test of ethnicity outlined in a previous case (the *Mandla* criteria).[58] But the two are "virtually coextensive" and, according to Lord Phillips, "[a] woman who converts to Judaism thereby acquires both Jewish religious status and Jewish ethnic status."[59] Accordingly, Lord Phillips concluded that the matrilineal test is a prohibited "test of ethnic origin."[60]

2. Lady Hale of Richmond

Lady Hale's judgment focused more closely on the applicable discrimination law, explaining that her decision to write separately despite reaching the same conclusion as the other justices in the majority, and for the same reasons, was because "the debate before us and between us has called in question some fundamental principles . . . ."[61] She explained, first, that there is a difference between direct discrimination, which stems from a difference in formal equality of treatment, and indirect discrimination, which may exist where a formally neutral rule adversely and disproportionately affects members of a particular protected class.[62] Lady Hale explained that while indirect discrimination is justifiable where it is a proportionate means of achieving a legitimate aim, direct discrimination is, as a matter of law, never justifiable.[63] After reviewing the leading cases, Lady Hale concluded that there is a difference between the ground and the motive for a discriminatory act, and that the ground relied on by the OCR in rejecting M was that his mother was ethnically Italian and not Jewish.[64]

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[56] *Id.* [13] (Lord Phillips).
[57] *Id.* [29].
[58] *Id.* [30].
[59] *Id.* [39].
[60] *Id.* [45].
[61] *Id.* [55] (Lady Hale).
[62] *Id.* [56].
[63] *Id.* [57].
[64] *Id.* [58]-[66].

Lady Hale discounted the fact that M's mother had not converted under Orthodox auspices, holding that because his mother's ethnic origin was the sole criterion, the school still would have been basing its admissions decisions on ethnicity, regardless of whether the conversion was considered valid or not.[65] In effect, Lady Hale concluded that Jewish ethnicity and membership in the People of Israel are coterminous, either discounting entirely the possibility of conversion or, like Lord Phillips, concluding that ethnicity is not immutable. Lady Hale went on to observe that "no other faith schools in this country adopt descent-based criteria for admission" and that "[t]he Christian Church will admit children regardless of who their parents are."[66] Lady Hale concluded by suggesting that if special arrangements are to be made for Jewish schools to apply Jewish principles in determining who is Jewish, then such a step should be taken by Parliament; the courts should not "depart[ ] from the long-established principles of the anti-discrimination legislation."[67]

3. Lord Mance

Lord Mance agreed in large part with the judgments of Lord Phillips and Lady Hale. But his judgment reflected a significant concern with the application of international and European law. Lord Mance explained, "I also consider it to be consistent with the underlying policy of s.1(1)(a) of the [Race Relations] Act [1976] that it should apply in the present circumstances. The policy is that individuals should be treated as individuals, and not assumed to be like other members of a group."[68] Lord Mance continued, that, notwithstanding Article 9(1) of the European Convention on Human Rights, which affords importance to the "autonomous existence of religious communities," freedom to manifest one's religion is subject to limitations prescribed by law and which are "necessary in a democratic society for the protection of the rights and freedoms of others"; that the United Nations Convention on the Rights of the Child 1989 required the Court to treat the interests of the child as a primary consideration; and that Protocol 1, Article 2 of the European Convention on Human Rights provided parents with a right to ensure education in conformity with their own religious convictions.[69] Lord Mance also concluded that even in the

[65] *Id.* [66].
[66] *Id.* [69].
[67] *Id.* [70].
[68] *Id.* [90] (Lord Mance).
[69] *Id.*

absence of direct discrimination, he would have found that "JFS has not and could not have justified its admissions policy."[70]

4. Lord Kerr of Tonaghmore

Lord Kerr, like Lady Hale, began by distinguishing the ground of a decision—the criteria applied—from the decision maker's subjective motivation.[71] Lord Kerr then departed slightly from the other Justices in the majority, concluding that Jewish religious law was not just the motivation for the school's decision, but was also its ground.[72] Lord Kerr, however, held that underlying that religious determination was itself a question of ethnicity.[73] He explained that "the reason that [M] was not a Jew was because of his ethnic origins, or more pertinently, his lack of the requisite ethnic origins."[74] Lord Kerr opined that when religious questions have consequences under civil law, the lawfulness of the action by religious authorities is subject to judicial process.[75] Because the ground for the school's decision ultimately rested on M's ethnicity, the fact that it was a religious ground did not insulate it from the reach of the Court.[76]

5. Lord Clarke of Stone-cum-Ebony

Lord Clarke agreed with Lord Kerr that the grounds in question were religious, but that notwithstanding that categorization, could still be unlawful if the religious grounds were based on ethnicity.[77] Thus, Lord Clarke concluded that both ethnic and religious grounds were implicated in the school's decision.[78] And because "the ethnic element is an essential feature of the religious ground," the ethnic ground of the school's decision is inescapable.[79] Lord Clarke also suggested that the subjective intent of the OCR was irrelevant, noting that the question of whether the subjective state of mind of the alleged discriminator had, until then, "not perhaps been as clearly identified in the

[70] *Id.* [103].
[71] *Id.* [113]-[115] (Lord Kerr of Tonaghmore).
[72] *Id.* [117].
[73] *Id.*
[74] *Id.* [116].
[75] *Id.* [119].
[76] *Id.* [120]. Lord Kerr joined in Lord Mance's resolution of the question of indirect discrimination.
[77] *Id.* [128]-[129] (Lord Clarke of Stone-cum-Ebony).
[78] *Id.* [129]-[130].
[79] *Id.* [130].

authorities as it should be."[80] Finally, Lord Clarke found apt Sedley LJ's analogy between Judaism and the South African Dutch Reformed Church, which "until recently, believed that God had made black people inferior and had destined them to live separately from whites."[81] Lord Clarke agreed with Lords Mance and Kerr on the issue of indirect discrimination.[82]

6. Lord Hope of Craighead

Lord Hope offered a nuanced judgment, concluding that although JFS had not engaged in direct discrimination, it had engaged in indirect discrimination for which it had failed to offer a sufficient justification.[83] He began by noting that "[i]t has long been understood that it is not the business of the courts to intervene in matters of religion,"[84] and explained that the center of contention concerned how the grounds for the school's decision should be characterized.[85] Lord Hope explained that "the difficulty in this case arises because of the overlap between the concepts of religious and racial discrimination and, in the case of Jews, the overlap between ethnic Jews and Jews recognized as members of the Jewish religion," and that perhaps the governing law was not equipped to deal with cases of discrimination that were not "obvious."[86]

With regard to direct discrimination, Lord Hope explained that "[t]he development of the case law in this area has not been entirely straightforward," and that in new fields, such as discrimination law, "the need for the court to clarify one issue may result in a principle being stated too broadly," making it difficult to resolve an interlocking issue arising later in a consistent and principled way.[87] Contrary to the Justices in the majority, Lord Hope concluded that the existing case law did not preclude the use of evidence of a discriminator's subjective

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[80] *Id.* [132].

[81] *Id.* [150]. Lord Clarke then insisted that, "any suggestion that [the Chief Rabbi, the OCR, or JFS] acted in a racist way in the popular sense of that term must be dismissed." *Id.* [156]. Either Lord Clarke is dissembling or he must not think that the Dutch Reformed Church was racist in the popular sense of the term either. The juxtaposition of the two propositions admits of no other interpretations.

[82] *Id.* [154].

[83] *Id.* [218].

[84] *Id.* [157] (Lord Hope of Craighead).

[85] *Id.* [169].

[86] *Id.* [183].

[87] *Id.* [189].

intent in determining the ground for the discrimination.[88] Rather than the majority's blanket rejection of subjective intent, Lord Hope held that subjective motive may be relevant, or even necessary, to determine whether the grounds of the decision were premised on race, but that a benign intent will not negate direct racial discrimination where the grounds are, in fact, racial.[89] He thus concluded that with regard to the relevance of subjective motivation, "[i]t all depends on the stage of the enquiry."[90]

Lord Hope held that the Chief Rabbi, and thus JFS, made their determination that M was not Jewish on entirely religious grounds.[91] He provided two contrasting examples: one child, who is not in any way affiliated with the Jewish community, has unimpeachable documentary evidence that his mother's mother's mother converted to Judaism in an Orthodox synagogue (although he is descended from no other Jews), and would be considered Jewish by the OCR; another child is descended from Jews in every ancestral line *except* the direct maternal line, participates fully in the Jewish community, and considers himself Jewish. But his mother's mother's mother was converted in a non-Orthodox synagogue.[92] The OCR would not consider that child Jewish.[93] Thus, Lord Hope, in agreement with Lord Rodger, concluded that the test the OCR applied was entirely religious; descent is involved, but the determination is based entirely on religious criteria.[94]

Lord Hope also concluded, with regard to indirect discrimination, that for the reasons given by Lord Brown, JFS had shown that its aim was legitimate.[95] He explained that a faith school is entitled to adopt an admissions policy that gives effect to the principles of its faith, which would include JFS's interest in educating in the Jewish faith those students it considers Jewish.[96] But with regard to whether JFS had shown that its policy was a proportionate means of achieving that aim, Lord Hope concluded that—although it might be—JFS had not shown that there were no less restrictive options available, largely because JFS failed to produce evidence to show that it had considered

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[88] *Id.* [192].
[89] *Id.* [191]-[203].
[90] *Id.* [197].
[91] *Id.* [201].
[92] *Id.* [203].
[93] *Id.*
[94] *Id.*
[95] *Id.* [209].
[96] *Id.* [207]-[209].

any alternative policies.[97] Lord Hope explained, "as JFS have not addressed [alternative measures], it is not entitled to a finding that the means that it adopted were proportionate."[98]

7. Lord Walker of Gestingthorpe

Lord Walker concurred in the judgment of Lord Hope, adding no analysis of his own.[99] He did express agreement with the import of Lady Hale's summary of discrimination law generally, but suggested that the impossibility of ever justifying direct discrimination contrasted with the constant availability of a defense to indirect discrimination was somewhat "arbitrary."[100]

8. Lord Rodger of Earlsferry

Lord Rodger wrote a stinging dissent. He began (perhaps in response to Lord Mance's suggestion that the European Convention on Human Rights supported E's claimed right to send his child to a Jewish school) that the point of religious schools "is not to ensure that there will be a school where Jewish or Roman Catholic children can be segregated off to receive good teaching in French or physics. . . . Rather, the whole point of such schools is their religious character."[101] In the case of JFS, the religious character is Judaism and, specifically, Orthodox Judaism, and the admission policy is, therefore, based on guidance from the Chief Rabbi, who applies the matrilineal test to determine if an applicant is Jewish.[102] "[N]o other policy would make sense. . . . [I]n its eyes, irrespective of whether they adhere to Orthodox, Masorti, Progressive or Liberal Judaism, or are not in any way believing or observant, these are the children—and the only children—who are bound by the Jewish law and practices."[103]

Lord Rodger suggested that this case reflected a dispute between rival religious authorities regarding who constitutes the Jewish people, and that the majority was wrong to conclude that a question of ethnicity was involved in any respect.[104] He said, "to reduce the religious element in the actions of those concerned to the status of a mere motive

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[97] *Id.* [211]-[212].
[98] *Id.* [212].
[99] *Id.* [235] (Lord Walker of Gestingthorpe).
[100] *Id.* [236]-[237].
[101] *Id.* [223] (Lord Rodger of Earlsferry).
[102] *Id.*
[103] *Id.*
[104] *Id.* [224].

is to misrepresent what they were doing."[105] He explained that the question before the Court was whether the religious matrilineal test was necessarily also based on ethnic origins and that, although Lady Hale found that the school rejected M because of his mother's Italian and Roman Catholic ethnic origins, M's "mother could have been as Italian in origin as Sophia Loren and as Roman Catholic as the Pope for all that the governors cared: the only thing that mattered was that she had not converted to Judaism under Orthodox auspices."[106]

9. Lord Brown of Eaton-under-Heywood

Lord Brown dissented as well, but less vociferously, suggesting that the arguments on both sides were "entirely coherent and entirely respectable."[107] Lord Brown agreed that Jews, including converts, constitute an ethnic group, but found no support for the proposition that the Race Relations Act prohibited intra-ethnic discrimination.[108] And, in light of the unavailability of a defense of justification in the case of direct discrimination, Lord Brown thought it advisable to limit its reach in borderline cases.[109] Lord Brown also found persuasive the fact that Jewish religious law concerning who is a Jew would be irrelevant for purposes of admission to Jewish schools, and chastised the Court of Appeal for inventing a non-Jewish definition of who is Jewish, particularly given that the matrilineal test is, in practice, not so different from a Catholic school giving priority to children who have been baptized, since a child without at least one Christian parent is unlikely to be baptized.[110] Lord Brown explained that to hold that Jewish religious law cannot be applied in determining admission to a Jewish school "would be to stigmatise Judaism as a directly racially discriminatory religion."[111] With regard to indirect discrimination, Lord Brown agreed with Lord Rodger that a religious practice test, in addition to being "invasive, difficult to measure and open to abuse, would be contrary to the positive desire of schools like JFS to admit non-observant as well as observant Jewish children."[112] He concluded that it could be no more disproportionate for a Jewish school to give priority to children it

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[105] *Id.* [227].
[106] *Id.* [228].
[107] *Id.* [243] (Lord Brown of Eaton-under-Heywood).
[108] *Id.* [244].
[109] *Id.* [247].
[110] *Id.* [248].
[111] *Id.* [249].
[112] *Id.* [253].

deems Jewish, regardless of commitment, over a sincere and committed child it did not recognize as Jewish "than it would be to refuse to admit a boy to an oversubscribed all-girls school."[113]

E. *The Reaction*

Reaction to the Supreme Court's decision was mixed. As Lord Brown noted, JFS became obliged to apply a non-Jewish test to determine whether an applicant was Jewish.[114] Indeed, all maintained Jewish schools had to do so, because all Jewish denominations define membership according to descent or conversion (the chief difference among them being whether patrilineal descent alone is sufficient).[115] Didi Herman went further, suggesting that "by insisting on a test of religious observance rather than matrilineal descent, the Court . . . impos[ed] a model of Christian worship on Jewish people."[116] Similarly, Rabbi Michael Simon claimed that the remedy ordered by the Court of Appeal and approved by the Supreme Court focused on belief and practice "[b]ecause those are the criteria for determining religion in the Christian world."[117] Once in place, the "religious-practice test" was found to lead to "all sorts of awkward practical issues."[118] For example, Orthodox Jews do not write on the Sabbath, so a child signing in to record attendance at religious services in order to demonstrate religious commitment for school admission purposes, presented something of a problem.[119]

But it was not just Jewish schools that were affected. *The Daily Telegraph* reported that the Secretary of State warned that other faith schools might be affected by the *JFS* decision as well because religion is often "closely related" to ethnicity.[120] Roman Catholic schools, in particular, expressed concern that baptism, long their criteria for membership, might have to be suspended in favor of a practice-based test focused more on belief than on participation in rites.[121]

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[113] *Id.* [256].

[114] Michael Simon, *Who Decides 'Who is a Jew'*, S. FLA. SUN-SENTINEL, Jan. 6, 2010, at 38.

[115] Frank Cranmer, *Who is a Jew: Jewish Faith Schools and the Race Relations Act 1976*, 164 LAW & JUST. 75, 80 (2010).

[116] HERMAN, *supra* note 10, at 168.

[117] Simon, *supra* note 114, at 38.

[118] Lyall, *supra* note 12.

[119] *Id.*

[120] Cranmer, *supra* note 115, at 80.

[121] *Id.* at 81-82.

Despite significant coverage in the popular press, the volume of commentary from legal scholars has been surprisingly small and has generally failed to address the assumptions concerning the nature of "religion" underlying the Court's decision.[122] Indeed, much of the legal commentary, even from notable practitioners, has been venomous in its criticism of the school and, by implication, of Jewish law generally. Mark Hill QC (editor of the *Ecclesiastical Law Journal*), writes that all of the members of the Court agreed that "faith schools can, and should, adopt selection policies based on genuine religious adherence and practice," strongly suggesting that the matrilineal test is either not genuine, not religious, or both.[123] Geoffrey Bindman (the noted human rights solicitor whose law firm represented E), echoed this, explaining that "the irony of the situation was that the boy's exclusion was not an issue of faith at all."[124] Bindman goes on to suggest, in language that one could fairly term antisemitic, that "[i]t is profoundly paradoxical that the orthodox method of preserving racial exclusivity has survived. It seems primitive and out of touch with modern reality . . . ."[125] Perhaps the better question is whether modernity is sufficiently mature and self-reflective to consider the possibility that its conception of "religion" is the product of development in particular times and places, rather than a neutral and static category of human existence.

III. THE LEGAL CONCEPT OF "RELIGION"

When I mention Religion, I mean the Christian Religion; and not only the Christian Religion, but the Protestant Religion; and not only the Protestant Religion, but the Church of England.

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[122] *But see* Weiler, *supra* note 16. Other literature has addressed other aspects of the Court's decision. McColgan, *supra* note 14; Connolly, *supra* note 15; Swartz, *supra* note 15.

[123] Mark Hill, *What the JFS Ruling Meant*, THE GUARDIAN (Dec. 21, 2009, 6:00 AM), http://www.guardian.co.uk/commentisfree/belief/2009/dec/21/judaism-jfs-faith-schools-discrimination.

[124] Bindman, *supra* note 13, at 320.

[125] *Id.* Jewish exclusivity has long been a theme in British antisemitism, particularly in response to Jewish claims to be the "chosen people." TONY KUSHNER, THE PERSISTENCE OF PREJUDICE: ANTISEMITISM IN BRITISH SOCIETY DURING THE SECOND WORLD WAR 93-94 (1989). Although clearly to his client's benefit, the distinction Bindman tries to draw between determination of Jewish status in Orthodox circles and in other branches of Judaism is at best tendentious and misleading. Even the *JFS* majority recognized that descent and conversion are the criteria used by *all* branches of Judaism, not just Orthodoxy. R (on the application of E) v. Governing Body of JFS & Others, [2009] UKSC 15, [41] (Lord Phillips), [76] (Lord Mance), [119] (Lord Kerr) (U.K.).

—Mr. Thwackum[126]

"[D]efining religion for legal purposes has always been difficult in the U.K."[127] Neither legal academic commentary nor judicial opinions have taken into consideration the historical, sociological, or anthropological literature addressing the problem of conceptualizing "religion" as a category.[128] A. Bradney characterizes the attitude of British law toward religion as a "mixture of bias and muddle,"[129] the origins of which James A. Beckford traces "back to the late medieval and early modern tendency to equate religion with a particular form of Christianity," *à la* Mr. Thwackum.[130] The confusion this shift in terminology created has been exacerbated, Beckford says, by the "rapid growth of non-Christian faith communities and philosophies of life in the U.K. in the second half of the twentieth century."[131] In light of these developments, a reassessment of the meaning of "religion," and an investigation of the presuppositions that judges bring with them to the bench about what religion necessarily entails would seem to be in order.

A. *The Religious Subtext of JFS*

Given the current state of the law, it may not be immediately apparent why the idea of "religion" is relevant to the analysis of *JFS*. "Religion" is not mentioned in the Race Relations Act of 1976;[132] the question before the courts was whether the school discriminated on grounds of ethnic origins.[133] Nor is this a case where there is any doubt about the religious nature of the group in question.

The idea of "religion" manifests itself in this case in subtler and more insidious ways. The clearest example of this in the Supreme Court is Baroness Hale's comment that "[t]he Christian Church will

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[126] T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189, 189 (2003) (quoting HENRY FIELDING, TOM JONES 83 (Sheridan Baker ed., Norton 1995) (1749)).

[127] James A. Beckford, *The Politics of Defining Religion in Secular Society*, *in* THE PRAGMATICS OF DEFINING RELIGION: CONTEXTS, CONCEPTS AND CONTESTS 23, 28 (Jan G. Platvoet & Arie L. Molendijk eds., 1999).

[128] HERMAN, *supra* note 10, at 6-7. For more on the distinction between general concepts and specific conceptions see RONALD DWORKIN, LAW'S EMPIRE, 70-71 (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 134-36 (1977).

[129] ANTHONY BRADNEY, RELIGIONS, RIGHTS AND LAWS 132 (1993).

[130] Beckford, *supra* note 127, at 29.

[131] *Id.*

[132] *See generally* Race Relations Act, 1976 (U.K.) (amended 2000).

[133] R (on the application of E) v. Governing Body of JFS & Others, [2009] UKSC 15 (U.K.).

admit children regardless of who their parents are."[134] Although she "is the only [Supreme Court] judge to explicitly compare Christianity with Judaism, finding the latter wanting,"[135] Lady Hale's reasoning echoes the statement by Sedley LJ that "[i]f for theological reasons a fully subscribed Christian faith school refused to admit a child on the ground that, albeit practicing Christians, the child's family were of Jewish origin, it is hard to see what answer there could be to a claim for race discrimination."[136] Indeed, the Court of Appeal went on to explain that admission to Jewish faith schools must "as one would expect . . . depend on faith, however defined, and not on ethnicity."[137] What would be the basis for such an expectation? The assumption that *faith* is the only proper criterion on which membership in a religious group can be based is striking.

Although the courts pay token respect to the evidence concerning how Jewish law defines the Jewish people, that evidence does not figure into their analyses in any meaningful way. The subtext of the judgments suggest that the judges and justices view "religion" as a category where (1) membership cannot be inherited, but is instead a matter of individual choice that (2) depends on faith, which (3) can be largely identified by proxy through public worship. How broadly the idea of "religion" is construed and, in particular, how membership in a religion can be attained and identified, is relevant to whether JFS's refusal to admit M was a decision taken on religious grounds alone. What it means to be a member of a religion is therefore of central importance in determining whether the grounds for the discrimination were religious, and not ethnic.

B. *The Development of the Idea of "Religion"*

For many years, "religion" as a category was "left largely unhistoricized, essentialized, and tacitly presumed immune to or inherently resistant to critical analysis."[138] More recently, a scholarly notion of religion that gives primacy to propositional belief has been called "a modern, privatized Christian one because and to the extent that it emphasizes the priority of belief as a state of mind rather than as consti-

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[134] *Id.* [69] (Baroness Hale).

[135] HERMAN, *supra* note 10, at 168.

[136] R (on the application of E) v. Governing Body of JFS & Others, [2009] EWCA (Civ) 626, [32] (Eng.)

[137] *Id.* [33].

[138] TOMOKO MASUZAWA, THE INVENTION OF WORLD RELIGIONS 1-2 (2005).

tuting activity in the world."[139] The reasons for this change can be illustrated by reference to both the semantic and ontological history of the idea of religion.

Scholars differ on the extent to which "religion," as it is generally understood, is a product of post-Enlightenment Protestantism or of the early Christian period in late antiquity.[140] But the idea of religion itself, as it "is generally recognized, derive[s] from Western cultural traditions and experiences."[141] One also might add Western linguistic traditions because how an idea is understood requires both an idea and the means to express it. *Religion* "is originally from the Latin *religio,* a term that eventually was used in a great variety of senses, even by a single writer, without precision."[142] Thus, although Benson Saler warns us that "the semantic history of *religio* better serves us as a cautionary tale than as an encouraging paradigm" because "the derivation of *religio* is hidden from our view by the layered fog of millennia,"[143] it is not the term's origin, but the changing nature of its referent over time (and the causes for such change) that are relevant to rooting out any in-built bias in the modern legal understanding of "religion."

Scholars are also divided on whether *religio* "first designated a power outside man obligating him to certain behavior under pain of threatened awesome retribution, a kind of tabu, or the feeling in man

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[139] ASAD, GENEALOGIES OF RELIGION, *supra* note 8, at 47.

[140] DANIEL BOYARIN, BORDER LINES: THE PARTITION OF JUDAEO-CHRISTIANITY 11 (2004) [hereinafter BOYARIN, BORDER LINES].

[141] Benson Saler, *Religio and the Definition of Religion,* 2 CULTURAL ANTHROPOLOGY 395, 395 (1987). *See also* Jan G. Platvoet, *Contexts, Concepts and Contests: Toward a Pragmatics of Defining Religion, in* THE PRAGMATICS OF DEFINING RELIGION: CONTEXTS, CONCEPTS AND CONTESTS 463, 463-64 (Jan G. Platvoet & Arie L. Molendijk eds., 1999) ("[T]he modern terms 'religion' and 'religions' are diffuse and untidy prototypical concepts of recent Western origin."); Russell T. McCutcheon, *The Category "Religion" in Recent Publications: A Critical Survey,* 42 NUMEN 284, 285 (1995).

[142] WILFRED CANTWELL SMITH, THE MEANING AND END OF RELIGION 19 (1963) [hereinafter SMITH, THE MEANING AND END OF RELIGION]. One cannot escape reliance on Smith's work when discussing the development of the idea of religion in the West. Even his critics acknowledge that his "attempt to address the old question of the nature of religion by denying that it has any essence was truly original," Asad, *Reading a Modern Classic, supra* note 4, at 206, and that his recommendation against using "religion" as a reified concept has gained acceptance, McCutcheon, *supra* note 141, at 286, even if his further conclusions have not. Other important works in this vein include Ernst Feil's four-volume series *Religio* (in German) and Michel Despland's *La religion en Occident: Évolution des ideés et du vécu* (in French). Jan Platvoet summarizes (in broad strokes) and synthesizes much of what these seminal works have found (especially Feil). *See generally* Platvoet, *supra* note 141.

[143] Saler, *supra* note 141, at 396.

vis-à-vis such powers."[144] Either way, "an emphasis on isolating various beliefs and making them central to an analytically distinct department of culture termed *religion* is not a markedly ancient tradition."[145] Gavin Langmuir takes the former position, suggesting that, "*religio* primarily indicated recognition of a system of supernatural constraints or obligation (*oblige*, to bind or tie), while *religiositas* denoted action in conformity with those obligations."[146] Wilfred Cantwell Smith seems to take this position as well. He notes that, "the early phrase *religio mihi est* is illuminating. To say that such-and-such a thing was *religio* meant that it was mightily incumbent upon me to do it [or not]."[147] For example, "[t]here is no evidence in the New Testament that the early Christians were conscious of being involved in a new religion. They . . . simply did not think in such terms."[148] There were certain beliefs or postulates (i.e., the existence of gods) that provided both the framework for *religio* and the impetus for activities that constituted *religiositas*, but there was no conception that holding particular beliefs was either necessary or sufficient to make one a member of a community bound by a particular *religio* or that practiced *religiositas* in a particular manner. In first-century Roman Judea, "being a Judean [which included participation in the Temple cult] and being a follower of Jesus were incommensurable categories, rather like being a Russian or a Rotarian, a Brazilian or a Bridge player."[149] In short, "the concept of *religion*, which is fundamental to our [contemporary] outlook and our historical research, lacked a taxonomical counterpart in antiquity."[150]

The advent of Pauline Christianity began to change this understanding of *religio* as personal piety. "Pauline Christianity placed itself against a Jewish notion of 'inherited contract,' replacing it with a different narrative—one about consent."[151] Thus, we begin to see *nostra religio* and *nostrae religiones* as against *vestra religio* and *vestrae religiones*, early post-Christian terms used by some Church fathers, including Arnobius of Sicca.[152] Thereafter, the "ours/theirs" distinction becomes

[144] SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 20.
[145] Saler, *supra* note 141, at 395.
[146] GAVIN I. LANGMUIR, HISTORY, RELIGION, AND ANTISEMITISM 70 (1990).
[147] SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 20.
[148] *Id.* at 60.
[149] Steve Mason, *Jews, Judeans, Judaizing, Judaism: Problems of Categorization in Ancient History*, 38 J. FOR THE STUDY OF JUDAISM 457, 512 (2007).
[150] *Id.* at 482 n.55 (listing sources noting that the modern category *religion* has no equivalent in ancient Greek or Latin (or any other language)).
[151] HERMAN, *supra* note 10, at 167.
[152] SMITH, THE MEANING AND END OF RELIGION *supra* note 142, at 27-28.

vera religio/falsa religio (but here using *vera* in the sense of "correct" or "proper," rather than "true"), adding a layer of normativity to what was previously a matter of differing tribal or regional customs.[153] Thus, the patristic understanding of *religio* still referred chiefly to personal piety (even if to the *correct form* of piety).[154]

Medieval usage of *religio* appears multifaceted. Among Latin Christians in the West, *religio* became equated with the particular obligations of monastic life.[155] Later, it came to signify (as it does to this day) the monastic life itself, including, but not limited to, its attendant obligations.[156] But the ancient connotations of *religio* still had currency, even into the late medieval period.[157] For example, in 1474, Marsilio Ficino wrote *De Christiana Religione*—"'Christian religion,' not '*the* Christian religion'"—the "kind of religion [as action] exemplified by Jesus."[158] And Ernst Feil has claimed "an astonishingly strong attachment to a classical and Roman concept of *religio*" even later, well into the sixteenth century.[159]

The Protestant Reformation redefined *religio* to correspond to individual beliefs concerning the supernatural. This was not the result of a conscious effort at redefinition, but the logical conclusion of some novel aspects of Protestant theology coupled with technological development. Robert A. Yelle explains that "[t]he triumph of an antinomian concept of religion . . . was . . . largely a product of the Reformation."[160] Protestants, buoyed by the development of the printing press, sought to encourage direct relation between the individual and God; sacraments and rites decreased in importance.[161] "[T]he po-

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[153] *Id.* at 27; *see also* Robert A. Yelle, *Moses' Veil: Secularization as a Christian Myth, in* AFTER SECULAR LAW 25 (Winnifred Fallers Sullivan, et al. eds., 2011).

[154] Platvoet, *supra* note 141, at 474.

[155] LANGMUIR, *supra* note 146, at 70.

[156] *Id.*; Platvoet, *supra* note 141, at 475.

[157] Platvoet, *supra* note 141, at 475.

[158] PETER HARRISON, 'RELIGION' AND THE RELIGIONS IN THE ENGLISH ENLIGHTENMENT 12-13 (1990).

[159] Ernst Feil, *From the Classical Religion to the Modern Religion: Elements of a Transformation between 1550 and 1650, in* RELIGION IN HISTORY: THE WORD, THE IDEA, THE REALITY 32 (Michel Despland & Gérard Vallée eds., 1992).

[160] Yelle, *supra* note 153, at 34.

[161] JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 23-24 (1985) ("The ensuing orgy of creed making probably owed something to the advent of printing. . . . But it owed much more to the Protestant spokesmen and Catholic apologists who chose to use the press (and councils and synods) to draw lines of division along ever finer points of creedal logic.").

sition and functions formerly controlled by the church came to be transferred to the individual and his or her conscience."[162]

Luther seems not to have concerned himself with a concept of religion.[163] Rather, his interest was in personal *faith*.[164] But "an immediate consequence of Luther's objections to Church authority was a growing, and eventually obsessive, focus on doctrinal disputes."[165] The transition did not occur overnight. John Calvin, for example, propounded doctrines, practices, and interpretations of biblical passages that he hoped *would induce* a personal relationship with God, which he called—quite in keeping with predecessors like Ficino—*Christiana religio*.[166] A century later, though, those doctrines, practices, and interpretations—the system intended to foster religious sentiment—was itself called "religion," regardless of whether those practices had the intended effect.[167]

Rather than a sense of immanent transcendence, religion increasingly became identified with the (largely doctrinal) means used in pursuit of that end.[168] The doctrines propounded in some statements themselves, including, for example, those of the Council of Trent, accelerated this process by bringing "about an understanding of religion that was based less on piety and ritual than on intellectual assent."[169] And the emergence of the contemporary understanding of "religion" was pushed further by "sectarian doctrinal controversies over justification, the resistibility or irresistibility of grace, and the like . . . ."[170] Competing truth claims became the watchword of religion. In contrast to Ficino's *De christiana religione*, by 1627, Grotius could write *De veritate religionis Christianae*.[171] "Christian religion" had become both "*the*

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[162] Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1878 (2009).

[163] Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 975 (2010). Even now German theologians and the German language show a certain reluctance to embrace the term. *Id.*

[164] SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 35.

[165] Koppelman, *supra* note 163, at 975.

[166] *See* SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 39.

[167] *Id. But see* TURNER, *supra* note 161, at 24 (suggesting that the Protestant notion of religion as belief in the articles of a particular creed occurred early in the Reformation).

[168] *See* SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 39.

[169] Koppelman, *supra* note 163, at 975. *See also* TURNER, *supra* note 161, at 24 ("Belief in God . . . came to depend more heavily on cognition and intellectual assent.").

[170] Saler, *supra* note 141, at 395.

[171] Published initially in Dutch as BEWIJS VAN DEN WAREN GODSDIENST in 1622.

Christian religion" and the *true* religion: Christianity was reified as a truth-claim.

The English Reformation, most pertinent to understanding the assumptions of the judges presiding over the *JFS* case, provides a good illustration of this process. Peter Harrison writes that "[t]he new role which creeds and catechisms played in the religious lives of English Protestants shows how 'religion,' now imagined to be a set of beliefs, came to displace 'faith and piety.' "[172] The Thirty-Nine Articles (1563), the Elizabethan charter of the Church of England still in use today, for example, was described as "a [b]rief of that Religion, which amongst themselves was taught and believed, and whereby through the mercy of God in Christ they did hope to be saved."[173] Salvation came to be linked with knowledge and belief. The Westminster Confession (1647) similarly emphasizes that salvation can be attained only through knowledge of God, which itself requires an understanding of the propositions of faith that underlie the religion.[174]

But it was not until the Enlightenment that the construct of "religion"—as a category broader than Christianity alone—was "forged into a recognizably modern form . . . ."[175] The category of "religion," as it came to be used during the Enlightenment, "drew heavily upon prior Christian understandings."[176] Indeed, it is only during the Enlightenment that the term "Christianity" became standard, when it increasingly came to refer to "a system of beliefs."[177] By the Eighteenth Century, after the Roman Catholic monopoly on European Christianity failed, the term "religion" "came to be applied to the beliefs of the competing religious societies into which Europe had been fragmented."[178]

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[172] HARRISON, *supra* note 158, at 20.

[173] *Id.*; *see also* THIRTY-NINE ARTICLES OF RELIGION (1563), *available at* http://www.thirtyninearticles.org/religion/.

[174] *See* HARRISON, *supra* note 158, at 20-21.

[175] Saler, *supra* note 141, at 395. *See also* HARRISON, *supra* note 158, at 1. ("The concepts 'religion' and 'the religions' . . . emerged quite late in Western thought, during the Enlightenment.")

[176] Michael L. Satlow, *Defining Judaism: Accounting for Religions in the Study of Religion*, 74 J. AM. ACAD. RELIGION 837, 841 (2006).

[177] SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 74, 75.

[178] LANGMUIR, *supra* note 146, at 70. *See also* Molendijk, *supra* note 5, at 5. Molendijk suggests that "Deists turned religion into 'a natural object constituted primarily by propositional knowledge,' . . . ." but no other sources have been found which suggest that the reification of "religion" can be ascribed solely, or even primarily, to Deists.

One of the earliest attempts at a definition of "religion" is found in Lord Herbert's work, *De veritate*, which provided an account of what would later be called "Natural Religion," "in terms of beliefs . . . and ethics . . . said to exist in all societies."[179] Lord Herbert's emphasis on belief "meant that henceforth religion could be conceived as a set of propositions to which believers gave assent . . . ."[180] As a result, various creeds could be compared and judged with regard to how precisely they track Natural Religion.[181] This focus on belief, coupled with "the Enlightenment's encounter with world cultures," resulted in the modern conception of "religion" as an "isolable category."[182] It is only when the idea of religion is reified and becomes a method for comparison that "the plural 'religions'" becomes possible ("piety, obedience, [and] reverence" have no plural).[183]

Most scholars would agree that *religion*, in its contemporary understanding, both popular and academic, is "an intellectual construction, a device through which the rationalist passion for classifying and pigeonholing expresses itself."[184] In particular, it was nineteenth-century scholars who gave "religion . . . ontological status," exemplified by "Marx's conclusion that religion is the opium of the working classes."[185] And it is for this reason that, apart from the special case of Islam, one is hard-pressed to find any "named religion earlier than the nineteenth century."[186] As Jonathan Z. Smith explains:

> "Religion" is not a native term; it is a term created by scholars for their intellectual purposes and therefore is theirs to define. It is a second-order, generic concept that plays the same role in establishing a disciplinary horizon that a concept such as "language" plays in linguistics or "culture" plays in anthropology.[187]

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[179] ASAD, GENEALOGIES OF RELIGION, *supra* note 8, at 40.

[180] *Id.* at 40-41.

[181] *Id.* at 41.

[182] Mason, *supra* note 149, at 512.

[183] SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 43.

[184] McCutcheon, *supra* note 141, at 286. *See also* W. Richard Comstock, *Toward Open Definitions of Religion*, 52 J. AM. ACAD. RELIGION 499, 504 (1984) ("Whether man made his gods or the gods made man may still be to some a matter of controversy. There can be no doubt that it is the scholar who makes 'religion.'").

[185] LANGMUIR, *supra* note 146, at 70-71.

[186] SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 61.

[187] Jonathan Z. Smith, *Religion, Religions, Religious*, in CRITICAL TERMS FOR RELIGIOUS STUDIES 269, 281-82 (Mark C. Taylor ed., 1998) [hereinafter Smith, *Religion, Religions, Religious*]. *See also* Satlow, *supra* note 176, at 838.

The scholars who created the concept, though, were all Western and, we may assume, largely Christian.[188] Thus, Bryan Rennie can conclude that Daniel Dubuisson's thesis that the "concept [of] 'religion' was produced in the West and imposed upon the anthropological study of human cultures in such a way as to ensure and maintain the dominance of the culture of its production" is "unexceptional."[189] Tomoko Masuzawa adds that the category "world religions" (as it is used, for example, in university course listings) belies a pervasive, unexamined, and "rather monumental assumption . . . that religion is a universal, or at least ubiquitous, phenomenon to be found anywhere in the world at any time in history . . . ."[190] And Tim Murphy has suggested that, "universalized categories as 'religion'—defined as essence or manifestation, are part of the baggage of Occidental Humanism."[191] The prominent features of a "religion," then, are those that are important in the religion of the dominant culture.[192] Therefore, application of the idea of religion without regard for its provenance risks limiting understanding of the "other" to those facets that can be analogized to one's own religion. A fulsome application would consider the emic understanding of the "other" religion as well.

C. *The Christian Construction of Judaism*

Judaism is perhaps the prototypical "other" religion and, from a theological perspective, the Christian project of constructing and reifying "Judaism" is an ancient one. Westerners, both lay and scholarly, speak of "Judaism" and "Christianity" as members of the same category, "religions" (or worse, "faiths").[193] Daniel Boyarin notes that this practice, and particularly the equation of religion with faith, reveals that the notion of "Judaism" and a particular "religion" "involves the reproduction of a Christian worldview."[194] Boyarin explains that, "[i]t has become a truism that religion in its modern sense is an invention of Christians,"[195] and the same could be said of "Judaism" as well.

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[188] Molendijk, *supra* note 5, at 4-5.

[189] Bryan Rennie, *Daniel Dubuisson, The Western Construction of Religion: Myths, Knowledge, and Ideology*, 87 J. RELIGION 315, 315 (2007) (book review).

[190] MASUZAWA, *supra* note 138, at 1.

[191] McCutcheon, *supra* note 141, at 286 (citing Tim Murphy, *Wesen und Erscheinung in the History of the Study of Religion: A Post-Structuralist Perspective*, 6 METHOD & THEORY STUD. RELIGION 119, 119-46 (1994)).

[192] Smith, *Religion, Religions, Religious*, *supra* note 187, at 269.

[193] BOYARIN, BORDER LINES, *supra* note 140, at 8.

[194] *Id.*

[195] *Id.* at 11.

Many scholars have explained that in the ancient world there was no cognitive equivalent to the modern English term *Judaism*.[196] Jewish sources from antiquity uniformly use *Ioudaismos* to mean something "akin to 'Judeanness,'" a combination of traits that would fall under the modern heading of ethnicity (premised on a real or imagined kinship), with some that would be called "religious," pertaining to a particular way of life.[197] יהדות [*Yahadut*], the rough Hebrew equivalent, is found in 2 (and 4) Maccabees, but then disappears from the historical record for four hundred years (and even then is found only in two inscriptions). It is not used at all by Philo or Josephus (despite the enormous volume each wrote on the ways of the *Ioudaioi*), or in any known work authored by their contemporaries.[198] And even in 2 Maccabees, *Ioudaismos* refers to "the entire complex of loyalties and practices that mark off the people of Israel."[199]

The roots of the modern concept of Judaism begin to arise nearly in step with the early spread of Christianity.[200] Sts. Paul and Ignatius, for example, used *Ἰουδαϊσμος/Ioudaismus* on occasion,[201] and, for Ignatius, Ἰουδαϊσμος consisted of personal qualities, not institutions.[202] But in the third through sixth centuries, the Church Fathers gave a new and different import to the forerunner to the modern "*Judaism*," and its use increased dramatically.[203]

Tertullian took the most significant step, in the third century, when he severed the Jews' connection to the land, their history, and their common culture from their particular beliefs and practices—in

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[196] *Id.* at 8; Daniel Boyarin, *The Christian Invention of Judaism: The Theodosian Empire and the Rabbinic Refusal of Religion*, 85 REPRESENTATIONS 21, 47 (2004) [hereinafter Boyarin, *The Christian Invention of Judaism*]; Daniel Boyarin, *Rethinking Jewish Christianity: An Argument for Dismantling a Dubious Category (to which is Appended a Correction of my* Border Lines*)*, 99 JEWISH Q. REV. 7, 8 (2009) [hereinafter Boyarin, *Rethinking Jewish Christianity*]; Mason, *supra* note 149, at 460. Indeed, *Judaism* was not used by Jews in a self-referential way until quite late: the Medieval period, according to Satlow; the Nineteenth Century, according to Boyarin. *See* Satlow, *supra* note 176, at 840; BOYARIN, BORDER LINES, *supra* note 140, at 8.

[197] Satlow, *supra* note 176, at 839-40. *See also* SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 72 (defining *Ioudaismos* in 2 Maccabees as "Jewishness").

[198] Mason, *supra* note 149, at 460-61, 465-68.

[199] BOYARIN, BORDER LINES, *supra* note 140, at 8; Boyarin, *The Christian Invention of Judaism*, *supra* note 196, at 21; Boyarin, *Rethinking Jewish Christianity*, *supra* note 196, at 8.

[200] SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 72-73.

[201] Mason, *supra* note 149, at 461.

[202] SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 73.

[203] Mason, *supra* note 149, at 461, 471.

short, from "what had made it *different in kind* from Christian belief."[204] Most *ethnoi* in the ancient world had a national cult, but the cult was inseparable from the *ethnos* itself because the "temples, priesthood, and cultic practices were part and parcel of [the] people's founding stories, traditions, and civic structures."[205] Thus, although *Iudiasmus* initially is meant to refer to an ossified system made redundant by the risen Christ, Tertullian's usage "abstract[s] only an impoverished *belief system*" that persists in modern references to the Jewish faith.[206] By the Fourth Century, *Ἰουδαϊσμος/Ioudaismus* refers only to a disembodied system of thought disconnected from "real life in Judea, an abstraction to be treated theologically."[207]

The Church Fathers constructed "*Judaism*" to serve as the "other" in their process of defining what it meant to be a Christian. And (even perhaps especially), an important part of being a Christian was not to be a Jew.[208] Judaism came to represent a system of adherence to an external discipline superseded by an internal, subjective, spiritual Christian consciousness.[209] Christianity, as a systematic and organized community, was a novel creation, not just in content, but also in form; it was a new way of being religious, not just a new expression of religiosity.[210] Importantly, the boundaries of this new concept, not being a national cult but instead claiming to transcend divisions between Jews and Greeks, were demarcated by "faith." Membership in the Church was a matter not of nationality, but of assent.[211]

D. *Judaism*

The emic understanding of Judaism is quite different from its construction by Christian heresiologists. For Jews, notions of Judaism "as a faith that can be separated from ethnicity, nationality, language, and

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[204] *Id.* at 473; *see also* Boyarin, *Rethinking Jewish Christianity*, *supra* note 196, at 10.

[205] Mason, *supra* note 149, at 484.

[206] Boyarin, *Rethinking Jewish Christianity*, *supra* note 196, at 10 (referencing Mason, *supra* note 149, at 472).

[207] Mason, *supra* note 149, at 475; *see also* Satlow, *supra* note 176, at 840.

[208] Mason, *supra* note 149, at 476. For an extended topic of this reasoning see Rosemary Radford Ruether, *The* Adversus Judaeos *Tradition in the Church Fathers: The Exegesis of Christian Anti-Judaism*, *in* ESSENTIAL PAPERS ON JUDAISM AND CHRISTIANITY IN CONFLICT: FROM LATE ANTIQUITY TO THE REFORMATION 174-89 (Jeremy Cohen ed., 1991).

[209] Yelle, *supra* note 153, at 26.

[210] SMITH, THE MEANING AND END OF RELIGION, *supra* note 142, at 23, 26.

[211] *Id.* at 27; *see* Molendijk, *supra* note 5, at 5 ("Does the notion [of 'religion'] not preserve a one-sided—Schleiermachian—focus on the inner religious sentiment as well? The alleged eurocentricity, especially, makes Western scholars feel uneasy.").

shared history have felt false."[212] For example, "when Jews teach Judaism in a department of religious studies, they are as likely to be teaching Yiddish literature or the history of the Nazi genocide as anything that might be said (in Christian terms) to be part of a Jewish religion!"[213] And, "[f]or most Jews, religious observance is a means of identifying with the Jewish community, rather than an expression of religious faith."[214]

Importantly, in the Jewish context, "religion cannot be so easily identified with the affirmation of a given content of belief."[215] Indeed, plurality of belief and of observance have been identifiable features of the Jewish experience since at least the destruction of the Second Temple.[216] "To be a Christian," in contrast, "is to assent, however tacitly, to a creed or set of beliefs."[217] This is not so in Judaism. "Judaism is not and has not been, since early in the Christian era, a 'religion' in the sense of an orthodoxy whereby heterodox views, even very strange opinions, would make one an outsider."[218] Amos Funkenstein suggests that, "no written or oral commandment forbids an orthodox Jew even now to believe in the messianity of Christ."[219] Similarly, one's level of observance is irrelevant with regard to membership. Rabbi Yitzchak Schochet, chairman of the Rabbinical Council of the United Synagogue, explained that "having a ham sandwich on the afternoon of Yom Kippur doesn't make you less Jewish."[220]

Only status is relevant to membership in the Jewish people.[221] And this status is generally thought to be "inalienable," even for converts.[222]

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[212] BOYARIN, BORDER LINES, *supra* note 140, at 8.

[213] Boyarin, *The Christian Invention of Judaism*, *supra* note 196, at 47.

[214] Zvi Gitelman, *The Decline of the Diaspora Jewish Nation: Boundaries, Content, and Jewish Identity*, 2 JEWISH SOC. STUD. 112, 119 (1998) (internal quotation omitted).

[215] Victoria S. Harrison, *The Pragmatics of Defining Religion in a Multi-Cultural World*, 59 INT'L J. FOR PHIL. OF RELIGION 133, 134 (2006) (internal quotation omitted).

[216] Hayim Lapin, *The Origins and Development of the Rabbinic Movement in the Land of Israel*, *in* THE CAMBRIDGE HISTORY OF JUDAISM: VOLUME IV: THE LATE ROMAN-RABBINIC PERIOD 206 (Steven T. Katz ed., 2006).

[217] MODERN JUDAISM: AN OXFORD GUIDE 11 (Nicholas de Lange & Miri Freud-Kandel eds., 2005).

[218] BOYARIN, BORDER LINES, *supra* note 140, at 13.

[219] AMOS FUNKENSTEIN, PERCEPTIONS OF JEWISH HISTORY 170 (1993).

[220] Lyall, *supra* note 12.

[221] MODERN JUDAISM, *supra* note 217, at 6-7. *See also* BOYARIN, BORDER LINES, *supra* note 140, at 12 ("[T]he end of rabbinic heresiology constituted an ultimate refusal of that [Judaism's] membership [in the category 'religion.']").

[222] Gerald J. Blidstein, *Who Is Not a Jew?—The Medieval Discussion*, 11 ISRAEL L. REV. 369, 372, 374 (1976) ("Jewish status is irreversible and inalienable.").

"There is now virtually no way that a Jew can stop being a Jew, since the very notion of heresy was finally rejected and Judaism (even the word is anachronistic) refused to be, in the end, a *religion*."[223] Jewish law continues to recognize apostates as Jews,[224] regardless of "adher[ence] to the Torah, subscrip[tion] to . . . precepts, or affilia[tion] with the community."[225] Although certain actions may result in the curtailment of particular privileges and practices, the Talmud contemplates neither the total and permanent expulsion of a Jew from the community nor the possibility that one could forfeit one's status as a Jew.[226] Even baptism does not irrevocably cut one off from the Jewish community.[227] And even the dissenting voices within the Jewish community conclude that where Jewish status might be subject to forfeiture, that loss would be "based on association and assimilation, not propositional faith."[228]

"'Religion' and its cognate terms seem self-evidently meaningful because they are so deeply embedded and widely used in everyday language. But their meaning is loose and heavily influenced by traditional—and conflicting—religious preconceptions."[229] "If historians categorize Judaism and Christianity as instances of the same kind of basic human activity, as 'religion,' despite the obvious differences in the beliefs and actions of Jews and Christians, they should recognize that they themselves are deciding what they mean by religion."[230] "[I]t is not the case that Christianity and Judaism are two separate and different religions, but that they are two different kinds of things altogether."[231] Christianity is a religion. Judaism "refuses to be one."[232]

IV. A CHRISTIAN UNDERSTANDING

The extent to which the *JFS* courts relied on a conception of religion that favors confessing faiths, like Christianity, over others can be seen both in explicit statements by individual judges, and obliquely by examining the reasoning of judges in rendering their decisions. Both

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[223] Boyarin, *The Christian Invention of Judaism*, *supra* note 196, at 47.

[224] Edward Fram, *Perception and Reception of Repentant Apostates in Medieval Ashkenaz and Premodern Poland*, 21 AJS REV. 299, 300-01 (1996).

[225] Boyarin, *The Christian Invention of Judaism*, *supra* note 196, at 22.

[226] Blidstein, *supra* note 222, at 370, 373; Aharon Lichtenstein, *Brother Daniel and the Jewish Fraternity*, 12 JUDAISM 260, 263 (1963).

[227] Fram, *supra* note 224, at 301-02.

[228] Lichtenstein, *supra* note 226, at 266.

[229] LANGMUIR, *supra* note 146, at 6.

[230] *Id.* at 46.

[231] BOYARIN, BORDER LINES, *supra* note 140, at 13.

[232] *Id.* at 8, 12.

the rhetoric and the rationale suggest that the conception of religion employed by the Court of Appeal judges and the Supreme Court Justices in the majority reflects a Christian bias to a rather significant extent. Their explicit statements would otherwise make little sense, and the internal logic of their reasoning would not stand.

A. *Explicit Comparisons*

Both the Court of Appeal and the Supreme Court (per Lady Hale) offer explicit comparisons between Judaism and Christianity that suggest religion, as the courts conceive of it, is incompatible (or at least is very difficult to reconcile) with how Judaism functions. First, the Court of Appeal analogized Jewish status to membership in the Christian Church, explaining that "[i]f for theological reasons a fully subscribed Christian faith school refused to admit a child on the ground that, albeit practicing Christians, the child's family were of Jewish origin, it is hard to see what answer there could be to a claim for race discrimination."[233] Frank Cranmer responded to this contention in language worth repeating:

> But that ducks the question, "Who is a Jew?" by equating it, at least by implication, with the question "Who is a Christian?" However arresting a rhetorical device it might be to stand the problem on its head in this way, from a theological perspective it confuses two issues that should be kept quite separate. The overwhelming majority of Christians hold that one becomes a Christian not by inheritance but by *baptism*; and a baptized person of Jewish parents is as much a Christian as someone whose family has been Christian since New Testament times. The whole point of the JFS/OCR argument, on the other hand, is *precisely* that Jewishness is acquired not by general racial origins, nor even by religious practice, but specifically by matrilineal descent in accordance with very strict criteria.[234]

In effect, the Court of Appeal suggests that the Jewish method of determining who is Jewish cannot be religious, because such determinations necessarily must be made with regard to practice (presumably because that is how Protestant Christianity works). The Court of Appeal also mandated that preference to Jewish students must be based on "faith, however defined,"[235] notwithstanding the fact that faith is irrelevant in determining who is and is not a Jew in all Jewish traditions (but highly relevant in Christianity).

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[233] R (on the application of E) v. Governing Body of JFS & Others, [2009] EWCA (Civ) 626, [32] (Eng.).
[234] Cranmer, *supra* note 115, at 81-82.
[235] *JFS*, [2009] EWCA (Civ) 626, [33].

In the Supreme Court, Lady Hale (with whom the other Justices in the majority agreed) similarly explained that, "no other faith schools in this country adopt descent-based criteria for admission" and that "[t]he Christian Church will admit children regardless of who their parents are."[236] Lady Hale suggests, at the very least, that there is something alien, if not suspicious, about applying a test of descent to determine religious status and, again, contrasts the matrilineal test with universality of Christianity, concluding that Christianity is superior.[237]

These statements demonstrate that for an entire panel of the Court of Appeal, and a majority of the Supreme Court, religion is not just something that can be separated from ethnicity, but also *ought* to be separate from it because religion, properly understood, is an individual matter of faith and faith alone. This position perpetuates a Christian worldview. "Relations between religion and ethnicity span a spectrum. At one end are universal religions (Christianity and Islam) that are not specific to any ethnic group. At the other end are ethnically specific or tribal religions (Judaism, Hinduism, Old Order Amish)."[238] To hold that, as a matter of law, religion and ethnicity can and should be segregated off from one another, denying religious legal status to the ethnic component of non-universal religions, privileges universal religions at the expense of others. And with respect to Judaism in particular, it continues the project Tertullian began nearly two millennia ago—stripping Jewish civilization of its uniqueness, of its *Jewishness*, except to the extent that it resembles an inferior sort of Christianity.

B. *Tacit Assumptions*

The *JFS* courts' understanding of religion in a way that privileges Christianity is also reflected in the tacit assumptions they make. The decisions reflect at least two such assumptions: (1) that religion is an individual, rather than group, matter and therefore is necessarily severable from ethnicity, and (2) that religion is, specifically, a matter of belief and practice.

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[236] R (on the application of E) v. Governing Body of JFS & Others, [2009] UKSC 15, [69] (U.K.).

[237] *Id.*

[238] Gitelman, *supra* note 214, at 115.

The assumption that religion is a matter of individual conscience and, therefore, distinct from ethnicity, can be seen in Lord Mance's invocation of international and European law. Relying chiefly on one of Lady Hale's opinions in an earlier case, Lord Mance wrote that the policy of Race Relations Act 1976 was "that individuals should be treated as individuals, and not assumed to be like other members of a group."[239] Lord Mance finds support for this principle in the United Nations Convention on the Rights of the Child, which provides that the interests of the child are paramount, and in the European Convention on Human Rights, which—although it grants importance to the existence of autonomous religious communities—provides that the freedom to manifest religious beliefs may be limited by laws "necessary in a democratic society for the protection of the rights and freedoms of others."[240] Lord Mance thus appears to suggest that the matrilineal test is incompatible with democratic society; that group-based rights, even if religious, *necessarily* infringe on the rights and freedoms of others.

Didi Herman has called this a "'civilizational' argument."[241] "[O]n the one hand, there is the law of the Jews—archaic and discriminatory [and, I would specify, group-oriented]. On the other hand, there is the law of the Christians . . . modern, just, and protective of individual rights."[242] Of course, "[m]any traditions, such as Judaism and Hinduism, historically have placed greater importance on communal religious practice or observance."[243] "Modes of life based upon the primacy of communal ritual have been ghettoized, rhetorically and socially, devalued, and, in some cases, eliminated altogether."[244] Lord Mance's judgment reflects an understanding of religion limited to the individual. The possibility that ethnicity can exist as an essential part of religion is discounted entirely.

As a corollary to the primacy of the individual over and against the group in the context of religion, Lord Mance's judgment also suggests that, in particular, it is the individual's conscience that matters most; that the individual exists as an individual *believer*. This is reflected in the Court of Appeal's remedial order as well. But as explained above,

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[239] *JFS*, [2009] UKSC 15, [90] (Lord Mance). What assumption the school made with regard to M is never explained.

[240] *Id.*

[241] HERMAN, *supra* note 10, at 163.

[242] *Id.*

[243] Yelle, *supra* note 153, at 33.

[244] *Id.*

the understanding of religion as primarily a matter of "belief in" or "propositional faith" is a peculiarly Christian and largely Protestant understanding of what constitutes a religion.

V. CONCLUSION

Talal Asad has noted that the "conceptual geology" of "Christian and post-Christian history" have "profound implications for the ways in which non-Western traditions are able to grow and change."[245] In this paper, I have suggested that one such implication is a Christian (or at least universalizing) bias in how the *JFS* courts understood what it meant to be a member of a religion. Religion, as the courts understand it, is a matter of propositional faith—*i.e.*, belief—in the correctness of a particular creed. But this is not how Jews define themselves as a group, and restricting the legal understanding of religion to a generalized notion of Christianity privileges universalizing religions at the expense of those religious groups with a more substantial connection to ethnicity. Further, excavation of the judicial conception of "religion" may prove helpful in assisting courts called upon to adjudicate such disputes in a more consciously neutral manner.

Last year, the Rt. Hon Lord Justice Munby[246] declared that, "the laws and usages of the realm do not include Christianity, in whatever form."[247] The courts insist that "[t]he precepts of any one religion, any belief system, cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other."[248] But *JFS* suggests that this is not the case with regard to how courts understand "religion" itself. In this respect, at least, it is not Munby J's statement, but Lord Chief Justice Sir Matthew Hale's 1676 declaration that Christianity was indeed "parcel of the laws of England," that still rings true.[249] Even 103 years later, Maitland's suggestion that religious equality in Britain is complete still seems premature.

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[245] ASAD, GENEALOGIES OF RELIGION, *supra* note 8, at 1.
[246] Munby J was elevated to the Court of Appeal in 2009.
[247] Johns & Another R (on the application of) v. Derby City Council & Another, [2011] EWHC (Admin) 375, [39] (Eng.).
[248] McFarlane v. Relate Avon Ltd., [2010] EWCA (Civ) 880, [22] (Eng.).
[249] Peter Cumper, *The United Kingdom and the U.N. Declaration on The Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 13 (2007) (quoting Taylor's Case, (1676) 86 Eng. Rep. 189 (K.B.)).

The Concept of "Religion" in the Supreme Court of Israel

Aaron R. Petty*

> *[L]egal principles may have a strong relationship to a particular religious heritage—a relationship which is so deep that we do not always recognize it.*†

INTRODUCTION

Fifteen years ago, Joseph Dan reminded us that "there is no 'neutral' linguistic expression, one which does not reflect various layers of cultural and conceptual meanings."[1] Legal discourse is no exception. "The cultural study of law shows that legal controversies and legal reasoning often reflect underlying cultural perceptions."[2] And how law accounts for, responds to, and is imbued with cultural phenomena is far more important than "mere abstract intellectual exercises"[3] that the lack of neutral expression may cause in other disciplines. In law, cultural conceptions and common understandings are "embedded in passionate social disputes on which the law of the state pronounces."[4] So where the language of law is imbued with common terms and concepts, and neutrality is assumed rather than demonstrated, "it is not . . . a harmless affair."[5]

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† Margaret Davies, *Pluralism in Law and Religion*, *in* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 72, 80 (Peter Cane et al. eds., 2008).

1. Joseph Dan, *Jewish Studies and European Terminology: Religion, Law and Ethics*, *in* JEWISH STUDIES IN A NEW EUROPE: PROCEEDINGS OF THE FIFTH CONGRESS OF JEWISH STUDIES IN COPENHAGEN 1994 UNDER THE AUSPICES OF THE EUROPEAN ASSOCIATION FOR JEWISH STUDIES xxiii, xxiii (Ulf Haxen et al. eds., 1998).

2. DAPHNE BARAK-EREZ, OUTLAWED PIGS: LAW, RELIGION, AND CULTURE IN ISRAEL 7 (2007).

3. Talal Asad, *Reading a Modern Classic: W. C. Smith's* The Meaning and End of Religion, 40 HIST. RELIGIONS 205, 220 (2001).

4. *Id.*

5. Arie L. Molendijk, *In Defence of Pragmatism*, *in* THE PRAGMATICS OF DEFINING RELIGION: CONTEXTS, CONCEPTS AND CONTESTS 3, 6 (Jan G. Platvoet & Arie L. Molendijk eds., 1999) (internal quotation omitted).

In this Article, I suggest that "religion," both as it is commonly understood, and as it is understood and applied by courts as a legal term of art, refers chiefly to belief. This understanding of "religion" is incorrectly, if tacitly, assumed to be both neutral and broadly applicable. Building on previous work focusing on British courts,[6] I now turn to investigating how Israeli courts understand the concept of religion. And, as before, I focus on cases addressing the question "who is a Jew?" as a window into how courts understand religion and membership in a religion more generally.

"Among the Western-style modern democracies there is no other country which experiences more intensely the problem of religion's place in the state than Israel."[7] The country contains a "deeply divided society"[8] and, as a result, where the state and religion meet "even simple matters become complicated."[9]

One such complication is Israel's status as both a Jewish and democratic state. "The Jewish-Israeli case—that of the Jewish people, the Jewish national movement—Zionism—and the Jewish nation-state—Israel—is . . . often said to be unique."[10] This is because "[b]eyond the ordinary tasks of a modern secular democratic state, Israel's specific mission is to constitute the national state of the Jews and to preserve and further Jewish national culture."[11] Reconciling these dual and perhaps sometimes incompatible roles "is an issue with which Israeli courts have been struggling ever since the establishment of the state in 1948."[12] And within that legal discourse "[n]o single problem . . . has received as much attention as the definition of the word 'Jew.'"[13]

Israeli law uses the term "Jew" in relation to the jurisdiction of rabbinical courts, the law of return, and matters of personal registration.[14] In particular, while "Jew" as a legislative term of art "has been accorded a religious definition in matters pertaining to the rabbinical courts, other

6. Aaron R. Petty, *"Faith, However Defined": Reassessing* JFS *and the Judicial Conception of Religion*, 6 ELON L. REV. 117 (2014).

7. Izhak Englard, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185, 185 (1987).

8. Gila Stopler, *Religious Establishment, Pluralism and Equality in Israel—Can the Circle be Squared?*, 2 OXFORD J.L. & REL. 150, 150 (2012).

9. Amnon Rubenstein, *State and Religion in Israel*, 2 J. CONTEMP. HIST. 107, 107 (1967).

10. Alexander Yakobson, *Jewish People and the Jewish State, How Unique?—A Comparative Survey*, 13 ISRAEL STUD. 1, 1 (2008).

11. Englard, *supra* note 7, at 187.

12. Daniel B. Sinclair, *Introduction*, *in* JEWISH LAW ASSOCIATION STUDIES XI: LAW, JUDICIAL POLICY, AND JEWISH IDENTITY IN THE STATE OF ISRAEL 1, 1 (Daniel B. Sinclair ed., 2000).

13. *Id.*; *see also* S. ZALMAN ABRAMOV, PERPETUAL DILEMMA: JEWISH RELIGION IN THE JEWISH STATE 270 (1976) ("Of the many controversies periodically agitating public opinion in Israel, none is more acute and more fraught with emotion than the legal, religious, and historical definition of a Jew. No other issue has engendered so much dissention and public debate as this one."); Amy-Jill Levine, *Reflections on Reflections: Jesus, Judaism and Jewish-Christian Relations*, 8 STUD. JEWISH-CHRISTIAN REL. 1, 9 (2013) ("The question 'who is a Jew' was a problem in antiquity, and it remains a problem today.").

14. Menashe Shava, *Comments on the Law of Return (Amendment No. 2), 5730-1970 (Who Is a Jew?)*, 3 TEL AVIV U. STUD. L. 140, 141 (1977).

definitions have been applied to the same term in other contexts."[15]

As Judaism is the dominant religion in Israel, how Israeli courts understand "who is a Jew" in a legal context says a great deal about how those courts understand religion more generally. This legal understanding reveals factors that the courts would likely find relevant in deciding what makes a religion *a religion*. Accordingly, I am not particularly concerned with the answer to the question "who is a Jew"—if there is one (or even if there are many).[16] Instead, I am interested in *how* the question has been answered by courts of law and what the shape of the legal discourse has been in responding to that question; I am interested in what assumptions have been made, and in what factors have been determinative.

To set the legal issues in context, in Part II, I briefly trace the emergence of the State of Israel. Part II.A discusses the early Zionist movement with particular attention to the philosophy of Theodor Herzl. Part II.B traces the early legal foundations of the State of Israel from the Balfour Declaration through the Proclamation of the State. Part III concerns the legal system created by the State. Part III.A introduces the legal structure of the state of Israel. Part III.B details the function and authority of the courts within that structure. Part III.C addresses the legal status of religion in the state, and Part III.D looks at the Law of Return, a unique feature of Israeli law applicable only to Jews (and certain relations). Part IV concerns the substantive debate on "Who is a Jew" under Israeli civil law. Part IV.A discusses in detail three seminal cases addressing the legal relationship between Judaism and the State—*Rufeisen* (also known as *Brother Daniel*), *Shalit*, and *Beresford*—along with significant legislation passed in the wake of *Shalit*. Part IV.B attempts to reconcile these decisions and tease out the factors that the Israeli Supreme Court has considered significant and the assumptions that it has made in adjudicating issues of religious identity.

Part V turns to the historical validity and neutrality of the understanding of "religion" applied by the Israeli Supreme Court. Part V.A offers an overview of the Christian origins of the modern concept of "religion" as primarily a matter of belief. Part V.B reflects on how the Jewish state, through its secularist Supreme Court, could have come to a Christian understanding of religion. Finally, Part VI takes a step back to place the findings in the wider debate on secularization. Part VI.A provides the

15. *Id.*; *see also* ABRAMOV, *supra* note 13, at 270 ("[I]n Israel the problem has been focused . . . on the legal definition of *who* a Jew is.").

16. As Gad Barzilai has persuasively argued, the question of "Who is a Jew" is "not a static question or a fixed dilemma but rather a dynamic construction of political interests amid struggles of communities over political power. Thus the issue of 'who is a Jew' is not an autonomous problem waiting to be politically and legally resolved but rather a social language that serves the political purposes of social engineering." Gad Barzilai, *Who is a Jew? Categories, Boundaries, Communities and Citizenship Law in Israel*, *in* BOUNDARIES OF JEWISH IDENTITY 27, 28 (Susan Anita Glenn & Naomi B. Sokoloff eds., 2010).

necessary background on this secularization paradigm, and Part VI.B suggests that these cases may point to a useful refinement. Part VII offers a brief conclusion.

II. THE EMERGENCE OF THE STATE OF ISRAEL

The modern state of Israel claims an ancient pedigree. In 586 B.C. Babylonians captured the land of Israel and forced a significant portion of the population to relocate to Babylon.[17] After the return from exile the Israelite population flourished for several centuries, but the conversion of Constantine to Christianity in the fourth century signaled a period of decline in both population and status of Jews.[18] Over the ensuing centuries, "Jews became united . . . by a sense of unique isolation, periodically accentuated by outbursts of active anti-semitism."[19] And it was in this context of "shared persecution, made more bitter by frustrated attempts at assimilation, that Zionism grew."[20] The discussion of "Who is a Jew?" in the Supreme Court of Israel "takes place within the Zionist narrative of history."[21]

A. The Zionist Movement

"The Zionist movement arose in the context of nineteenth-century European nationalism and defined itself in opposition to the idea that Jews could be full members of a modern nation-state, whether French, German, or Russian, while adhering to their Jewish religion in their private lives."[22] Instead, Zionism claimed that Jews constituted a nation themselves,[23] and aimed to create a state for that nation.[24] Over time, three main strands of Zionist thought emerged: religious, socialist, and "Zionism as refuge."[25] What united all Zionists, however, was their agreement "on the need to

17. S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 118 (1997).

18. *Id.* at 119.

19. Rubenstein, *supra* note 9, at 107.

20. *Id. See also* MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL 14 (2011) (noting that Zionism was a response to both "the distressing conditions of Jewish existence in Eastern and central Europe" and "an answer to the grave cultural crisis that Jews faced in the nineteenth century."). On the historical development of secular Judaism generally, of which Zionism is part, *see* ABRAMOV, *supra* note 13, at 272-73.

21. Daphne Barak-Erez, *Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court*, 16 CANADIAN J.L. & SOC'Y. 93, 109 (2001).

22. LEORA BATNITZKY, HOW JUDAISM BECAME A RELIGION: AN INTRODUCTION TO MODERN JEWISH THOUGHT 147 (2011).

23. *Id.*

24. Zvi Gitelman, *The Decline of the Jewish Nation: Boundaries, Content, and Jewish Identity*, 4 JEWISH SOC. STUD., NEW SERIES 112, 112 (1998).

25. Lucy Endel Bassli, *The Future of Combining Synagogue and State in Israel: What Have We Learned in the First Fifty Years?*, 22 HOUS. J. INT'L L. 477, 480 (2000).

recreate a Jewish State—that is what made them Zionists."[26]

Religious Zionists rejected the Orthodox Jewish religious tenet that the Jews will return to the land of Israel *en masse* only when the Messiah comes, and instead focused on the biblical promise of the land of Israel to the people of Israel.[27] Socialist Zionism, by contrast, "rejected any association with traditional Judaism, including such basic tenets . . . as observance of the Sabbath and dietary laws."[28] But "[t]he mainstream of Zionism," which ultimately led to the creation of the state, "tried to introduce an element of normalcy into an abnormal situation."[29] That is, it viewed Zionism as the preferable response to "the Jewish question" in Europe.[30]

In the late nineteenth century, "[f]aced with the rise of anti-Semitism throughout Europe, Zionism, or Jewish nationalism, was revived by Theodor Herzl, an educated Western European Jewish journalist and author."[31] Herzl was born in 1860 in Budapest to an assimilated Jewish family.[32] He studied law in Vienna and, as a young man, left an unpromising career as a playwright to take up journalism.[33] In 1892 he became the Paris correspondent for Vienna's *New Free Press*, and in this capacity two years later he reported on the trial of Captain Alfred Dreyfus.

Following Germany's 1871 annexation of Alsace-Lorraine under the terms of the Treaty of Frankfurt, French support for Russia increased steadily.[34] In this context, French Jews who were not favorably disposed toward Russia (as many were not, on account of anti-Jewish pogroms)

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26. Martin Edelman, *A Portion of Animosity: The Politics of Disestablishment of Religion in Israel*, 5 ISRAEL STUD. 204, 205 (2000).

27. BATNITSKY, *supra* note 22, at 147.

28. BARAK-EREZ, *supra* note 2, at 37.

29. Rubenstein, *supra* note 9, at 107. *See also* BATNITSKY, *supra* note 22, at 56 ("Zionism claims to seek the normalization of the Jewish people.").

30. Bassli, *supra* note 25, at 481. "The Jewish Question" broadly concerns the debate in Europe at the end of the nineteenth century concerning the appropriate treatment and status of Jews in society, with particular reference to political rights, and the extent to which Jewish identity (especially Jewish *national* identity) did or should prevent or limit integration and political participation in European states. The phrase appears to have entered broad usage following Bruno Bauer's 1843 work *Die Judenfrage* (The Jewish Question), and Karl Marx's 1844 response *Zur Judenfrage* (On the Jewish Question). The phrase, however, appeared much earlier in both English and French (*la question juive*), and at least the idea of Jewish emancipation had entered discussion in Germany close to a century earlier. *See* Gad Freudenthal, *Aaron Salomon Gumpertz, Gotthold Ephraim Lessing, and the First Call for an Improvement of the Civil Rights of Jews in Germany (1753)*, 29 AJS REV. 299 (2005). Even ancient origins have been suggested. AVI AVIDOV, NOT RECKONED AMONG NATIONS: THE ORIGINS OF THE SO-CALLED "JEWISH QUESTION" IN ROMAN ANTIQUITY (2009).

31. *Id.* at 479. Although Herzl's contribution was undoubtedly more significant to the creation of the State of Israel, he was not the first to call for the establishment of a state. In 1882 Leo Pinsker published a pamphlet entitled *Auto-Emancipation*, which advocated for the creation of a Jewish state. *See* ABRAMOV, *supra* note 13, at 44.

32. ABRAMOV, *supra* note 13, at 60; BATNITSKY, *supra* note 22, at 152.

33. *Id.*

34. BATNITSKY, *supra* note 22, at 152.

were seen as pro-German and, therefore, anti-French.[35] Coupled with a simultaneous rise in French nationalism, the perceived anti-French attitude of French Jews heightened an atmosphere of antisemitism that culminated in the trial of Dreyfus.[36]

Dreyfus, like Herzl, was an assimilated Jew.[37] He hailed from Alsace (a German-speaking region) and was a career officer in the French Army.[38] Accused of treason for allegedly communicating French military secrets to the German embassy in Paris, Dreyfus was subjected to a trial closed to both the public and journalists.[39] Despite his claims of innocence and the lack of any reliable evidence against him, Dreyfus was convicted and sentenced to life imprisonment.[40] After the verdict was announced, "mobs crowded the streets of Paris for days, shouting 'Death to the Jews.'"[41]

The turning point in Herzl's life was his coverage, as a journalist, of the Dreyfus affair and "its attendant outbursts of antisemitism."[42] He later claimed, "The Dreyfus trial . . . which I witnessed in Paris in 1894, made me a Zionist."[43] He claimed that this injustice, and the public sentiment that followed, demonstrated the ultimate futility of Jewish assimilation in Europe. If the most enlightened of European countries—in his words, "republican, modern, civilized France one hundred years after the declaration of the Rights of Man"—could not tolerate even the most assimilated of Jews—a Jewish officer in the French Army—there could be

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* Dreyfus spent almost five years as a prisoner on Devil's Island in French Guiana. In 1896, Colonel Georges Picquart, the head of counterespionage in the French Army, identified Major Ferdinand Walsin Esterhazy as the real spy. For this discovery, Picquart was transferred to Tunis. Esterhazy was tried, but acquitted, and some historians theorize that Esterhazy was, in fact, a double agent. After Esterhazy's acquittal, both Dreyfus and Picquart faced charges related to the documents implicating Esterhazy.

In January 1898, Émile Zola published *J'accuse*, an open letter claiming that Dreyfus was framed. Leading intellectuals began to call for the case to be reopened. Dreyfus was returned to France in 1899, re-tried, and again convicted. He was sentenced to ten years' imprisonment but pardoned and set free shortly after the trial. It was not until 1906 that Dreyfus was fully exonerated. He was reinstated as a Major in the French Army, served during World War I, and retired as a Lieutenant Colonel. Picquart, who had left the Army, was reinstated and promoted to Brigadier General and later served in the Clemenceau cabinet as Minister of War.

There is a wealth of literature on the Dreyfus affair. For the broad outlines, see, for example, LOUIS BEGLEY, WHY THE DREYFUS AFFAIR MATTERS (2009); MICHAEL BURNS, FRANCE AND THE DREYFUS AFFAIR: A BRIEF DOCUMENTARY HISTORY (1999); PIERS PAUL READ, THE DREYFUS AFFAIR (2012).

41. BATNITSKY, *supra* note 22, at 152.

42. Rubenstein, *supra* note 9, at 108.

43. BATNITSKY, *supra* note 22, at 152 (quoting THEODOR HERZL, ZIONIST WRITINGS: ESSAYS AND ADDRESSES 2:112 (Harry Zohn trans., 1973). Batnitzky notes that some recent scholarship has cast doubt on Herzl's claim about the centrality of the Dreyfus affair to the development of his own Zionist thought, and that the importance Herzl later ascribed to the Dreyfus affair may be a "belated contrivance." *Id.*

no hope for assimilation of any Jews anywhere in Europe.[44] An alternative was required. In the aftermath of the Dreyfus affair, Herzl wrote his seminal essay, *Der Judenstaat*, in which he proposed "the Jews 'be granted sovereignty over a portion of the globe large enough to satisfy the rightful requirements of a nation.'"[45] This 1896 publication "brought the concept of creating a Jewish homeland to the attention of international leaders and politicians."[46]

Herzl prioritized the physical survival and political emancipation of individuals over the survival of Jewish religion or culture.[47] Indeed, in *Der Judenstaat*, Herzl "depicted the future state in terms of the European atmosphere which he knew among the liberal assimilated Jews of Central Europe."[48] Even the title of his work, although often translated into English as "The Jewish State" means something closer to "the Jews' state."[49] In other words, for Herzl, "the state is for the sake of the survival of Jews, and not for the sake of the survival of Judaism or some form of Jewishness."[50] And as in other European states, religion, as he understood it, was to be subordinated to the state:

> Are we eventually going to set up a theocracy? No! Belief holds us together, science makes us free. We are not going to allow our rabbis even to think about theocratic ideas. We are going to know how to restrict them to their synagogues just as we are going to retain our army within their bases. Army and rabbinate shall be honoured deeply as is becoming to their high function and merits. They have no word to say in the affairs of the State which has thus honoured them because they would bring about internal and external complications.[51]

This subordination of religious authority to the state was "the very foundation" of the secular Zionist movement.[52] But if Judaism could acquire a secular meaning, then who was a Jew? And could, for instance, a Jew who converted to another religion still be a Jew and a member of the Zionist movement?[53] The following year, Herzl participated in convening the World Zionist Congress, held in Basel on August 29, 1897. The

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44. *Cf.* MAUTNER, *supra* note 20, at 14 (noting that Zionism was precipitated by "the rejection of the Jews' attempt to be accepted as equals by the non-Jewish societies in which they lived.").

45. ABRAMOV, *supra* note 13, at 60; *see also* Bassli, *supra* note 25, at 479 n.9.

46. Bassli, *supra* note 25, at 480.

47. BATNITSKY, *supra* note 22, at 154.

48. Rubenstein, *supra* note 9, at 108.

49. BATNITSKY, *supra* note 22, at 154; ABRAMOV, *supra* note 13, at 60 ("This was nationalism pure and simple, in itself devoid of any religious content.").

50. *Id.*; *see also* ABRAMOV, *supra* note 13, at 60.

51. Rubenstein, *supra* note 9, at 108.

52. *Id. See also* Englard, *supra* note 7, at 187 ("The mainstream of modern political Zionism, which led to the establishment of the State of Israel in 1948, was . . . guided by this idea of a national secular Jewish state.").

53. Rubenstein, *supra* note 9, at 108. Herzl's response to the latter question was "no." *Id.* at 109.

Congress, in turn, created a permanent Zionist Organization (now known as the World Zionist Organization) through which it could work to implement its policy decisions.[54]

B. Early Legal Foundations

1. The Balfour Declaration

The work of the Zionist Organization eventually resulted in the support of the British government. On November 2, 1917, British Foreign Secretary Arthur Balfour, in a letter to Lord Rothschild, President of the British Zionist Federation, called for the establishment of a national Jewish homeland.[55] Balfour's letter, which later became known as the Balfour Declaration, was preceded by significant pressure from Zionist groups,[56] but was also intended to raise Jewish support and capital for the British war effort, to ensure British control over strategically-important Palestine if the Ottoman Empire collapsed in the wake of the war,[57] and to garner support from both the United States and the Soviet Union.[58] Although the Declaration was in some ways cautious, preferring the term "national home" to "Jewish state" and avoiding mention of specific geographical boundaries, it was nevertheless a significant victory for the Zionist movement.[59]

2. The League of Nations Mandate

As the British government had anticipated, the Ottoman Empire did collapse after the war, and in 1922 the nascent League of Nations granted the United Kingdom a Mandate for Palestine, legitimizing British rule in the Levant.[60] The text of the Mandate incorporated the Balfour Declaration.[61] The Mandate continued the policy set out in the Declaration, but stopped short of preparing the way for an independent Jewish state.[62] Jewish immigration to Israel during the Mandate period,

54. Bassli, *supra* note 25, at 480.

55. *Id.* The Declaration noted that "His Majesty's Government view with favour the establishment in Palestine of a national home for the jewish people, and will use their best endeavours to facilitate the achievement of this object. . . ." ABRAMOV, *supra* note 13, at 85.

56. Nancy Caren Richmond, *Israel's Law of Return: Analysis of Its Evolution and Present Application*, 12 DICK. J. INT'L L. 95, 96 n.7 (1993); ABRAMOV, *supra* note 13, at 84 (noting the Declaration was the result of "[a] series of well-coordinated diplomatic moves on the part of Zionist leaders in London, Paris, Rome, and Washington").

57. Bassli, *supra* note 25, at 483.

58. JAMES GELVIN, THE ISRAEL-PALESTINE CONFLICT: 100 YEARS OF WAR 82-83 (2005).

59. Bassli, *supra* note 25, at 482.

60. *Id.* at 483. The Mandate was assigned to the United Kingdom in 1920, the terms were approved by the League of Nations in 1922, and it came into effect in 1923.

61. Richmond, *supra* note 56, at 96 n.8.

62. Bassli, *supra* note 25, at 483.

until 1937, was based on the ability of the territory to economically absorb Jewish immigrants without significantly shifting the social make-up of the territory between Jews and Arabs.[63]

3. The MacDonald White Paper

At the same time that the British government had been negotiating with Zionists regarding the establishment of a Jewish homeland, it had also promised to Arab leaders an independent Arab state in the same territory in exchange for support against the Ottomans. By the late 1930s, though, Hitler's Nuremburg Laws had triggered mass Jewish exodus from Germany and the influx of Jewish refugees had spawned Arab revolts in Mandatory Palestine. By 1939, the British government believed that Jewish support was either guaranteed or unnecessary, while losing the support of the Arab world would be disastrous.[64]

Thus, that year Colonial Secretary Malcolm MacDonald issued a White Paper declaring that the resettlement of 450,000 Jews had fulfilled the Balfour Declaration's promise of a homeland for the Jewish people, and called for the creation of a state to be governed by Jews and Arabs jointly, providing that it should not be a "Jewish State," that further Jewish immigration would be restricted, and that the transfer of land from Arabs to Jews also be restricted.[65] Lloyd George called the White Paper an act of perfidy and Winston Churchill voted against the Paper and the government in which he was a minister. Even the League of Nations' own Permanent Mandates Commission abstained from endorsing the White Paper, and several of its members thought MacDonald's views inconsistent with the Mandate.[66] The British government's new policy led to significant illegal immigration by European Jews and eventually a naval blockade. The significance of the situation was highlighted by James Rothschild MP, who said, "[f]or the majority of Jews who go to Palestine it is a question of migration or of physical extinction."[67] And so it was until the end of the Second World War.

For many, "Zionism alone emerged as a viable Jewish response" to the Holocaust.[68] The near-total annihilation of European Jewry seemed to confirm Herzl's doubts about the possibility of assimilation.[69] It also

63. RUTH GAVISON, THE LAW OF RETURN AT SIXTY YEARS: HISTORY, IDEOLOGY, JUSTIFICATION 21 (2010).

64. RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 716 (1961).

65. Bassli, *supra* note 25, at 483. *See also* GAVISON, *supra* note 63, at 21 (noting that the British government established stricter limits on Jewish immigration to Mandatory Palestine after the 1936-39 Arab uprisings).

66. HILBERG, *supra* note 64, at 717 n.7.

67. 347 PARL. DEB., H.C. (5th Ser.) (1939) 1984 (U.K.).

68. Richmond, *supra* note 56, at 95 (internal quotation omitted).

69. BATNITZKY, *supra* note 22, at 94 ("For Fackenheim, the Holocaust discredits the false promises of secular modernity, including the notion that Jews can be integrated as full citizens in a

"demand[ed] that secular and religious Jews unite in resisting any future threat to the existence of the Jewish people."[70] Zionism promised safety and security for Jews that the countries of Europe had failed to provide. As the Jewish Agency put it:

> When we say "Jewish independence" of a "Jewish state" we mean Jewish country, Jewish soil; we mean Jewish labour, we mean Jewish economy, Jewish agriculture, Jewish industry, Jewish sea. We mean Jewish language, schools, culture. We mean Jewish safety, security, independence, complete independence, as for any other free people.[71]

4. The Proclamation of the State of Israel

On November 27, 1947, the General Assembly of the United Nations adopted a resolution calling for the establishment of an independent Jewish state in Palestine, but the British Mandate remained in place until midnight on May 15, 1948.[72] "The establishment of Israel was the successful culmination of the Zionist movement" that Herzl had revived just fifty years earlier.[73] And "when David Ben-Gurion read the Israeli Proclamation of Independence in Tel-Aviv" the preceding afternoon, "everyone understood that the Zionists were establishing the first Jewish State in Palestine in two thousand years, but no one—not even the founders themselves—could indicate with certainty what was meant by the words 'Jewish State.'"[74] The Proclamation did provide, however, that "Israel will be open for Jewish immigration and the Ingathering of the Exiles."[75] And, almost immediately, *aliyah* from numerous overseas communities began.[76] "In the state's first years . . . tens of thousands made *Aliyah* from every corner of the world."[77]

For many Israelis, the Proclamation "appears to embrace the Herzlian vision of a secular democratic state, thus representing the fulfillment of the Zionist dream. But the one lesson to be gleaned from any comprehensive history of the Jewish people is that there are several competing Zionist

modern nation-state.").

70. *Id.*

71. Bassli, *supra* note 25, at 485 (quoting THE JEWISH AGENCY FOR PALESTINE, THE JEWISH CASE 66 (1947)).

72. Richmond, *supra* note 56, at 95 n.3; Strong, *supra* note 17, at 119-20 & n.54; G.A. Res. 181 (II) at 131, U.N. Doc. A/519 (Nov. 29, 1947).

73. Edelman, *supra* note 26, at 204-05.

74. *Id.* at 205.

75. Proclamation of the State of Israel, 5708-1948, 1 LSI 3 (1948).

76. GAVISON, *supra* note 63, at 11.

77. *Id.* For example, "nearly the entire Jewish community of Bulgaria moved to Israel, as did the old established communities of Yemen, Iraq, and Libya, and the vast majority of those who had survived in Poland, Hungary, Czechoslovakia, and Rumania. Tens of thousands came from Morocco, Tunis, Turkey, Persia, and India." ABRAMOV, *supra* note 13, at 147.

visions: *the* Zionist dream does not exist."[78] The most that can be said is that the Proclamation embodies a commitment to individual rights, as well as a vision of the Jewish people collectively as a nation.[79] "[T]he rights of individuals are in important and perhaps contradictory ways bound up with the organic nature of the community and its constituent parts."[80] The tension inherent in Israel's dual status as a "Jewish and democratic" state, concerned with both individuals and the Jewish people as a whole, has never been resolved.[81]

III. THE ISRAELI LEGAL SYSTEM

One place this tension manifests is in the preferential treatment accorded to Jewish immigrants under the Law of Return. "The Law of Return serves as a focus for controversy, both with respect to the justification for the preference given to Jews in Israeli immigration policy,[82] and with respect to the internal Jewish question regarding the essence of the Jewish collective and the standards for identifying its members or becoming one."[83]

A. The Constitutional Structure

Any discussion of Israeli law must begin with the most distinctive feature of its legal system: the lack of a formal constitution.[84] Although the Proclamation promised a constitution, the Knesset was never able to pass one. Instead, a number of Basic Laws have been passed, which have a quasi-constitutional status.[85] For many years, it was thought that Basic Laws were not inherently superior to ordinary legislation because absent an "entrenchment provision" requiring some specified supermajority to modify or repeal a Basic Law, they could be modified or repealed at the pleasure of the Knesset.[86] But at the same time, Basic Laws were thought

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78. GARY JEFFREY JACOBSON, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 7 (1993).

79. Cynthia A.M. Stroman, *Book Review*, 91 MICH. L. REV. 1545, 1546 (1993).

80. JACOBSON, *supra* note 78, at 8.

81. Edelman, *supra* note 26, at 218 ("Israel has never resolved the relationship between Judaism (the religion of the Jews) and Jewish national identity."); Barzilai, *supra* note 16, at 29 ("Zionism, as an aggregate of various Jewish national aspirations, has not clearly differentiated Jewish ethnicity from religious or from nationality. Consequently, public contentions over the issue 'who is a Jew' have been paramount for allocations of citizenship rights in Israel since the formal inception of the state in 1948."); JACOBSON, *supra* note 78, at 8 ("the achievement of liberal goals pertaining to individual rights will have to accommodate communitarian goals with which they will often be in conflict.").

82. *See, e.g.*, Stopler, *supra* note 8; GAVISON, *supra* note 63, at 37-59.

83. GAVISON, *supra* note 63, at 11.

84. Englard, *supra* note 7, at 190; Strong, *supra* note 17, at 135.

85. Strong, *supra* note 17, at 135. The Proclamation is also legally binding, but only to the extent that it "expresses the vision of the people and its faith." *Id.* at 136.

86. *Id.* at 135.

"fundamental in some ill-defined sense."[87]

B. The Role of the Courts

Although the Israeli Supreme Court has been functioning since shortly after the foundation of the state, its role was codified in a Basic Law only in 1984. The Israeli Supreme Court serves two functions. It is an appellate court of last resort, and also a court of first instance for claims against the state in matters not under the jurisdiction of any other tribunal.[88] "Any person who has reason to believe that a particular state action denies her legal rights may petition the court and ask it to issue an order *nisi*," which the court will "consider rapidly and inexpensively."[89] A single judge reviews the petition, and may direct the respondent to show cause why the relief requested should not be granted.[90] After a hearing, the court may grant permanent injunctive relief.[91]

For many years, the absence of a written constitution led the Supreme Court to "develop a position of judicial restraint[,] . . . preferring to leave many fundamental questions to the legislature."[92] And despite its initially limited authority to review legislation passed by the Knesset, the Supreme Court was able to "ensure that public officials and agents of the state [did] not abuse their powers of discretion"[93] because "a high percentage of laws in Israel consists not of primary legislation but of secondary legislation passed by administrative bodies to implement primary enactments."[94] (In 1995 the Supreme Court "took the revolutionary step of declaring that Israel no longer lacked a written constitution" and that "[h]enceforth . . . the Eleven Basic Laws that had been periodically enacted by the Knesset would function as the nation's constitution,"[95] but this development postdates the decisions under consideration here.)

C. The Legal Status of Religion

Israel is not a theocracy, nor is there even any established religion.[96]

87. *Id.* at 113 n.10 (quoting MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 30 (1994)).

88. Ronen Shamir, *"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 LAW & SOC'Y REV. 781, 784 (1990); Strong, *supra* note 17, at 137.

89. Shamir, *supra* note 88, at 784.

90. *Id.*

91. *Id.*

92. Stroman, *supra* note 79, at 1548.

93. Shamir, *supra* note 88, at 784.

94. Strong, *supra* note 17, at 138.

95. Edelman, *supra* note 26, at 209 (citing CA 6821/93 United Bank Mizrahi v. Migdal Coop. Vill. 49(4) PD221 [1995]. Having declared the existence of a constitution, the Supreme Court took it upon itself to review Knesset legislation for conformity with the constitution, arrogating to itself an American style of judicial review.

96. Edelman, *supra* note 26, at 206; Natan Lerner, *Religious Liberty in the State of Israel*, 21 EMORY INT'L L. REV. 239, 246 (2007). Alternatively, it has been suggested that "Israel does not have

Nominally, at least, Israel "is a secular state."[97] However, Israel does not maintain the separation between religion and the state that characterizes, for example, the French and American legal regimes.[98] Much of "Israeli law rests on the foundations of the legal system instituted during the British rule in Palestine between 1917 and 1948,"[99] which itself preserved a vestige of Ottoman rule—the *millet* system—under which "[t]he courts of each [religious] community have exclusive jurisdiction over specific matters of personal status, particularly marriage and divorce."[100] This remnant of religious authority in personal matters means that the state "does more than simply recognize the existence of certain religions."[101]

Indeed, the government "maintains formal links with the institutional organs of 14 religious denominations, and legally subjects individuals to religious rules by vesting the religious courts of those religions with the authority to resolve certain matters."[102] And because the vast majority of residents of Israel are Jewish, "Orthodox Judaism has functioned in the Israeli polity as if it were the official state religion," notwithstanding the modern, Western, secular outlook that dominated Israeli culture in the early twentieth century.[103]

Given this delegation and decentralization, "[t]he provisions of law relating to religion in Israel are not governed by any general scheme. History, political expediency, party politics and, even more, chance are responsible for an amorphous body of laws which baffles outsiders as well as some Israelis."[104] The state itself has even referred to its own relationship with religious bodies as "labyrinthine" and conceded that it consists of "a patchwork of laws and practices that are not easily susceptible to generalization."[105] One area in which this confusion is manifest is the Law of Return, which permits Jews and certain non-Jewish relatives of Jews to immigrate to Israel and obtain Israeli citizenship.

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an established religion; it has a multiple establishment." Edelman, *supra* note 26, at 206.

97. Lerner, *supra* note 96, at 244 (quoting HAIM COHEN, HUMAN RIGHTS IN JEWISH LAW 17 (1984)); BARAK-EREZ, *supra* note 2, at 4 ("In principle, Israeli law is a secular system with few exceptions.").

98. BARAK-EREZ, *supra* note 2, at 23.

99. *Id.* at 246.

100. Edelman, *supra* note 26, at 206. *See also* BARAK-EREZ, *supra* note 2, at 4 ("In matters of marriage and divorce [Israeli law] makes the law of the various religious communities binding on their individual members, thereby preserving the approach of the British Mandate's legislation."). Article 9 of the Mandate for Palestine "scrupulously preserved . . . the personal law and the system of religious community courts" by providing that "respect for personal status of the various peoples and communities and for their religious interests shall be guaranteed." ABRAMOV, *supra* note 13, at 93, 175.

101. Edelman, *supra* note 26, at 206.

102. *Id.* This model of interaction between the state and religion has been characterized as "state-organized pluralism." *See* Paul Cliteur, *State and Religion Against the Backdrop of Religious Radicalism*, 10 INT'L J. CONST. L. 127, 132 (2012).

103. Edelman, *supra* note 26, at 206.

104. Amnon Rubenstein, *Law and Religion in Israel*, 2 ISRAEL L. REV. 380, 380 (1967).

105. Lerner, *supra* note 96, at 239 (internal quotation omitted).

D. The Law of Return

"Jewish *aliyah* and *kibbutz galuyot* ('the ingathering of the exiles') are two of the primary goals of the Zionist enterprise and of the State of Israel."[106] Like the Zionist project itself, "[*a*]*liyah* and the struggle for *aliyah* began years before the foundation of the state."[107] Indeed, "[d]eliberations on the subject of *Aliyah* have accompanied the Zionist enterprise from the beginning."[108]

But it was not until two years after the Proclamation that Ben-Gurion fulfilled its promise that "Israel will be open for Jewish immigration."[109] Speaking before the Knesset on July 3, 1950, Ben-Gurion affirmed that Israel is a "state for all Jews wherever they may be" and emphasized that Israel's "gates are open to every Jew."[110] He explained that the Law of Return, which was then being debated, embodies the *raison d'être* of the state.[111] Two days after Ben-Gurion's address, on Herzl's memorial day, the Knesset enacted the Law of Return by unanimous vote.[112]

As Ben-Gurion explained in his address to the Knesset, the Law of Return "is regarded as one of the pillars of the (unwritten) Israel constitution, in the sense that it gives effect to one of the basic purposes of the very establishment of the state."[113] That is, it "was enacted in order to secure a safe place for all Jews in their own homeland after the Holocaust."[114] But more than simply providing refuge for Jews, wherever they may be, "[t]he Law of Return is one of the main legal instruments designed to make Israel the state of the Jews."[115] In this respect, the Law

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106. GAVISON, *supra* note 63, at 11.

107. *Id.*

108. *Id.* at 20.

109. *See supra* note 75.

110. Tiffany Pransky, Boundaries of Belonging: Conversion in Israel's Law of Return 5 (2012) (unpublished M.A. Thesis, Central European University), http://www.etd.ceu.hu/2012/pransky_tiffany.pdf. Last accessed May 1, 2014.

111. *Id. See also* GUY BEN-PORAT & BRYAN S. TURNER, THE CONTRADICTIONS OF ISRAELI CITIZENSHIP 11 (2011).

112. Pransky, *supra* note 110, at 5; GAVISON, *supra* note 63, at 24.

113. Bernard S. Jackson, *Brother Daniel: The Construction of Jewish Identity in the Israel Supreme Court*, 6 INT'L J. FOR SEMIOTICS LAW 115, 123-24 (1993).

114. BARAK-EREZ, *supra* note 2, at 83; *see also* GAVISON, *supra* note 63, at 17 ("The 1950 Law of Return was the political, symbolic and legal instrument with which the state fulfilled its obligation.").

115. Nahshon Perez, *Israel's Law of Return: A Qualified Justification*, 31 MODERN JUDAISM 59, 60 (2011). *See also id.* ("The Law of Return aims to enable the immigration of all Jews to Israel, regardless of . . . any other characteristic."); Claude Klein, *The Right of Return in Israeli Law*, 13 TEL AVIV U. STUD. Law 53, 56 (1997) ("The State of Israel is the state of the Jewish people, and, therefore, its gates are completely open to Jewish immigration."); Shalev Ginossar, *Who is a Jew: A Better Law?*, 5 ISRAEL L. REV. 264, 265 (1970) ("As everyone knows, the main concern of the State of Israel is to keep its gates wide open for every prospective *oleh*, i.e. for every Jew returning to settle in the land of his forefathers."); Yfaat Weiss, *The Golem and Its Creator, or How the Jewish Nation-State Became Multiethnic*, *in* CHALLENGING ETHNIC CITIZENSHIP: GERMAN AND ISRAELI PERSPECTIVES 82, 82 (Daniel Levy & Yfaat Weiss eds., 2002) (noting the Law of Return and the Citizenship Law are "a fundamental expression of the fact that Israel was created as the Jewish state");

of Return enabled the State to provide an answer to the "Jewish question," not just in Europe (to the extent that the Holocaust had not already rendered it moot) but everywhere. Accordingly, The Law of Return "is perceived by many as one of the major expressions of the state's Jewishness."[116]

"Section 1 of the Law of Return provides that every Jew has the right to immigration to Israel."[117] "In practice, in order to realize his or her right of return, an entitled individual must obtain a special visa known as an *oleh*'s visa."[118] Under Sec. 2(b), an *oleh*'s visa "shall be granted" to every Jew who has expressed his desire to settle in Israel (provided the applicant does not fall within one of three little-used exceptions on which a visa may be denied for reasons of public health or security).[119] Thus,

> [i]n principle, where an applicant is a Jew and where he or she does not fit into one of the three categories enumerated in section 2(b), the Minister of the Interior has no discretionary power. An *oleh*'s visa *must* be granted to the individual, since the right of return is an inherent right for every Jew.[120]

The Law of Return itself does not deal with the granting of citizenship, but rather only with *aliyah*."[121] But the Citizenship Law provides that "[e]very *oleh* by virtue of the 1950 Law of Return will be a Israeli citizen."[122] This has been interpreted to mean automatically and immediately.[123] Other avenues to citizenship exist, and include citizenship by residence (the primary path to Israeli citizenship for Arabs who had been citizens of Mandatory Palestine), birth, and naturalization (other than under the Law of Return).[124] But the essentially unlimited right of every Jew to immigrate to Israel and the availability of immediate and automatic Israeli citizenship for every *oleh* means that "for purposes of the Law of

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Barzilai, *supra* note 16, at 29 (noting the Law of Return and Citizenship Law "were more important in Israel than any other piece of legislation, including the Basic Laws, since they were supposed to entrench Jewishness as the main political force in state ideology, legal ideology, and public policy").

116. GAVISON, *supra* note 63, at 11. *But see* Sinclair, *supra* note 12, at 2 ("[T]he actual legal issues involved, i.e. automatic citizenship and registration, are not of any great practical significance. In this respect, this area is a relatively 'safe' one for the conduct of high-level legal debate as to the State of Israel's Jewish character.").

117. Shava, *supra* note 14, at 141.

118. Klein, *supra* note 115, at 56. This was perhaps not always so. Slovenko suggests that, at one point, a Jew could immigrate "without passport or number." Ralph Slovenko, *Brother Daniel and Jewish Identity*, 9 ST. LOUIS U. L.J. 1, 3 (1964).

119. Klein, *supra* note 115, at 56.

120. *Id.* at 57 (emphasis added).

121. GAVISON, *supra* note 63, at 30.

122. *Id.*

123. *Id. See also* Perez, *supra* note 115, at 60 ("Immigrants entering Israel under the Law of Return are eligible immediately for full citizenship.").

124. GAVISON, *supra* note 63, at 30-31. Both Jews and non-Jews may be naturalized outside of the process used for the Law of Return, but it does require a longer period of residence and a favorable exercise of discretion by the Minister of the Interior. *Id.* at 31; Slovenko, *supra* note 118, at 3-4.

Return the answer to the question 'Who is a Jew?' is of great importance."[125]

"In the period before the founding of the State and in the first years following it, the authorities did not define the term 'Jewish' but rather made do with a declaration from the *aliyah* applicant that he or she was Jewish."[126] The assumption was that few people would identify as Jews, much less immigrate to a besieged and struggling state, if they were not actually Jewish.[127] As Ruth Gavison writes, "[w]hen the Law of Return was formulated, shortly after the fall of Hitler, it was hardly thought, especially by those who shared Heinrich Heine's belief that 'Judaism is not a religion but a misfortune,' that there would be people claiming to be Jews."[128] Ben-Gurion himself explained:

> I was in the Jewish Agency for fifteen years and I do not recall that anyone raised this question. I was in the Jewish Agency for thirteen years together with Rabbi Maimon and Mr. Moshe Shapira. When a Jew arrived, I never once heard either of them asking who his mother and father were. Nobody asked this. If a Jew came and said he was a Jew—that was sufficient.[129]

During the discussions on the draft bill, the Knesset rejected the proposal of the religious Agudat Israel party to define "Jew" *halakhically*—one whose mother is Jewish or who converts to Judaism—and Ben-Gurion expressed opposition to such a definition several times.[130] Ultimately, the Knesset did not define "Jew." Some have suggested that

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125. Shava, *supra* note 14, at 141. *See also* GAVISON, *supra* note 63, at 61 ("Accordingly, the questions, *'Who is a Jew' and 'Who is a member of the Jewish people'* are of decisive importance."). The number of Jews that have immigrated to Israel under the Law of Return is substantial. Perez, *supra* note 115, at 61. Approximately 1.4 million immigrated between 1948 and the mid-1950s (mostly Holocaust survivors and those living in Muslim states), and almost one million from the former U.S.S.R. in the 1990s. *Id.* "It is unlikely that another massive wave of immigrants will arrive in Israel, short of an unforeseen event." *Id.* In recent years, immigration under the Law of Return has been modest: between 10,000 and 15,000 immigrants annually. *Id.*

126. GAVISON, *supra* note 63, at 62.

127. *Id.*

128. Slovenko, *supra* note 118, at 4. Or, as anther writer put it, with reference to Brother Daniel, "'You actually *sued* to be known as a Jew? Give me your hand, brother, and welcome aboard.'" *Id.*

129. Asher Maoz, *Who is a Jew? Much Ado About Nothing*, *in* JEWISH LAW ASSOCIATION STUDIES XI: LAW, JUDICIAL POLICY, AND JEWISH IDENTITY IN THE STATE OF ISRAEL 75, 111 (Daniel B. Sinclair ed., 2000).

130. Amnon Rubenstein, *The State of Israel as a Jewish State*, *in* JEWISH LAW ASSOCIATION STUDIES XI: LAW, JUDICIAL POLICY, AND JEWISH IDENTITY IN THE STATE OF ISRAEL 17, 18 (Daniel B. Sinclair ed., 2000). Ben-Gurion's opposition to defining "Jew" *halakhically* for purposes of the Law of Return was probably "based on his desire for new immigrants to settle in Israel." OSCAR KRAINES, THE IMPOSSIBLE DILEMMA: WHO IS A JEW IN THE STATE OF ISRAEL 2 (1976). As early as the 1940s, Ben-Gurion had supported free *aliyah* to "impede the possibility of an anti-Zionist solution to the Palestine question upon the end of the mandate." GAVISON, *supra* note 63, at 22. Ben-Gurion's view gained consensus after World War II. *Id.* And in the context of the military threats the state faced in its first years, turning away prospective immigrants who probably had some connection to the Jewish people and who wished to help may have seemed rather foolish.

the omission was intentional[131] and others claim that the omission allowed individuals who self-identify as Jews but who were not *halakhically* Jewish to "throw in their lot with Israel."[132] Still others claim that a *halakhic* definition was universally assumed, so that any definition would have been redundant[133] (though this seems difficult to square with the Knesset's rejection of, and Ben-Gurion's robust opposition to, Agudat Israel's proposed amendment).

IV. WHO IS A JEW?

"From the year 70 C.E. when the ancient State of Israel was destroyed by the Romans until the establishment of the modern State of Israel in 1948 the question 'Who Is a Jew?' was hardly ever posed."[134] "In the face of the Crusader, the Cossack, and the Nazi, it was all the Jew could do merely to maintain his identity. . . . [T]he emergence of the state has radically changed the character of the problem."[135]

"The term 'Jew' appears in various pieces of legislation: ss. 1, 2, 4A and 4B of the Law of Return; s. 3A(b) of the Population Registry Law 1965; the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law 1953, etc."[136] And with respect to these, and other, laws, "[t]he question of 'who is a Jew' has been the subject of endless, well-known discussions in Israel."[137] Some of the Supreme Court's decisions on this subject have "had strong political repercussions."[138] The issue has more than once led to a cabinet crisis.[139]

> The recurrence of the problem is hardly surprising. While it had always had a general relevance—increased somewhat by the growing secularization of European Jewry in the wake of the Haskalah—the emergence of the State of Israel as an independent

131. Amnon Rubenstein, *Who's a Jew and Other Woes*, ENCOUNTER 84, 86 (Mar. 1971).

132. Sinclair, *supra* note 12, at 3-4.

133. *Id.*

134. KRAINES, *supra* note 130, at 1.

135. Aharon Lichtenstein, *Brother Daniel and the Jewish Fraternity*, 12 JUDAISM 260, 261 (Summer 1963). *See also* ABRAMOV, *supra* note 13, at 271 ("The question of what or who a Jew is did not arise until the end of the eighteenth century, when the advent of Emancipation led to a revaluation of the nature and essence of Judaism.").

136. Rubenstein, *supra* note 130, at 17.

137. Klein, *supra* note 115, at 58. *See also* ABRAMOV, *supra* note 13, at 270; Ginossar, *supra* note 115, at 264 ("Few internal problems of Israel have aroused such heated and widespread controversy, as that of defining the term 'Jew'".); Lichtenstein, *supra* note 135, at 260 ("'Who is a Jew?' Twice within recent years this troublesome question has been a matter of public Jewish concern."); Perez, *supra* note 115, at 61 ("The disagreement about 'who is a Jew' is one of the biggest controversies in Israel."); Shava, *supra* note 14, at 140 ("The question 'Who is a Jew?' raises a thorny problem with which the Israeli public and the *Knesset* has been much preoccupied for some twenty years."). *But see* JACOBSON, *supra* note 78, at 56 ("For most Israelis, the issue of 'Who is a Jew' seems about as interesting as the question 'Who is a Sagittarius?'").

138. Englard, *supra* note 7, at 190.

139. Shava, *supra* note 14, at 140.

> socio-political entity, defined by fixed geographical bounds, has lent its treatment a rather different and generally sharper character.[140]

Crucially, the discussion is framed by the traditional Orthodox understanding of who constitutes the Jewish people. "By the emergence of rabbinic Judaism in the late Second Temple period, anyone born to a Jewish mother was automatically considered a Jew."[141] And even now, "[t]he religious definition of a Jew refers exclusively to two alternative elements: either the Jewishness of the individual's mother or his personal conversion to Judaism."[142] Recently, "[t]he fact that emphasis was placed on the origin of a person and that his beliefs were ignored has proved a source of furious arguments and sharp accusations."[143]

One focus of particular difficulty in this respect is the status of "apostates" under Jewish law, particularly "apostates" to Christianity because of the different way in which Christianity defines the Church, and the fact that belonging to community that defines itself by a common belief is not *necessarily* in conflict with simultaneously belonging to another community that defines itself by common ancestry.

The prevailing view[144] is that "[u]nder *halacha* . . . , an apostate is regarded as a Jew, but all rights and privileges accorded a Jew are, so to speak, suspended."[145] But "[t]he apostate's rejection . . . does not necessarily imply, however, that . . . he is considered a Gentile."[146] In the view of Orthodox Judaism a converted Jew, hated and despised as he may be, is nevertheless a Jew. "Judaism, like some nationalities, is a club which one can join but from which no one can escape."[147]

However, "[t]he premise that a person born to a Jewish mother who

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140. Lichtenstein, *supra* note 135, at 260.

141. Ruth Langer, *Jewish Understandings of the Religious Other*, 64 THEOLOGICAL STUD. 255, 258 (2003). *See also* Benjamin Akzin, *Who Is a Jew? A Hard Case*, 5 ISRAEL L. REV. 259, 261 (1970) ("Sharing with Roman law the realistic view that *mater semper certa est*, Jewish religious law views descent from a Jewish mother as decisive in this connection.").

142. Englard, *supra* note 7, at 194.

143. Rubenstein, *supra* note 130, at 18. For a recent example, *see* Petty, *supra* note 6, at 120-35 (discussing the *JFS* case in the U.K. Supreme Court).

144. In addition to the majority of the Orthodox movement, both the Reform and Conservative movements in the United States have formally adopted this position as well. *See Drifting Apostate*, CONTEMPORARY AMERICAN REFORM RESPONSA (July 1986), http:/ccarnet.org/responsa/carr-105-107/ (last visited May 1, 2014); *Apostate in the Synagogue*, TESHUVOT FOR THE NINETIES: REFORM JUDAISM'S ANSWERS TO TODAY'S DILEMMAS, http:/ccarnet.org/responsa/tfn-no-5753-13-81-85/ (last visited May 1, 2014); Gerald L. Zelizer, *The Return of Second Generation Apostates* (June 14, 1995), http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/zelizer_apostates.pdf (last visited May 1, 2014) ; Kassel Abelson & Reuven Hammer, *The Status of Messianic Jews* (Oct. 23, 2012), http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/abelson-hammer-messianic-jews.pdf (last visited May 1, 2014).

145. Slovenko, *supra* note 118, at 15. *See also* Lichtenstein, *supra* note 135, at 263 ("Halachically, a *meshumad* is barred from fulfilling certain tasks.").

146. Lichtenstein, *supra* note 135, at 263.

147. Rubenstein, *supra* note 131, at 86.

converts to Christianity remains halackhically a Jew (even if an apostate) is not universally shared."[148] "A baptized Jew is known in Hebrew, especially in medieval parlance, as '*meshummad*' meaning an 'extinct' one. His close relatives had to undergo for him the mourning rites for the deceased . . . . [F]or the nation, he was 'dead and buried.'"[149] "The *meshummad* was regarded as worse than a thief; he was regarded as the lowest kind of creature."[150]

Aharon Lichtenstein, an Orthodox rabbi, has noted the complexity of this status. "'Who is a Jew?' . . . admits of no single answer. A *meshummad*—of what type? A Jew—for what purpose?"[151] Lichtenstein maintains that there is a "Halachic principle that an apostate *can* become a Gentile and that Jewishness is not an absolutely irrevocable status."[152] And, as will become apparent in the pages to follow, Justice Landau is similarly convinced.[153]

But apart from the *halakhic* view of things, "a significant proportion of Israeli society . . . defines its Jewishness in secular rather than *halakhic* terms . . . [and] it is natural that secular Israelis should seek a legal definition which is inclusive of their non-*halakhic* ideology."[154] Although there are "relatively few cases where a gap between the two concepts created a practical problem,"[155] several of the "most famous cases in Israeli judicial history center on the question of who is a Jew."[156]

A. Cases and Legislation

Three seminal cases have tested the bounds of who is considered a Jew under Israeli civil law. The first, that of Oswald Rufeisen (later, Brother Daniel) concerns the right of a man, born and raised in the Jewish community in what became Poland, who performed heroic deeds during World War II, and who was persecuted as a Jew, but who later also became a Catholic monk and priest, to return to Israel under the Law of

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148. Shava, *supra* note 14, at 142 n.20 (citing S. Meron, *Apostate: Jew or Person of Dual Religion*, 23 HAPRAKLIT 164 (1967), and A.H. SHAKI, WHO IS A JEW IN THE LAWS OF THE STATE OF ISRAEL 154-169 (1976) [Heb.]); *see generally* Lichtenstein, *supra* note 135 (suggesting Jewish status may be lost through total alienation from the Jewish community).

149. Slovenko, *supra* note 118, at 15.

150. *Id.*

151. Lichtenstein, *supra* note 135, at 262.

152. *Id.* at 266. As he explained: "[t]here is an apostasy not of action but of person, an estrangement manifested not merely by the commission of various sins but by the complete severance of personal bonds with Jewry; by total alienation from the Jewish people and its history as a spiritual and physical community; and finally, by thorough assimilation into the mainstream of Gentile society. Such persons are not simply disqualified because of some apostate act. Nor are they merely treated as if they *were* foreign. They are—'They have betrayed God, for they have begotten strange children.' . . . There is, then, a point beyond which the apostate cannot go and yet remain a Jew." *Id.*

153. Jackson, *supra* note 113, at 123.

154. Sinclair, *supra* note 12, at 1.

155. Englard, *supra* note 7, at 194.

156. JACOBSON, *supra* note 78, at 63.

Return. "The decision of the Court—together with Brother Daniel's paradoxical identification of himself as a Jew— . . . brought into sharp focus certain questions of Jewish identity that continue to be vexing both in Israel and throughout the Diaspora."[157]

The second addresses the right of an officer in the Israeli Navy, who married a non-Jewish woman, to have his children registered as Jews on their identity cards. The third, following a legislative amendment, addresses whether Jews who have adopted a belief in Jesus as the Messiah, but who have not been baptized or otherwise formally affiliated themselves with Christianity remain Jews for purposes of the Law of Return. A close examination of these cases offers a view into how the Supreme Court of Israel understands who is a Jew, and thus what constitutes "Judaism," and more broadly "religion," under law.

1. Rufeisen (Brother Daniel)

"The story of Oswald Rufeisen is an extraordinary one in itself."[158] Some of Rufeisen's background is brought out in the Supreme Court's opinions. But for a full account, I rely heavily here on Nechama Tec's biography of Rufeisen because his persecution during the Holocaust bears on one central reason why the State of Israel was created: to provide a refuge for Jews. A thorough account of Rufeisen's experience is therefore relevant to the ultimate outcome of his court case. In any event, it is indeed extraordinary. As one reviewer put it, "[w]ere [Tec's] book not so heavily documented, one would be inclined to dismiss it as the musings of an incredibly creative mind. Were it a novel, one might be inclined to suggest that [she] has strayed into the realm of the improbable."[159]

a. Becoming Brother Daniel

Oswald Rufeisen, a short man with unimposing features and a humble demeanor who "liked to do favors for people,"[160] was born in Zadziele, a village in the south of what is now Poland.[161] Rufeisen's father had fought for the Germans in World War I. That, along with the high status that the German language carried in Poland at the time meant that German was Rufeisen's primary language at home. Unusually for Jews of limited means, Rufeisen finished school in 1939 and was awarded his *matura*.[162] His education and his fluency in German would both prove invaluable.

In September 1939, the Germans invaded Poland. Rufeisen, his brother,

157. Marc Galanter, *A Dissent on Brother Daniel*, COMMENTARY 10, 10 (July 1963).

158. Jackson, *supra* note 113 at 115.

159. Deborah E. Lipstadt, *Book Review*, 97 AM. HIST. REV. 160, 160 (1992).

160. NECHAMA TEC, IN THE LION'S DEN: THE LIFE OF OSWALD RUFEISEN vii-viii (1990).

161. *Id.* at 3.

162. *Id.* at 14.

and their parents fled north before the parents (his mother already ill) gave Rufeisen and his brother their money and instructed them to continue on without them. The brothers would never see their parents again.[163]

Rufeisen first went to Lviv, in what is now Ukraine, where about one hundred members of his Zionist youth group, Akiva, had found refuge. From there, Rufeisen made his way to Vilna (now Vilnius, Lithuania) where he remained for a time.[164] On June 22, 1941, the Germans bombed Vilna. After initially taking shelter in a basement, Rufeisen, without saying a word to anyone, went out into the streets to join a makeshift search-and-rescue team while the bombs continued to fall.[165]

Eventually Vilna fell to the Nazis, and Rufeisen was detained. Many of his companions at this time were murdered,[166] but Rufeisen was spared because he had learned the shoemaking trade as a youth and the Nazis had confiscated a large quantity of leather that required skilled labor he could provide. Additionally, because Rufeisen spoke German, he was appointed the representative for this group of forced laborers, and because of his education (which was far in excess of most shoemakers) he was also appointed the shop foreman, taking orders and doing the bookkeeping.[167]

When feeding Rufeisen and the other prisoners became too costly, the Nazis left them to fend for themselves, but permitted them to live unconfined. One day, a man Rufeisen passed in the street asked if Rufeisen would like to come work on his farm, where he would be safe. Rufeisen hesitated initially, but after seeing a crowd being led off to their deaths, he resolved to live the rest of the war as a gentile. He knew he could pass as a Pole, spoke good German, and had a school identification card that did not identify him as a Jew. He invented a story that he was half-Polish and half-German, and that his parents were dead.[168]

Just before the supply of leather ran out, and his fellow leather-workers were all murdered, Rufeisen walked the six miles to the man's farm. He remained there for several months, but when it became too dangerous to remain near Vilna, he went East to the home of the farmer's brother, in Belorussia.[169] The Germans in that area were short of translators, and it was suggested that he go work for them.[170]

The head of the regional police dragooned him into the police force to serve as a personal assistant and translator, and he shortly thereafter was

163. *Id.* at 15.
164. *Id.* at 16-17.
165. *Id.* at 26-27.
166. *Id.* at 35-37.
167. *Id.* at 38.
168. *Id.* at 45-47.
169. *Id.* at 47-61.
170. *Id.* at 61-62.

made the secretary of the regional police.[171] Once established, Rufeisen sought and was granted an official identification card. He could have claimed to be of German ethnicity (*volksdeutsche*) based on his fictitious German father, and this would have carried certain advantages; Rufeisen concluded that it might also raise additional questions and suspicions. Instead, he claimed Polish ethnicity, which (since German ethnicity was an option open to him) resulted in locals viewing him as a patriot and a principled man who valued his Polish heritage above material gain.[172]

While working for the regional police in Mir, Rufeisen had special access to information because of his language skills and education, and his position as secretary.[173] When he recognized a Jew he knew from Vilna, he began to construct a network to provide information to the Jews in the area. When Rufeisen learned that the Mir ghetto was to be completely liquidated on a particular date, he organized an "anti-partisan raid" that took the would-be persecutors in the wrong direction, to fight Russian partisans that did not exist, leaving time for those in the ghetto to escape. Although Rufeisen had also armed the Jews in the ghetto, fewer than 300 escaped successfully.[174]

After the raid, Rufeisen was denounced to his superiors.[175] He admitted that he was a Jew and started running. He found shelter in a convent, where he read the New Testament and various Carmelite publications.[176] Less than three weeks later, Rufeisen asked the mother superior to baptize him.[177] He felt that it was not a rejection of his Jewish heritage; he wanted a stronger connection to the New Testament, which he read as a Jewish document. In particular, the account of the death and resurrection of Jesus helped him to cope with the horrors of the Holocaust.[178] He had less interest in the Church as an institution and the writings of Catholic theologians.[179]

When he felt he might be placing the nuns at risk, Rufeisen left the convent and joined partisan militants.[180] Initially believing Rufeisen to be a German spy, the partisans condemned him to death, but he was saved by one of the Jews of Mir who had been able to escape the ghetto on account of Rufeisen's assistance.[181] After the Russians forced a German retreat and reclaimed the area, they indicated that they had no interest in detaining

171. *Id.* at 66, 85.
172. *Id.* at 87-88.
173. *Id.* at 89-91.
174. *Id.* at 132-148.
175. *Id.* at 151-56.
176. *Id.* at 166.
177. *Id.* at 169.
178. *Id.*
179. *Id.*
180. *Id.* at 191.
181. *See infra*, note 196, at 25-26 (opinion of Berinson, J.).

Rufeisen despite his former employment with the Germans. Rufeisen then made his way to Czerna where he applied to join a Carmelite monastery.[182] He chose the Carmelites deliberately because he knew from his time with the nuns they had a chapter in Israel.[183] After a period of preparation, Rufeisen took his final vows as a monk in 1949 at age 27.[184] He was later asked to prepare for the priesthood, and became a priest as well.[185]

After many unsuccessful attempts, the Carmelites gave him permission to relocate to Israel. But when he met with the Israeli ambassador, he was told that he could not emigrate to Israel as a Jew because he was a Christian monk, and that the determination of Jewish status under Israeli law was a contentious point in Israel at the time.[186] Instead, Rufeisen was granted a one-year visa based on his brother's residency there.[187] He entered the Carmelite monastery on Mt. Carmel in Haifa, to serve as a counselor to members of mixed marriages.[188]

In Israel, Rufeisen was received warmly by those he knew during the war, even if they were unhappy or disappointed by his conversion to Christianity. He was invited to family gatherings by his brother and treated as a close friend by many of his former Akiva companions. But, while loved dearly, he was also an outsider.[189] Not recognized as a Jew by the Israeli authorities before leaving Poland, he applied for an *oleh*'s certificate after arriving, and was refused.

b. Before the Supreme Court

After receiving permission from the relevant authorities in Rome, Rufeisen sought injunctive relief against the Minister of the Interior before the Supreme Court, sitting as the High Court of Justice. He claimed that because, despite his conversion, he remained a Jew as a matter of *halakha*, he was entitled to residency and citizenship under the Law of Return. "Under halachic law he was without question a Jew, born of a Jewish mother. The tradition was 'once a Jew, always a Jew': you could be a wicked Jew, a deserting Jew, a treacherous Jew, but a Jew you remained."[190]

In *Rufeisen*, the Court had to decide "whether the term 'Jew' in the Law

182. TEC, *supra* note 160, at 207.

183. *See infra*, note 196, at 26 (opinion of Berinson, J.) (quoting Rufeisen's passport application).

184. TEC, *supra* note 160, at 213.

185. *Id.*

186. *Id.* at 220.

187. *Id.* at 221.

188. Slovenko, *supra* note 118, at 3. Some Orthodox communities concluded that Rufeisen had come to Israel to convert Jews to Christianity. TEC, *supra* note 160, at 225.

189. TEC, *supra* note 160, at 224.

190. S. CLEMENT LESLIE, THE RIFT IN ISRAEL: RELIGIOUS AUTHORITY AND SECULAR DEMOCRACY 38 (1971).

of Return carried a religious-*halakhic*, or secular meaning."[191] One observer suggested that "[f]rom the opening argument until the last word of the judgment, the courtroom was less the scene of legal debate than a pageant of 2,000 years of Jewish history, philosophy, and religious thought; for the judges were being called upon to define—although in the admittedly specific context of the Law of Return—what the broad concept of Jewishness meant."[192] "Appearing before the Supreme Court in brown habit and sandals," Rufeisen spoke of "the sufferings and ordeals he endured as a Jew and the pride he felt in being Jewish and in the State of Israel."[193]

But suffering and pride were not enough to carry the day. "[T]he Supreme Court ruled that an individual who was born a Jew but converted to Catholicism and became a monk was not entitled to benefit from the Law of Return and could not be registered in the population register as being of Jewish nationality."[194] On Rufeisen's identity card, under the heading of "nationality," it says not "Jewish," but "Not clear."[195]

The Court, composed of five justices, produced four separate opinions.[196] All members of the Court agreed that the Law of Return was a secular law; there was no disagreement that the *halakhic* definition did not govern the interpretation.[197] The Court held that because "the Law of Return is secular legislation, . . . [it] must be interpreted according to secular principles."[198] Focusing on the need for a secular definition of "Jew" for a secular piece of legislation "enable[d] [the Court] expressly to affirm the nontheocratic nature of the state."[199] And "since the Law of Return contained no definition of 'Jew,' ordinary usage, 'the language of men,'" the Court determined, "must be the governing factor."[200]

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191. Shava, *supra* note 14, at 142.

192. Slovenko, *supra* note 118, at 5 (internal quotation omitted).

193. KRAINES, *supra* note 130, at 24.

194. Klein, *supra* note 115, at 59.

195. TEC, *supra* note 160, at 231. *See also* Rubenstein, *supra* note 131, at 88 n.6 (noting that Rufeisen was allowed to settle in Israel and acquire Israeli citizenship, but not under the Law of Return as a Jew); Klein, *supra* note 115, at 59 ("Rufeisen did actually apply for and was granted Israeli nationality through the naturalization process.").

196. HCJ 72/62 Rufeisen v. Minister of the Interior, 16 PD 2428 [1962] (Isr.), *translated in* SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL, SPECIAL VOLUME 1-34 (Asher Felix Landau ed., 1971) [hereinafter *Rufeisen*]. Justice Manny concurred in the opinions of Justices Silberg and Landau. *Id.* at 24.

197. Sinclair, *supra* note 12, at 5; Shava, *supra* note 14, at 142-43 (noting that "the majority opinion espoused an *objective secular* test—'in common parlance' and 'as used as the present time by the people' [while] H. Cohn J. favored the adoption of a *subjective secular* test") (citations omitted).

198. Slovenko, *supra* note 118, at 15.

199. JACOBSON, *supra* note 78, at 64.

200. LESLIE, *supra* note 190, at 39. *See also* JACOBSON, *supra* note 78, at 65 (noting that for the majority, "the secular meaning of the term 'Jew' in the Law of Return is to be derived from the common understanding of the 'ordinary simple Jew.'"); L.C. Green, *Book Review*, 71 AM. J. INT'L L. 175, 191 (1977) (Under the Law of Return, "'Jew' has the secular national meaning attributed to it in common parlance.").

The Justices split, however, on how to determine the ordinary, secular meaning of the word "Jew." The majority favored a combination of what they viewed as common understandings used in everyday language coupled with some notion of traditional bounds of collective identity.[201] Applying this test, the Court concluded that the secular view "treated conversion as decisive and excluded the convert from the Jewish community."[202] Justice Cohn, dissenting, favored a wholly subjective approach based on the individual's preference.[203]

Justice Silberg began, after noting Rufeisen's deeds during the Holocaust, to review the religious law on the matter, and concluded that the Jewishness of a convert is "indivisible and absolute."[204] But whereas the term "Jew" means a Jew according to Jewish law under the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, Silberg saw the same word as bearing a "secular meaning, as it is usually understood in common parlance—and this I emphasize—by the ordinary simple Jew."[205] He explained that the purpose of defining the jurisdiction of the rabbinical courts is to make Jewish law applicable to Jews, and defining Jews any other way than by *halakha* would defeat the purpose of the law.[206] On the other hand, "[f]or all its immense historical importance, [the Law of Return] is a secular law, and in the absence of definition either in the statute itself or in the decided cases, we must interpret its terms according to their ordinary meaning."[207] The question then, is whether the "ordinary Jewish meaning of the term 'Jew' . . . include[s] a Jew who has become a Christian?"[208]

Silberg held the answer was a clear "no."[209] "Justice Silberg, writing for the majority, concluded that the communal understanding of the term does not include a Jew who has become a Christian."[210] He suggested that "Jew" and "Christian" are incompatible statuses.[211] "The deeply rooted belief that Jew and Christian are contradictory terms is shared alike by simple people and scholars."[212] On this view, Rufeisen "has deserted, not merely lapsed."[213] Framing the issue of *return* in the context of Zionism, Silberg explains that it is the Jewish people's "historic culture as Jews

201. Sinclair, *supra* note 12, at 5; Shava, *supra* note 14, at 142-43.
202. Rubenstein, *supra* note 131, at 88.
203. Sinclair, *supra* note 12, at 5; Shava, *supra* note 14, at 142-43.
204. *Rufeisen*, *supra* note 196, at 2-10 (opinion of Silberg, J.).
205. *Id.* at 10.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 11.
210. JACOBSON, *supra* note 78, at 66.
211. Jackson, *supra* note 113, at 120.
212. *Rufeisen*, *supra* note 196, at 12 (opinion of Silberg, J.).
213. Jackson, *supra* note 113, at 122.

which entitles them to the land."[214] Silberg wrote:

> Whether he is religious, non-religious or anti-religious, the Jew living in Israel is bound, willingly or unwillingly, by an umbilical cord to historical Judaism from which he draws his language and its idiom, whose festivals are his own to celebrate, and whose great thinkers and spiritual heroes—not the least of whom are the martyrs of 1096 and those who perished at the stake in Spain—nourish his national pride.[215]

Because the adoption of Christianity is inconsistent with the maintenance of Jewish cultural ties, Silberg concluded that Rufeisen had forfeited his right to return to Israel as a member of the Jewish people.[216]

Justice Landau joined in Silberg's opinion and added some commentary of his own.[217] "[T]he main thrust of the judgment of Landau J. is to stress the importance for this case of the manner of construction of Jewish identity by the founders of Zionism."[218] He suggested that the position of *halakha* toward the convert was not one of forbearance, but of contempt, and thus Rufeisen should not have invoked it in aid of his cause.[219] In any event, he agreed that the question was not to be decided by religious law because the Law of Return "is a secular Law of the State of Israel."[220]

Looking to the Zionist roots of the state, Landau noted that Herzl had refused admission to the Zionist Organization of a Jew who had converted to Christianity,[221] and that Ahad Haam[222] rejected the notion that even an entirely secular Israeli could deny the influence and importance of historical Jewish practice on its current constitution—to deny that past would be to deny what made Jewish nationalism Jewish.[223] Thus, Landau concluded that "[a] Jew who, by changing his religion, cuts himself off from the national past of his people ceases thereby to be a Jew in the national sense to which the Law of Return gives expression."[224] "The stress placed by Landau J. upon identification with the religious sentiment of the past is not based upon any assertion of the religious value of the past, but rather upon its sociological function in constituting group

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214. *Id.* It has been suggested that the case was regarded as a cause célèbre, in part, because it "pose[d] questions, not only about Jewish identity, but also about Zionism, and about the relations between them." *Id.* at 120.

215. *Rufeisen*, *supra* note 196, at 11 (opinion of Silberg, J.).

216. *See* Jackson, *supra* note 113, at 122.

217. *Rufeisen*, *supra* note 196, at 18-19 (opinion of Landau, J.).

218. Jackson, *supra* note 113, at 120.

219. *Rufeisen*, *supra* note 196, at 19 (opinion of Landau, J.).

220. *Id.*

221. *Id.* at 20.

222. For more on the intellectual contribution of Ahad Haam to Zionism, *see* BATNITZKY, *supra* note 22, at 155-60.

223. *Rufeisen*, *supra* note 196, at 20-21 (opinion of Landau, J.).

224. *Id.* at 22.

identity."[225] In becoming a Christian, Landau, J., concluded that Rufeisen "excluded himself from the common fate of the Jewish people and has linked his destiny to other forces whose precepts he honours both in thought and in observance."[226]

Justice Berinson likewise "explained the popular view as based upon the (mutual) denial of community which occurs when a Jew converts to another religion."[227] And, like Silberg, Berinson took the relevant understanding of "Jew" to be that of the man on the street.[228]

Berinson began by observing, almost wryly, that the "usual case" of conversion—"for reasons to which we have become accustomed"—assimilation, mixed marriages, improvement of social or material status, public career, etc., do not apply; "material comforts and worldly pleasures" hold no attraction for the monk.[229] After summarizing the particulars of Rufeisen's conduct during the War and his attempts to immigrate to Israel,[230] Berinson noted that he was not free to simply grant the request, which he would if he were so empowered.[231] He noted that the parties agreed that the Law of Return must be given a "secular-national, and not a religious connotation," but diverged on what that connotation was.[232] He further conceded that had Rufeisen been captured by the Nazis after his conversion, the conversion would have made no difference "and he would have fallen victim to them as a *Jew*."[233] Interestingly, Berinson suggests that "had he declared that he believed in Buddhism which does not require a change of religion and lived as a Buddhist monk, he would apparently have been recognized as a Jew. Thus as a Buddhist monk yes, but as a Christian monk no!"[234] Berinson also maintains that Ahad Haam would not have viewed a Jew who converted to another religion, but who in all other respects was deeply Zionist, as outside the bounds of the Jewish people.[235]

But despite this, Berinson concluded that "[t]he people themselves . . . have decided otherwise. . . . For them a Jew who has embraced another religion has withdrawn himself not only from the Jewish faith but also from the Jewish nation and has no place in the Jewish community."[236] The common understanding of the Jewish people is that "a Jew and a Christian

225. Jackson, *supra* note 113, at 126.
226. *Rufeisen*, *supra* note 196, at 23 (opinion of Landau, J.).
227. Jackson, *supra* note 113, at 128.
228. *Id.* at 126.
229. *Rufeisen*, *supra* note 196, at 24 (opinion of Berinson, J.).
230. *Id.* at 24-26.
231. *Id.* at 27-28.
232. *Id.* at 28.
233. *Id.* at 29.
234. *Id.* at 31.
235. *Id.* at 31-32.
236. *Id.* at 32.

cannot reside in one person"[237] because of "the (mutual) denial of community which occurs when a Jew converts to another religion."[238] It was this "popular meaning" that Berinson believed the Knesset intended when it enacted the Law of Return.[239] Justice Berinson noted that even as early as 1947, the position of the Jewish Agency, in testimony given before the United Nations Special Committee for Palestine, was that formal conversion to another religion would exclude one from the Jewish people for political purposes.[240]

Justice Cohn dissented.[241] He agreed that according to Jewish religious law a converted Jew remains a Jew, agreed that the Law of Return (and related registration laws) should not be construed according to Jewish religious law, and agreed that the Law of Return should not be construed to negate the principles on which the State of Israel was founded.[242] But he differed on whether permitting Rufeisen to become an Israeli citizen under the Law of Return would do so. Instead, he would permit anyone who declared in good faith that he was a Jew the privileges granted by the Law of Return, regardless of whether the applicant had no other religion.[243] Just as Jewish religious law cannot claim to be the proper lens through which to view the Law of Return's ambiguous terms, Cohn held that it would be equally improper to consider the religious law of any other religion, as his colleagues had done in examining the effect of Rufeisen's participation in Catholic sacraments, in determining who is a Jew for purposes of secular legislation.[244]

Rufeisen's aim in going to court was to establish a precedent.[245] He was offered immediate citizenship by the Minister of the Interior if he would drop the case, but refused.[246] Later, Rufeisen regretted having taken the case to court. He suggested, "had my position been accepted this would have created a revolution in conventional concepts."[247]

The *Rufeisen* decision, although its result was broadly applauded in Israel, was not without its critics and detractors. For example, by tying the legal definition of "Jew" to common understanding, some complained that the "majority's definition was both vague and impermanent."[248] It also turned on the supposition that "a single 'common' meaning [of 'Jew']

237. *Id.*
238. Jackson, *supra* note 113, at 128.
239. *Rufeisen*, *supra* note 196, at 32 (opinion of Berinson, J.).
240. *Id.*
241. *Id.* at 13-18 (Cohn, J., dissenting).
242. *Id.* at 13-14.
243. *Id.* at 16.
244. *Id.* at 16.
245. TEC, *supra* note 160, at 227.
246. *Id.*
247. *Id.* at 231
248. LESLIE, *supra* note 190, at 39.

exists and can be found."[249] And even assuming such a definition can be discerned, a further question remains with respect to who is permitted to offer an answer in order to determine the common understanding. "Israelis? If so, only Jewish Israelis, or, since this is a secular law, all Israelis? The Diaspora as well? Contemporary Jews or those throughout history?"[250]

Moreover, apart from problems of determining who is a Jew according to a common understanding, the majority's reasoning with respect to collective identity "rests on the theory that Jewishness and Christianity are incompatible."[251] And this theory rests in turn on the premise that while irreligion does not vitiate one's connection to the Jewish people, conversion to Christianity does.[252] This conception of Jewishness "tends to visualize all of Jewish history in relation to Christianity."[253] Finally, the decision "in no way answers the question of who is a Jew under the Law of Return; it only asserts that an apostate such as Brother Daniel is *not* a Jew."[254]

2. Shalit

The next case was not long in coming. The use of *halakhic* standards to determine who is a Jew for purposes of registration was a longstanding controversy. Initially there may have been a tacit understanding that *halakhic* standards governed, but as early assumptions that determination of Jewish status would be a simple matter turned out to be incorrect, any understanding that previously existed began to break down before the state was a decade old.

"On March 10, 1958, Minister of the Interior Bar-Yehuda from the Labour Party, issued new guidelines on registration, whereby 'a person who declares himself to be Jewish, in good faith, should be registered as Jewish.' . . . As a reaction to those guidelines all the religious parties left the Coalition."[255] The prime minister established a committee to study the situation, and the committee consulted eminent scholars and public

249. Galanter, *supra* note 157, at 11.
250. *Id.*
251. *Id.* at 15.
252. *Id.*
253. *Id.*
254. JACOBSON, *supra* note 78, at 66.
255. Rubenstein, *supra* note 130, at 20; Lawrence S. Nesis, *Who is a Jew?*, 4 MANITOBA L.J. 53, 61 (1970). Bar-Yehuda's guidelines formalized the existing practice of accepting a declaration that one was a Jew as sufficient for registration. For example, in 1953, Abraham Samuelov, a Catholic Monk, was registered as Jewish on the basis of his own representation that he was a Jew of the Catholic faith. Z. Warhaftig, *Who is a Jew?*, *in* JEWISH LAW ASSOCIATION STUDIES XI: LAW, JUDICIAL POLICY, AND JEWISH IDENTITY IN THE STATE OF ISRAEL 23, 25 (Daniel B. Sinclair ed., 2000). However, under directives dating to 1956, children of mixed marriages were to be registered under their mother's religion. Nesis, *supra*, at 62.

figures.[256] A significant majority of those consulted favored the *halakhic* definition.[257] "Forty-five replies were received, and of them, thirty-seven scholars argued in favor of the *halakhic* test.... Only three replies supported the view that the meaning of 'Jew' in a secular and in a religious context were different."[258] The prime minister then assigned a member of a religious party to be Minister of the Interior and henceforth *halakhic* criteria were applied to registration as a matter of policy.[259]

Benjamin (or Binyamin) Shalit was born in Haifa in 1935.[260] While studying in Edinburgh, he met and married his wife Anne (or possibly Ann), who was not Jewish and who did not convert to Judaism.[261] Both husband and wife were non-believers, and their marriage was a civil one.[262] The couple returned to Israel in 1960, Anne became a naturalized citizen, and together they had a son in 1964 and a daughter in 1967.[263] In the meantime, Shalit, a psychologist, had become an officer in the Israeli Navy.[264]

The Shalits registered their children in accordance with the Registration of Inhabitants Ordinance 1949 (the forerunner to the Population Registry Law 1965).[265] "Registration, as such, does not confer any benefit upon the persons registered, nor does it alter their legal status in any way. It means nothing beyond the fact of registration."[266] The details to be registered included the children's *dat* (literally "law" but connoting "religion") and *le'um*.[267] *Le'um* is "an untranslatable term which was probably derived from Central and Eastern Europe. It means something akin to 'peoplehood' and designates a common ethnic, cultural, and linguistic

256. Sinclair, *supra* note 12, at 4.

257. *Id.* at 4-5; ABRAMOV, *supra* note 13, at 292.

258. Rubenstein, *supra* note 130, at 20-21.

259. Sinclair, *supra* note 12, at 5.

260. Nesis, *supra* note 255, at 53.

261. *Id.* Anne was, however, the granddaughter of Sir Patrick Geddes, a Zionist who collaborated with Chaim Weizmann to establish the Hebrew University. *See* Rubenstein, *supra* note 131, at 84.

262. KRAINES, *supra* note 130, at 46; Nesis, *supra* note 255, at 53 (noting the Shalits considered themselves atheists).

263. Nesis, *supra* note 255, at 53; KRAINES, *supra* note 130, at 46.

264. Nesis, *supra* note 255, at 53; KRAINES, *supra* note 130, at 46. By the time of the Supreme Court's decision in 1970, he had risen to the rank of Lieutenant Commander. Rubenstein, *supra* note 131, at 84; KRAINES, *supra* note 130, at 26.

265. Nesis, *supra* note 255, at 60.

266. Rubenstein, *supra* note 131, at 84.

267. Nesis, *supra* note 255, at 53. It should be noted that "[t]he Hebrew language does not have a word for 'religion.'" Dan, *supra* note 1, at xxvi. The word *dat*, which in Modern Hebrew denotes the concept of religion, is a Persian loan-word that entered ancient Hebrew in late biblical times, and which originally referred to simply "law," *i.e.*, the law of the gentile king. *Id.* at xxvi & n.5. In Modern Hebrew, however, it denotes "divine law." *Id.* "[T]he concept, as used today, is a translation from European languages rather than an intrinsic development." *Id.* As will be explained more fully below, "[t]he use of the term 'religion' in a Jewish context is . . . an external imposition rather than an authentic expression of the intrinsic nature of Judaism." *Id.* at xxviii.

origin."[268] "Ethnic group," "nationality," and "people" have all been used as English translations.[269]

In keeping with their atheistic convictions, the Shalits declined to designate a religion for their son's registration, and listed his *le'um* as "Jewish." The registration clerk amended the religion to "Father—Jewish, Mother—non-Jewish" and amended the entry for *le'um* to read "not registered."[270] Later, a different clerk, following new guidance, reversed these designations when the Shalits' daughter was registered. For her, the clerk designated "Father—Jewish, Mother—non-Jewish" under *le'um*, and "not registered" under religion.[271]

In February 1968, Shalit applied to the Supreme Court to order the Minister of the Interior to register both children as "Jews" under *le'um* and "without religion" under *dat*.[272] After the first hearing, a special court of five justices was convened, but later, the President of the Court, Justice Agranat, took the unprecedented step of convening the entire court to hear the case.[273] "As soon as Shalit applied to the Court, the judges sensed that they were dealing with an explosive issue."[274] "Both parties were armed mainly with non-legal authorities, invoking the writings of Jewish philosophers, statesmen, and scholars. It was the least legal case ever argued."[275]

Shalit argued, first, that the registration must be made in accordance with the declaration of the declarant, and that the registration clerk was not authorized to change what was declared.[276] Second, he maintained that one's *le'um* is something different from one's religion, and that belonging to the Jewish ethnic group need not be determined *halakhically*, which

268. Rubenstein, *supra* note 131, at 84. *See also id.* at 103 n.1 (noting near-equivalency with the German concept of *Nationalität*).

269. Nesis, *supra* note 255, at 54.

270. KRAINES, *supra* note 130, at 46.

271. *Id.* This was in error, and the Minister of the Interior later specified that he was ready to correct the daughter's registration to be identical with the son's. Nesis, *supra* note 255, at 55.

272. KRAINES, *supra* note 130, at 46; Rubenstein, *supra* note 131, at 88.

273. Rubenstein, *supra* note 131, at 88; Shava, *supra* note 14, at 144. Other sources suggest that the Court at that time had a tenth member who was not on the panel. Gideon Hausner, *The Rights of the Individual in Court*, 9 ISRAEL L. REV. 477, 490 (1974); KRAINES, *supra* note 130, at 46. The Supreme Court typically hears cases in panels of three justices. Exceptionally, a panel of five justices may be convened, as happened in *Rufeisen*. Larger panels have been convened only twice: a panel of seven was seated in HCJ 51/80 Cohen v. Rabbinical High Court of Appeals 35(2) PD 8 [1980] (Isr.), and the panel of nine that heard *Shalit* has never been replicated. The reason why larger panels are convened so infrequently is the staggering workload of the court. In contrast to most courts of last resort (and especially the Supreme Court of the United States, which exercises almost exclusively discretionary jurisdiction), the Supreme Court of Israel not only hears appeals as of right from most civil and criminal matters, but also acts (in its capacity as the High Court of Justice) as a court of first instance in most public matters. Gidon Sapir, *How Should a Court Deal With a Primary Question That the Legislature Seeks to Avoid? The Israeli Controversy Over Who Is a Jew as an Illustration*, 39 VAND. J. TRANSNAT'L L. 1233, 1241 n.30, 1242 n.34 (2006).

274. Rubenstein, *supra* note 131, at 88.

275. *Id.*

276. Nesis, *supra* note 255, at 55.

could not fully apply to Israeli conditions, but could be evidenced by subjective identification with Jewish-Israeli culture and values.[277] Shalit asked whether "Kamal Nimri, the terrorist, [would] be regarded as a Jew while my children, who get a Hebrew and Israeli education and who would fight for Israel, [would] be considered as non-Jews?"[278] The Attorney General, in response, tied the Jewish religion to the Jewish nation as inseparable elements of Jewish existence, with religion taking primary importance.[279]

In November 1968, after the case had been under consideration for several months, the entire court asked the Government to intervene by deleting the requirement that *le'um* be listed in registration documents.[280] "The court's plea was brought to the cabinet and rejected in what was later described by one of the judges as 'a summary procedure.'"[281] It was reported that the rejection was based upon security grounds: *le'um* is the only way to quickly and easily distinguish between Jews, Arabs, and Druze because *dat* is not printed on identity cards.[282]

The *Shalit* majority held by a vote of five-four that *le'um*, as nationality/ethnicity, need not follow the *halakhic* view of who belonged to the Jewish people.[283] And "[s]ince the issue was only registration and not a substantive right such as citizenship, the majority was also prepared to adopt the purely subjective definition advocated by Cohn J. in *Rufeisen*."[284] The Court ordered the Minister of the Interior to register the

277. *Id. See also* KRAINES, *supra* note 130, at 46 ("What Shalit, in effect, was trying to accomplish was to have the Supreme Court declare that there is a Jewish nationality separate from the Jewish religion.").

278. Rubenstein, *supra* note 131, at 88. Nimri was the commander of the Fatah movement in East Jerusalem. *See* TOM SEGEV, 1967: ISRAEL, THE WAR, AND THE YEAR THAT TRANSFORMED THE MIDDLE EAST 499 (2005) (Jessica Cohen trans., 2007). Nimri's mother was Jewish; his father, an Arab Muslim.

279. Rubenstein, *supra* note 131, at 88; KRAINES, *supra* note 130, at 47.

280. Rubenstein, *supra* note 131, at 88-89.

281. *Id.* at 89.

282. Rubenstein, *supra* note 131, at 89; *Shalit*, *infra* note 283, at 106 (Kister, J., dissenting). This would confirm Ben-Gurion's 1958 explanation that "[i]n light of our special situation, when there is no practical possibility of a thorough and permanent control of the country's borders to prevent the entry of infiltrators from the hostile neighboring countries, who are a source of grave and constant danger to the peace of the country and its population, it is essential that a legal resident in Israel should be able to identify himself at all times by means of a document supplied by an official authority." Nesis, *supra* note 255, at 61 (internal quotation omitted). Under the Registry of Inhabitants Ordinance 1949, during times of emergency, every male resident was required to carry his identity card. *Id.* at 60.

283. *See* HCJ 58/68 Shalit v. Minister of the Interior, 23(2) PD 477 [1969] (Isr.), *translated in* SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL, SPECIAL VOLUME 35-191 (Asher Felix Landau ed., 1971) [hereinafter "*Shalit*"]. The nine justices produced eight opinions: Justices Sussman, Berinson, Witkon, and Manny agreed (with Manny simply joining in the opinions of Sussman and Cohn) that the primary question concerned the authority of the registration officer; Cohn concurred, but would accord less authority to the registration officer than the other justices in the majority; President of the Supreme Court Agranat, Deputy President Silberg, and Justices Landau and Kister dissented, addressing the question of nationality more directly. *See also* Green, *supra* note 200, at 191.

284. Sinclair, *supra* note 12, at 7; *see also* Rubenstein, *supra* note 131, at 84 ("As legal battles go, the Shalit case was ostensibly marginal.").

Shalit children as Jews under *le'um*.[285] Justice Sussman, delivering the opinion of the Court, explained that "[t]he determination of the affiliation of an individual to a given religion or a given nation derives principally from the subjective feeling of the person concerned."[286]

"Sussman (and even more explicitly, Justice Berinson) underscored the secular orientation of the earlier Court. It is implicit in their opinions that the divisive nature of the issue raised by Shalit effectively removed the last barrier to the adoption of a secular and subjective interpretation."[287] Sussman explained that the registration officer refused to register the Shalit children as Jewish by nationality because the category "embraces . . . the norms of Jewish nationality and of the Jewish religion together, and accordingly no person is to be regarded as being of Jewish nationality if the Jewish religion does not regard him as a Jew at all."[288] And, in turn, the respondents claimed that the Jewish religion embraced only a person whose mother is Jewish or who has been converted according to religious law, and who is not also a member of another religion.[289]

Sussman disclaimed any suggestion that the Court was determining who was a Jew; rather, he proposed that the only matter before the Court was whether the registration officer was required to register the children in accordance with the instructions of the parents, or whether "they can be justified in their refusal."[290] Sussman held that the registration officer had not been statutorily authorized to "decide any question," and as a citizen who provides information to the officer in accordance with law is presumed to be stating the truth (unless the statement is clearly false on its face, as an adult wishing to register as a five-year old child).[291] Sussman explained that while the registration officer was acting in accordance with earlier directives of the Minister of the Interior, they are administrative only, and to the extent they are inconsistent with or extend beyond powers granted by statute, they are invalid.[292]

After noting that the purpose of registration is largely statistical, and that some matters of registration are largely subjective, and therefore the legislative purpose was not effectuated by refusing to register bona fide

285. Rubenstein, *supra* note 131, at 89.

286. KRAINES, *supra* note 130, at 48.

287. JACOBSON, *supra* note 78, at 72.

288. *Shalit*, *supra* note 283, at 64.

289. *Id.* It is interesting to note that the respondents asserted the primacy of the *halakhic* definition, while at the same time narrowing that definition to exclude members of other religions using, essentially, the secular definition the Court created in *Rufeisen*. *See id.* at 72 ("[B]y not registering as a Jew anyone born a Jew who is a member of another religion . . . they deny the very religious principle according to which they purport to act.").

290. *Id.* at 64-65 (opinion of Sussman, J.).

291. *Id.* at 66.

292. *Id.* at 66-67.

claims, Sussman turned to application of *Rufeisen*.[293] Sussman recalled that *Rufeisen* established that the term "Jew," as a legal term of art, has no settled meaning; Rufeisen was Jewish under the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953, which was based on *halakha*, but not under the Law of Return of 1950.[294] Sussman concludes that given the largely statistical purposes of the Population Registry Law, the malleable and subjective nature of "nationality," and the limited scope of the registration officer's discretion, the officer was required to register the Shalit children in accordance with the application.[295]

Justice Berinson concurred in Sussman's opinion,[296] but proceeded to explain why his judgment in favor of Shalit was consistent with his views expressed in *Rufeisen*.[297] Berinson explained that in *Rufeisen*, he concluded that the definition of "Jew" for purposes of the Law of Return was not the *halakhic* definition, but instead rested on popular understanding.[298] Applying the same principle here, Berinson concluded that "[t]he term 'nation' is to be interpreted according to the popular notion of our place and times."[299] Berinson found it inconceivable that the children of an officer of the Israeli Defense Forces, raised in Israel, and whose mother, while not Jewish, comes from Zionist stock and has "bound her fate with that of the people of the State of Israel," would not be recognized as of Jewish nationality while the "head of the terrorists in East Jerusalem, born of a Jewish woman and a Moslem, who has striven to destroy and annihilate the State of Israel" would be "considered a son of the covenant."[300]

The bulk of Justice Witkon's opinion was spent refuting Justice Landau's contention that the non-Jewishness of Shalit's children was evident on the face of the application, and explaining that the subjective notion of Jewish nationality divorced from *halakhic* standards was a "legitimate and serious" one.[301]

Justice Cohn, like the other judges in the majority, concluded that the Jewishness of the Shalit children did not present itself for consideration, and that the question was limited to the authority of the registration officer applying the Minister of the Interior's directives.[302] "[I]t is immaterial whether by virtue of instructions or directives he received from the Minister of the Interior, or out of his abundant knowledge of the law or his

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293. *Id.* at 67-71.
294. *Id.* at 71-72.
295. *Id.* at 72-77.
296. *Id.* at 185 (opinion of Berinson, J.).
297. *Id.* at 186.
298. *Id.*
299. *Id.* at 188.
300. *Id.* at 187-88.
301. *Id.* at 98-102 (opinion of Witkon, J.).
302. *Id.* at 40-41 (opinion of Cohn, J.).

erudition in the Talmud and the *Poskim*, the registration officer knows (or thinks he knows) with certainty what is or is not the 'nationality' of the person concerned."[303] Cohn, in accordance with views on subjective identity he expressed in *Rufeisen*, held that "the notification of the Jewish 'nationality' of the petitioners' children was given bona fide since the petitioners believe with perfect faith that their children's nationality *is* Jewish, and the contrary directives of the Minister of the Interior certainly cannot bind them."[304]

Justice Manny simply concurred with both Sussman and Cohn.[305]

President of the Supreme Court Agranat, dissenting, concurred in large part with Justice Landau.[306] The President rejected the subjective approach to nationality championed by Cohn, suggesting that this was perhaps even required by *Rufeisen* (although he did not address what roles Rufeisen's conversion *away* from Judaism and the fact that it was *to* another religion, and Christianity specifically, nor the difference between the terms "nationality" in the Population Registry Law and "Jew" in the Law of Return).[307] Agranat discussed at length the reasons why, in his view, it was not such a simple matter to disassociate religion from nationality, and why Jewish religious law was still a relevant criterion in determining Jewish nationality even for a secular law.[308] He suggests that the contrary view "had its source in the school of liberalism and individualism which teaches that religious faith is a matter of conscience falling in the individual's private domain."[309] After reviewing some of the arguments on both sides,[310] Agranat concluded that the issue presented depends so heavily on ideological views that judicial resolution of the case would essentially amount to rule by caprice.[311] Accordingly, Agranat would have let stand the Minister's decision, owing to its lack of amenability to judicial review.

Deputy President of the Supreme Court Silberg explained at the outset that "[t]he problem in all its magnitude and gravity is the substance of the concept 'Jew': can a person belong to the Jewish people without being at the very same time an adherent of the Jewish religion?"[312] Silberg contended that the secular definition of "Jew" elucidated in *Rufeisen* was inapplicable because in *Rufeisen*, the secular usage was what the Knesset was assumed to have intended. Here, the issue was "nationality," and so he suggested that if there was no definition of "Jew" in general usage

303. *Id.* at 44.
304. *Id.* at 47.
305. *Id.* at 148 (opinion of Manny, J.).
306. *Id.* (Agranat, President of the Supreme Court, dissenting).
307. *Id.* at 149.
308. *Id.* at 150-64.
309. *Id.* at 167.
310. *Id.* at 170-78.
311. *Id.* at 181.
312. *Id.* at 49 (Silberg, Deputy President of the Supreme Court, dissenting).

other than that of *halakha*, then the *halakhic* definition would be applied notwithstanding the similarly secular nature of the Population Registry Law.[313] Silberg then proceeded to consider what test should be applied to determine nationality. He concluded that there existed no Israeli nation, only an Israeli state and a much larger Jewish nation.[314] Suggesting that the abandonment of religious principles would spell the end of the Jewish people, he reached the conclusion that the Jewish nation determined its membership according to religious precepts.[315]

After reprising the basic facts,[316] Justice Landau noted that Shalit made two arguments: (1) that the registration must be made by the registration officer upon the notification provided, and the registration officer is not empowered to alter that notification; and (2) that even if the registration officer had the power to amend the notification, Shalit's notification to the registration officer that his children were of Jewish nationality was accurate.[317] This case, therefore, squarely presented the question whether in the State of Israel it was possible to be Jewish by nationality (in the ethnic sense as opposed to citizenship), while not being a member of the Jewish people as a religious matter.[318]

Landau thought that *Rufeisen* could not answer the matter. In *Rufeisen*, the Court had no trouble concluding that popular sentiment would exclude a Jew by descent who had converted to Christianity from registering as a Jew. But no similar consensus view of "the man on the street" existed with respect to the status of children of mixed marriages where the mother was not Jewish, yet the father was, and the children acculturated Israelis.[319] Landau, like several of the other judges, concluded that there was little the Court could do to resolve an ideological dispute that turns a "court of law into a court of judges."[320] Consonant with the views of Agranat on matters ideological, Landau concluded that "the decision must rest with the Knesset which represents the people and, so long as the Knesset has not decided otherwise, with the Government which is entrusted with matters of policy and depends upon the confidence of the Knesset."[321]

Justice Kister delivered a lengthy opinion ranging from the meaning of "nationality" in the context of political theory,[322] to the treatment of mixed marriages in Jewish law,[323] to psychological studies on maternal

313. *Id.* at 50.
314. *Id.* at 53.
315. *Id.* at 53-62.
316. *Id.* at 78-79 (Landau, J., dissenting).
317. *Id.* at 79.
318. *Id.*
319. *Id.* at 80-81.
320. *Id.* at 82-83.
321. *Id.* at 94.
322. *Id.* at 108-13 (Kister, J., dissenting).
323. *Id.* at 118.

attachment of children.[324] He canvassed the dilemma of European Jews during the emancipation and the desire on the part of the Reform movement to reduce Jewish life to religion (in order to make room for an adopted nationality and full political rights).[325] Kister concluded that the views of the scholars consulted that led to the new directives were a sufficient ground to defer to the government, and that in any event the idea that nationality (as ethnicity) could be acquired simply by "feeling" was incredulous.[326]

3. Amendment No. 2

Although *Rufeisen* and *Shalit* may appear somewhat contradictory, at least insofar as they reach different results (Shalit winning and Rufeisen losing their respective claims to Jewish status), on closer inspection, the cases reveal a consistent adherence to what the Court considers a "secular" definition of Israeli nationality.[327] In effect, the Court determined that religion and nationality were separable, and that based on prevailing norms, (1) *halakhic* non-Jews may be considered Jews for purposes of registration (as in *Shalit*), and (2) *halakhic* Jews may be considered non-Jews for purposes of the Law of Return (as in *Rufeisen*). Leaving aside for the moment the difference between registration, which carries no substantive rights, and the Law of Return, which carries immediate and automatic citizenship, the two decisions reflect, sometimes at pains, that the religious view of who is a Jew matters very little apart from questions reserved to the rabbinical courts. This did not sit well with everyone. Despite the fact that "[o]f the five majority justices, only one, Justice Berinson, stated clearly that the Shalit children were Jewish in the secular sense evolved in the *Brother Daniel* case,"[328] and "only three out of the nine judges actually delivered any opinion on the controversial question,"[329] the *Shalit* decision was venomously attacked by the Chief Rabbi, the Minister of Religious Affairs, and the Rabbinate's chief executive.[330]

As a result of the public rancor, "[t]he inevitable governmental crisis in the wake of the *Shalit* case was not long in coming, and in response to the strong protests against the decision made by the religious parties, the Law of Return was amended."[331] Indeed, "[e]ven before anyone had time to

324. *Id.* at 121.
325. *Id.* at 129-31.
326. *Id.* at 143-45.
327. Stroman, *supra* note 79, at 1547.
328. Rubenstein, *supra* note 131, at 89.
329. *Id.* at 90.
330. LESLIE, *supra* note 190, at 42; ABRAMOV, *supra* note 13, at 303.
331. Sinclair, *supra* note 12, at 8. *See also* Sapir, *supra* note 273, at 1243 (noting that the *Shalit* decision "triggered a public storm and a threat on the National Religious Party's part to bolt the

read the lengthy judgment . . . the religious parties lashed out against the majority with a ferocity unparalleled in Israel's history of respect for the judiciary."[332] "[U]nder threat by the Orthodox to bring down the government, the Knesset passed legislation directly addressing the Court's decision."[333] Out of necessity, the process was rapid. "[T]he new Law was hastily prepared by the Minister of Justice and approved by the Cabinet, presented to the Knesset, discussed, adopted and promulgated: the entire legislative process was completed within a few weeks."[334] The Shalit decision had been handed down on January 23, 1970. By March 16, 1970, the Amendment had been adopted.[335]

The Amendment rejected the Supreme Court's secular position on the severability of religion and nationality.[336] "It amended the Law of Return by defining as a Jew 'a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.'"[337] The Amendment also extended the right of return to a Jew's spouse, children, grandchildren, and the spouses of children and grandchildren, regardless of whether they were Jewish (unless they had previously been Jewish and converted to another religion).[338] Thus, the Amendment, "[t]hough basically following the religious concept . . . constitutes a typical compromise between the two ideologies by granting

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coalition, a move that would have precipitated the government's downfall."); Edelman, *supra* note 26, at 218 ("The *Shalit* decision created a political maelstrom and propelled a most reluctant Knesset to act."); Shava, *supra* note 14, at 146 ("The judgment in Shalit's case . . . created a public storm and the threat of a governmental crisis due to the dissatisfaction of the National Religious Party."); Klein, *supra* note 115, at 60 n.23 ("The amendments were spurred by the Supreme Court's *Shalit* decision"); Ginossar, *supra* note 115 at 264 ("[F]ar from settling the issue, [the *Shalit* decision] exacerbated it further, even threatening the stability of the Coalition Government."); KRAINES, *supra* note 130, at 54 ("The *Shalit* decision stirred the public for days."); Rubenstein, *supra* note 131, at 89 (noting "a loud and heated debate swept the whole country," "[t]wo religious [government] ministers spoke out against the decision," and "[t]he Rabbinate issued a proclamation stating that any enforcement of the Court's ruling would be contrary to Holy Writ and ordered the Minister of Interior not to obey the Court's decision").

332. Rubenstein, *supra* note 131, at 89; *see also* ABRAMOV, *supra* note 13, at 303.

333. JACOBSON, *supra* note 78, at 70. *See also* KRAINES, *supra* note 130, at 54 ("On January 25, 1970, the National Religious Party announced that it would resign from the Government Coalition unless the Knesset passed legislation reversing the Court's decision."). In fact, the legislation amending the Law of Return did not address the Court's decision at all. "The Law of Return was not invoked as all the Shalits were Israeli citizens—Anne Shalit by naturalization, the father and children by birth." Rubenstein, *supra* note 131 at 85. *But see Shalit*, *supra* note 283, at 103, 145 (Kister, J., dissenting) (suggesting that Anne Shalit had not been naturalized).

334. Ginossar, *supra* note 115, at 264. *See also* KRAINES, *supra* note 130, at 54 ("Four days later the Cabinet voted to recommend to the Knesset the legislation demanded by the National Religious Party."); Rubenstein, *supra* note 131, at 90 ("A week later, the two Shapiros—the Minister of Justice and Minister of Interior—came out with a proposed package deal.").

335. Ginossar, *supra* note 115, at 264 n.3.

336. Stroman, *supra* note 79, at 1547 n.15 (quoting JACOBSON, *supra* note 78, at 71).

337. JACOBSON, *supra* note 78, at 70; Law of Return (Amendment No. 2), 5730-1970, 24 LSI 28 (1969-1970) (Isr.). The Population Registry Law was simultaneously amended to preclude registration as a Jew of anyone failing the test laid down for the Law of Return. JACOBSON, *supra* note 78, at 70; *see also* Shava, *supra* note 14, at 146-47; Klein, *supra* note 115, at 58-59.

338. Ginossar, *supra* note 115, at 266 & n.10.

equal rights under the Law of Return to persons who are formally not Jews."[339]

4. Beresford

The final act in the Supreme Court's drama concerns Gary and Shirley Beresford, a Messianic Jewish couple who sought to emigrate to Israel from their home in South Africa.[340] *Beresford* is notable because unlike *Rufeisen*, there was no formal act of affiliation (as with Rufeisen's baptism and subsequent holy orders) and unlike *Shalit*, there was no absence of some outward manifestation of affiliation (as with Anne Shalit's decision not to convert). Instead, *Beresford* concerns solely individual beliefs and the result that particular beliefs may have on religious status under civil law. Where Brother Daniel was deemed no longer Jewish because he "linked his destiny to other forces whose precepts he honours in both *thought and observance*,"[341] *Beresford* took this one step further by making maintenance of Jewish status turn exclusively on thought. The case is also notable insofar as two Justices, applying two very different modes of analysis, come to the same result. At first, this may seem innocuous. But, again, closer inspection reveals that both rely on some of the same suppositions, and there is good reason to believe that suppositions, which frame both analyses, have a significant influence on the result the Court reaches.

Gary Lee Beresford and Shirley Beresford sought *oleh*'s visas to immigrate to Israel under the Law of Return, either as Jews themselves or, under the newly enacted category, as children of Jews.[342] That both of them were born Jews was not in dispute.[343] With respect to practice, the Beresfords observed the Sabbath and Jewish dietary laws, were Zionists, and held strong emotional ties with the people, state, and land of Israel.[344] But the couple also belonged to the "Jews for Jesus" movement. Although

339. Englard, *supra* note 7, at 194-95. At the time, Israel was preparing for the possibility of massive immigration from the Soviet Union due to the Jewish "national awakening" that country had recently experienced. Weiss, *supra* note 115, at 94. Many in Israel understood that given the realities of life in the U.S.S.R., they could expect a significant number of Jews with non-Jewish spouses, and there was a call from some quarters to ease the process of immigration for these couples. *Id.* At the same time as the National Religious Party had acquiesced to broadening the Law of Return to include non-Jewish family members, there was significant pressure to define who was a Jew for Law of Return and registration purposes along religious lines. *Id.*

340. HCJ 265/87 Beresford v. Minister of the Interior 43(4) PD 793 [1987] (Isr.), *translated in* JEWISH LAW ASSOCIATION STUDIES XI: LAW, JUDICIAL POLICY, AND JEWISH IDENTITY IN THE STATE OF ISRAEL 27-63 (Daniel B. Sinclair ed., 2000) [hereinafter *Beresford*].

341. *Rufeisen*, *supra* note 196, at 23 (opinion of Landau, J.) (emphasis added).

342. *Id.* at 28. For a more colorful, if unflaggingly sympathetic, background to the Beresfords' case, *see* LINDA ALEXANDER, THE UNPROMISED LAND: THE STRUGGLE OF MESSIANIC JEWS GARY & SHIRLEY BERESFORD (1994).

343. *Beresford*, supra note 340, at 28.

344. *Id.*

not Christians—neither had ever been baptized—the Beresfords "came to believe that there is no contradiction between the Jewish faith and the belief in Jesus as the Messiah; this belief, according to their view, is an inseparable part of a clearly Jewish religious movement, which characterized a legitimate stream of Judaism in the Second Temple period" and which they contended was "a legitimate stream of Judaism today."[345]

The question before the Court was whether this belief alone, in the absence of baptism and affiliation with any Christian church, rendered the Beresfords "members of another religion" such that they had extinguished their rights, as Jews, to make *aliyah* under the Law of Return. Justice Elon stressed that formal admission to another religion under its own terms is not required for purposes of the Law of Return (though it would be with respect to matters of personal status adjudicated by the religious courts).[346] Instead, with respect to the Law of Return, "all that we need ask of the other religion is whether such beliefs are amongst the principles which express the substance and the character of that religion."[347] Notably, Elon held that what counts is not ceremonial admission, but "theological criteria, i.e. what are the central doctrinal or theological principles through which that other religion finds expression."[348] Applying this test, Elon concluded that "the most important thing—even more important than baptism— . . . in Christianity—is the belief in the Divinity of Jesus."[349]

Elon continued by refuting the Beresfords' claim that Jews for Jesus should be counted among the various branches of Judaism because "[i]n the entire world of Jews and Judaism, in all its movements and divisions, there is not a single community which believes in the divinity of a human being in the incarnation of God, and in a Messiah that has already arrived."[350] Elon held that "Notwithstanding any historical claim that Messianic Jews were once fully accepted as members of the Jewish religion, the situation has changed irreversibly and no person believing in Jesus can claim today to be a Jew under this objective definition."[351] Breaking somewhat with past cases that went to lengths to distance the Court from application of *halakha*, Elon also turned to several religious

345. *Id.* at 28-29.

346. *Id.* at 29-30.

347. *Id.* at 30.

348. *Id.* at 30.

349. *Id.* at 30.

350. *Id.* at 32. Of course, this reasoning is deeply flawed; it defines-out Messianic Jews. Any denomination could be similarly excluded by essentializing a particular characteristic or lack of a particular characteristic. For example, if one wanted to define Judaism in theological terms, one could create a definition that ". . . there is not a single community that does not profess a belief in a supernatural God." Such a definition would exclude Humanistic Judaism. Other examples could be drawn up along similar lines, simply by identifying a particular characteristic and declaring it to be either essential or disqualifying.

351. Sinclair, *supra* note 12, at 9.

authorities to conclude that even under religious law, an apostate is considered a Jew only for purposes of marriage and divorce.[352]

Justice Barak agreed that the petition must be dismissed, but on rather different grounds. He reasoned that the definition of Judaism for the Law of Return is a dynamic, secular, liberal one, established on the basis of public opinion at any given time.[353] He noted that the question before the Court was only the meaning of the phrase "and is not a member of another religion."[354] Barak rejected an earlier approach that assessed whether an individual is a member of another religion by reference to the position of the other religion, because it is "incompatible with the aim underlying the definition of 'Jew' in the Law of Return" which was "intended to establish the identities of those who are entitled to immigration to Israel" and therefore Jewishness cannot be made contingent upon the particularities of a non-Jewish community.[355] Secondly, applying another religion's membership criteria, although it serves the purpose of permitting relative autonomy of religious groups to direct their own affairs in the matters that have been delegated to them, does not serve any parallel purpose in the context of the Law of Return.[356] Barak rejects determining who is a member of another religion according to any religious law, including Jewish law, not least because the Amendment was generally thought inconsistent with *halakha*.[357] He concedes that the Law of Return is animated by Jewish religious conceptions of Jewry as a body corporate, but concludes that this cannot mean that the Jewish religious conception of "another religion" is what the Knesset intended to adopt.[358]

Instead, Barak held that it must be understood in the context of secular Israeli law.[359] He explained that "[t]he expression 'is not a member of another religion' is like any other expression in the Law of Return, which must be accorded a secular interpretation."[360] Relying on the opinions of Justices Silberg, Cohn, Landau, and Berinson in *Rufeisen*, he noted that the interpretation that governs is the common understanding.[361] This understanding, he continued, "undoubtedly contains religious elements, for these elements currently constitute a component in the identity of the Jewish people."[362] But ultimately, it is a criterion of "national-secular and

352. *Beresford*, *supra* note 340, at 32-35.
353. Sinclair, *supra* note 12, at 9.
354. *Beresford*, *supra* note 340, at 46.
355. *Id.* at 47.
356. *Id.* at 48-49.
357. *Id.* at 49-51.
358. *Id.* at 51-52.
359. *Id.* at 53.
360. *Id.*
361. *Id.*
362. *Id.* at 55.

not religious significance."[363]

Barak concluded that the national-secular definition of the Jewish people excluded those who have a religion other than Judaism that is "their effective religion" to which they "see themselves connected in their every-day lives."[364] Notably, he explained, "it is essential that this effective connection be incompatible with the secular conception of a person being a Jew," and offered Brother Daniel as a prime example.[365] "A person who was born of a Jewish mother but has become a Christian priest is 'a member of another religion' since, according to our secular approach, he has stopped being a Jew."[366]

Applying this national-secular concept of "Jew" to the case at hand, Barak noted that the Beresfords were not part of the Jewish community in Johannesburg and that they believed in Jesus as the son of God, the Messiah, and the King of the Jews. He also noted, however, that they do not believe in the doctrine of the Trinity and have not been baptized, and that they have a profound connection with the Jewish people.[367] Conceding that the followers of Jesus in the first century may have seen no contradiction in that pursuit with membership in the Jewish community, Barak concluded that the Jew "from the marketplace" today would take the Beresfords as members of another religion because "it is not possible to skip two thousand years of history as if nothing happened."[368] "According to the secular criterion, the other religion—the one to which the Petitioners belong—is Christianity," even if Christians would not view things that way according to Christian doctrine.[369] The controlling factor is the current secular conception of what it means to be a member of another religion, not whether the petitioners are apostates under Jewish law, or whether they have been formally accepted into another religion according to the norms of the other religion.[370] Justice Halima concurred in the result without opinion.[371]

B. The Court's Conclusions

Rufeisen, *Shalit*, and *Beresford* raise a number of intriguing points concerning how the Supreme Court of Israel understands what it means as a legal matter to be a Jew and, in turn, what constitutes a "religion" and a

363. *Id.*

364. *Id.* at 56.

365. *Id.*

366. *Id.*

367. *Id.* at 59-60.

368. *Id.* at 60.

369. *Id.* at 61-62.

370. *Id.* at 62. Justice Barak noted briefly that the same reasoning applied with equal force to the phrase "voluntarily changed his religion" in section 4A, and the Beresfords were therefore not entitled to immigration under the Law of Return as relatives of Jews.

371. *Id.* at 63.

"nationality." First, a strong majority of the Court in *Rufeisen* rejected the notion that who is a Jew for purposes of the Law of Return should be determined according to *halakha*.[372] Instead, *Rufeisen* referred to the popular understanding of religion to make that determination.[373] Popular understanding, in turn, "treated conversion as decisive."[374] Rufeisen had placed himself outside of the Jewish community "in both thought and observance."[375] *Shalit* held that nationality is subjective (or at least mostly subjective) but to reach that conclusion had to assume that religion and nationality are separable categories.[376] And finally *Beresford* took *Rufeisen* one step further, holding that religion is primarily a matter of belief and closing the door on the possibility raised in *Rufeisen* that formal affiliation is necessary.[377] In *Rufeisen*, Berinson suggested that had Rufeisen become a Buddhist, rather than a Christian monk, he would not have extinguished his right of return.[378] After *Beresford*, that possibility appears to be foreclosed.

In short, for the Supreme Court of Israel, religion is 1) something separable from nationality and 2) primarily a matter of belief. These conclusions, although not inevitable, were also not unprecedented in Israeli history. For example, a minister of the Jewish Agency said that not joining another religion is a requirement of Jewish status for *aliyah*.[379] This conclusion may have been based on a statement Herzl made that a Jew who converted to another religion was not a Jew and was not entitled to membership in the Zionist Organization.[380]

In reaching these conclusions, the Court understood itself to be applying an "ordinary" or "secular" understanding of "religion" and "nationality."[381] Oswald Rufeisen himself admitted, "had my position been accepted this would have created a revolution in conventional concepts."[382] But how did these concepts come to be considered

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372. Sinclair, *supra* note 12, at 5.

373. Slovenko, *supra* note 118, at 15; LESLIE, *supra* note 190, at 39; JACOBSON, *supra* note 78, at 65 (noting that for the majority, "the secular meaning of the term 'Jew' in the Law of Return is to be derived from the common understanding of the 'ordinary simple Jew.'"); Green, *supra* note 200, at 191.

374. Rubenstein, *supra* note 131, at 88.

375. *See Rufeisen*, *supra* note 196, at 23 (opinion of Landau, J.).

376. *See supra* notes 277, 287-88, 295, 300, and accompanying text.

377. *See supra* note 367-70 and accompanying text. *See also Rufeisen*, *supra* note 196, at 23 (opinion of Landau, J.) (noting importance of both "thought" and "observance").

378. *Rufeisen*, *supra* note 196, at 31 (opinion of Berinson, J.).

379. TEC, *supra* note 160, at 226.

380. Rubenstein, *supra* note 9, at 109.

381. Slovenko, *supra* note 118, at 16-17 ("[T]he Court in the Brother Daniel case looked to the ordinary meaning of the term 'Jews.' Justice Silberg made reference to the 'ordinary every meaning' of the word as used by Jews; Justice Landau spoke of the 'instinct of the overwhelming majority of Jews today' . . . and Justice Berenson, of the 'common meaning of the word' and of the 'popular understanding.'"); Galanter, *supra* note 157, at 11 (same).

382. TEC, *supra* note 160, at 231.

"ordinary" and "conventional"—so ubiquitous and fundamental as to be unworthy of critical inquiry, and so widely accepted as to be presumptively neutral?

The answer appears to be two-fold. First, "religion" is generally understood to mean something chiefly concerned with beliefs because Christianity is chiefly concerned with beliefs. "Religion" historically connoted those non-Western modes of behavior, rituals, institutions, etc. that had at least rough parallels in Christianity. "Religion" is, at its core, a Christian category. But as the centrality of religion generally and Christianity specifically declined in the West, the idea of religion as an isolable component of the human experience lost the connection to its Christian origins. Eventually, the Christian idea of "religion" was adopted by non-Christians. Religion was reified as a legal construct in constitutions and laws guaranteeing "freedom of religion." And as religion became a universal concept, there seemed little reason to question its provenance or its neutrality as a category.

V. A CHRISTIAN CONCEPTION

The approach the Supreme Court of Israel has taken to defining who is a Jew under civil law is not secular, but is instead derived from the history of Christian hegemony in the West.[383] It is not a neutral definition, but rather a sacrifice—intentional or not—of a Jewish corporate self-conception at the altar of Christian universalism.

A. A "Rather Odd Modern Concept"[384]

In colloquial speech, "religion" is "one of the simplest, most obvious and minimal terminological statements" one can make.[385] As understood by the Court, the concept is essentially "transhistorical and transcultural,"[386] *i.e.*, unhistoricized, essentialized, and tacitly presumed immune to or inherently resistant to critical analysis."[387] Even today, the category "'world religions" belies a pervasive, unexamined, and "rather monumental assumption . . . that religion is a universal, or at least ubiquitous phenomenon to be found anywhere in the world at any time in history."[388]

But despite its ubiquity, "[t]he modern concept of religion . . . is not a

383. *See* DIDI HERMAN, AN UNFORTUNATE COINCIDENCE: JEWS, JEWISHNESS, & ENGLISH LAW 16 (2011) ("[S]ecularism becomes a term that facilitates judicial Christian thinking").

384. BATNITSKY, *supra* note 22, at 13, 190.

385. Dan, *supra* note 1, at xxv.

386. TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 28 (1993).

387. TOMOKO MASUZAWA, THE INVENTION OF WORLD RELIGIONS 1-2 (2005).

388. *Id.* at 1.

neutral or timeless category but instead a modern, European creation, and a Protestant one at that."[389] Leora Batnitzky explains "this Protestant notion simply as the view that religion denotes a sphere of life separate and distinct from all others, and that this sphere is largely private and not public, voluntary and not compulsory."[390] An understanding of religion that gives primacy to propositional belief (which occupies the private, voluntary sphere) has been called "a modern, privatized Christian one because and to the extent that it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world."[391] In short, the common understanding of "religion," as primarily a matter of voluntary, internal, propositional belief is neither neutral nor secular.[392] It assumes and is built on a Christian normativity.

The extent to which "religion" is a product of post-Enlightenment Protestantism or of the early Christian period is not well understood.[393] But the idea of religion, as it "is generally recognized, derive[s] from Western cultural traditions and experiences."[394] Ruth Langer and Joseph Dan agree "that the very concepts of religion and theology as the academy understands them today are Christian concepts, derived from Christianity's early accommodations with Greco-Roman culture, resulting

389. BATNITSKY, *supra* note 22, at 1, 13, 190; *see also* Linda Woodhead, *Five Concepts of Religion*, 21 INT'L REV. SOC.—REVUE INTERNATIONALE DE SOCIOLOGIE 121, 123 (2011) ("[T]he conception of religion as a matter of belief is a distinctly modern one, with a bias toward modern Christian, especially Protestant, forms of religion."); Hent de Vries, *Introduction: Why Still "Religion"?*, *in* RELIGION: BEYOND A CONCEPT 1, 4 (Hent de Vries ed., 2008) (Religion points to "many concepts, in any event, the ones we have come to associate with it too quickly, influenced by a Western and especially Protestant idiom."); James Boyd White, *Talking About Religion in the Language of the Law*, *in* JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EDUCATION 124, 131 (1999) ("Here is the image of religion (I think deeply Protestant in nature) to which I have been repeatedly exposed. Religion at heart consists in something called 'belief'; this belief is arrived at by an individual, in whatever way seems best to him or her; the object of this belief is a set of propositions, usually about a Supreme Being, sometimes about a set of beings superior to the human; this being (or beings) issues commands to human beings, who are threatened with punishment, often eternal punishment, if they fail to comply; and the life of religion consists in large part of obedience to these commands.").

390. BATNITSKY, *supra* note 22, at 13.

391. Charles Taylor, *The Future of the Religious Past*, *in* RELIGION: BEYOND A CONCEPT 178, 178-79 (Hent de Vries ed., 2008) ("One of the main vectors over the last six or seven centuries in this civilization has been a steadily increasing emphasis on a religion of personal commitment and devotion, over against forms centered on collective ritual."); ASAD, *supra* note 386, at 47.

392. *See generally* Petty, *supra* note 6, at 135-42 (discussing origin and development of the concept of religion).

393. DANIEL BOYARIN, BORDER LINES: THE PARTITION OF JUDAEO-CHRISTIANITY 11 (2004).

394. Benson Saler, Religio *and the Definition of Religion*, 2 CULTURAL ANTHROPOLOGY, 395, 395 (1987). *See also* Jan G. Platvoet, *Contexts, Concepts and Contests: Toward a Pragmatics of Defining Religion*, *in* THE PRAGMATICS OF DEFINING RELIGION: CONTEXTS, CONCEPTS AND CONTESTS 463, 463-64 (Jan G. Platvoet & Arie L. Molendijk eds., 1999) ("[T]he modern terms 'religion' and 'religions' are diffuse and untidy prototypical concepts of recent Western origin."); Russell T. McCutcheon, *The Category "Religion" in Recent Publications: A Critical Survey*, 42 NUMEN 284, 285-86 (1995) (citing Tim Murphy, Wesen under Erscheiung *in the History of the Study of Religion: A Post-Structuralist Perspective*, 6 METHOD & THEORY IN THE STUDY OF RELIGIONS 119, 119-46 (1994) ("universalized categories as 'religion'—defined as essence or manifestation, are part of the baggage of Occidental Humanism.")).

in a clear differentiation between the realms of church and state and between theology and philosophy."[395] In the Roman context, "*religio*" denoted that aspect of human life which is dedicated to the worship of the gods; a corner of the week's activities and a few days of festivals."[396]

The Protestant Reformation redefined *religio* to correspond to individual beliefs.[397] In contrast to their perception of Roman Catholic practice wherein the individual's relationship with God was mediated by priests performing sacraments and rites, Protestants sought a more direct relationship between the individual and God.[398] Thus, many of the "position[s] and functions formerly controlled by the church came to be transferred to the individual and his or her conscience."[399]

During the Enlightenment the construct of "religion"—as a category broader than Christianity alone—was "forged into a recognizably modern form,"[400] which "drew heavily upon prior Christian understandings."[401] Indeed, it was not until Enlightenment that the term "Christianity" becomes standard and increasingly comes to refer to "a system of beliefs."[402] And "[b]y the eighteenth century, religion did not refer mainly

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395. Langer, *supra* note 141, at 257; *see also* Dan, *supra* note 1, at xxvi ("Christianity did describe itself as a religion. It accepted this term from the Hellenistic world, especially from Roman ways of worship.").

396. Dan, *supra* note 1, at xxvi; *see also* BATNITSKY, *supra* note 22, at 6 ("The modern concept of religion also indicates that religion is one particular dimension of life among other particular and separate dimensions, such as politics, morality, science, or economics.").

397. *See* Robert A. Yelle, *Moses' Veil: Secularization as a Christian Myth*, *in* AFTER SECULAR LAW 23, 34 (Winnifred Fallers Sullivan et al. eds., 2011) ("The triumph of an antinomian concept of religion . . . was . . . largely a product of the Reformation."); Woodhead, *supra* note 389, at 123 ("The 'confessionalization' of religion in the post-Reformation period tended to define and distinguish different forms of religion (particularly Christianity) in terms of distinctive 'confessions' of faith."); Carolyn Evans, *Introduction*, *in* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 1, 8 (Peter Cane et al. eds., 2008) ("This is a particularly post-Reformation Western view of religion that gives primacy to the internal, intellectual aspects of religion over other viewpoints"); Taylor, *supra* note 391, at 179 ("The point of declaring that salvation comes through faith was radically to devalue ritual and external practice in favor of inward adherence."); de Vries, *supra* note 389, at 5 (discussing ". . . the modern definition of the concept, which has so often, and all too hastily, identified 'religion' with a 'set of beliefs.'").

398. JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 23-24 (1985).

399. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1877 (2009); *see also* Molendijk, *supra* note 5, at 5 ("Does the notion [of 'religion'] not preserve a one-sided—Schleiermachian—focus on the inner religious sentiment as well? The alleged eurocentricity, especially, makes Western scholars feel uneasy.").

400. Saler, *supra* note 394, at 395. *See also* PETER HARRISON, 'RELIGION' AND THE RELIGIONS IN THE ENGLISH ENLIGHTENMENT 1 (1990) ("The concepts 'religion' and 'the religions' . . . emerged quite late in Western thought, during the Enlightenment."); ASAD, *supra* note 386, at 45 (noting the modern view of religion as that which consists of "a positive attitude toward the problem of disorder, of affirming simply that in some sense or other the world as a whole is explicable, justifiable, bearable . . . is a product of the only legitimate space allowed to Christianity by post-Enlightenment society, the right to individual *belief*").

401. Michael L. Satlow, *Defining Judaism: Accounting for Religions in the Study of Religion*, 74 J. AM. ACAD. RELIGION 837, 841 (2006).

402. WILFRED CANTWELL SMITH, THE MEANING AND END OF RELIGION 70-71 (1964).

to ritual practice or performance, but instead to personal belief or faith."[403] The equation of religion with faith, therefore, "involves the reproduction of a Christian worldview."[404] Among scholars of religion, "[i]t has become a truism that religion in its modern sense is an invention of Christians."[405] As James Boyd White sardonically noted, "'religious belief' means the affirmation of certain propositions. What else could it be?"[406] Certainly for the Supreme Court of Israel, the affirmation of Christian articles of faith has often been determinative.

B. Christianity is a Religion. Judaism "Refuses to be One."[407]

The tension between Judaism and the common notion of religion is "one of the most vexed problems of modernity."[408] At least until very recent times, Judaism did not fit with the internal, private, voluntary Protestant conception of religion.[409] "Adherence to religious law, which is at least partially, if not largely, public in nature, does not seem to fit into the category of faith or belief, which by definition is individual and private."[410] In Judaism, actions matter most. As Moses Mendelssohn explained, "Among all the prescriptions and ordinances of the Mosaic law, there is not a single one which says: You shall believe or not believe. They all say: You shall do or not do."[411] As Mendelssohn elaborated, "Jewish religion is not a matter of belief but rather of behavior. As he puts it, 'Judaism knows of no revealed religion in the sense in which Christians understand the term. The Israelites possess divine legislation—laws, commandments, ordinances, rules of life, instruction in the will of God as to how they should conduct themselves in order to attain temporal and eternal felicity.'"[412] Indeed, plurality of belief and of observance have been identifiable features of the Jewish experience since at least the

403. BATNITSKY, *supra* note 22, at 1; *see also* GAVIN I. LANGMUIR, HISTORY, RELIGION, AND ANTISEMITISM 70 (1990) (By the eighteenth century, after the Roman Catholic monopoly on European Christianity failed, the term "religion" "came to be applied to the beliefs of the competing religious societies into which Europe had been fragmented.").

404. BATNITSKY, *supra* note 22, at 1.

405. *Id.* at 11. As early as the 1960s sociologists began to recognize that the conceptions of religion holding sway in academic studies were heavily influenced by the investigators' own Christian milieu. *See* Woodhead, *supra* note 389, at 121 ("Thomas Luckmann (1967) argued that sociological studies of religion hugged the form of churches so closely that they rendered other manifestations of religion 'invisible.'").

406. White, *supra* note 389, at 133.

407. *Id.* at 8, 12.

408. BATNITSKY, *supra* note 22, at 13, 190. *See also id.* at 1 ("From the eighteenth century onward, modern Jewish thinkers have been concerned with the question of whether or not Judaism can fit into a modern, Protestant category of religion.").

409. Victoria S. Harrison, *The Pragmatics of Defining Religion in a Multi-Cultural World*, 59 INT'L J. PHIL. RELIGION 133, 134 (2006) ("[R]eligion cannot so easily be identified with the affirmation of a given content of belief.") (internal quotation marks omitted).

410. BATNITSKY, *supra* note 22, at 1.

411. *Id.* at 27.

412. *Id.* at 20.

destruction of the Second Temple.[413]

Conversely, "Judaism is not and has not been, since early in the Christian era, a 'religion' in the sense of an orthodoxy whereby heterodox views, even very strange opinions, would make one an outsider."[414] Belief matters little. Indeed, Amos Funkenstein suggests that "no written or oral commandment forbids an orthodox Jew even now to believe in the messianity of Christ."[415] And "[f]or most Jews, religious observance is a means of identifying with the Jewish community, rather than an expression of religious faith."[416] As a result, notions of Judaism "as a faith that can be separated from ethnicity, nationality, language, and shared history have felt false."[417]

Beyond the focus on actions rather than belief, Judaism did not understand itself to be a "religion" in the Greco-Roman sense adopted by Christianity: "a corner of the week's activities and a few days of festivals."[418] Instead, Judaism saw itself "expressing the totality of the meaning and purpose of every single aspect of human activities."[419] As Hirsch explained, "Judaism is not a religion . . . . Judaism is not a mere adjunct to life: it comprises all of life."[420]

"'Religion' and its cognate terms seem self-evidently meaningful because they are so deeply embedded and widely used in everyday language. But their meaning is loose and largely influenced by traditional—and conflicting—religious preconceptions."[421] For this reason, "[i]f historians categorize Judaism and Christianity as instances of

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413. Hayim Lapin, *The Origins and Development of the Rabbinic Movement in the Land of Israel*, *in* THE LATE ROMAN-RABBINIC PERIOD 214 (Steven T. Katz ed., 2006).

414. BOYARIN, *supra* note 393, at 13.

415. AMOS FUNKENSTEIN, PERCEPTIONS OF JEWISH HISTORY 170 (1993).

416. Zvi Gitelman, *The Decline of the Diaspora Jewish Nation: Boundaries, Content, and Jewish Identity*, 2 JEWISH SOC. STUD. 112, 119 (1998) (internal quotation omitted); *see also* Andrew Buckser, *Secularization, Religiosity, and the Anthropology of Jewry*, 10 J. MODERN JEWISH STUD. 205, 208 (2011) ("[G]roup identity and membership are intimately linked to religious practice.").

417. BOYARIN, *supra* note 393, at 8; *see also* Buckser, *supra* note 416, at 208 ("In Judaism . . . ritual has a religious value of its own, one substantially independent of the particular theological meanings attached to it.").

418. Dan, *supra* note 1, at xxvi; *see also* BATNITSKY, *supra* note 22, at 6 ("The modern concept of religion also indicates that religion is one particular dimension of life among other particular and separate dimensions, such as politics, morality, science, or economics.").

419. Dan, *supra* note 1, at xxvi. On the other hand, "in the last two centuries a large segment of the Jewish people moved from one understanding of the meaning of 'religion' to another." *Id.* at xxviii. And today, virtually "[a]ll contemporary Jewish religious denominations . . . [have] adopted the Christian concept of religion as an individual spiritual realm which constitutes a part of human life, besides which other profane aspects of life and culture can co-exist." *Id.* In fact, Orthodox Judaism may have adopted the Protestant model the most fully. *See* BATNITSKY, *supra* note 22, at 43 ("[T]he historical irony is that Hirsch's orthodoxy is not only modern, but rather in a certain sense the most modern of modern Judaisms in molding itself as a religion on the German Protestant model."). *See also* Woodhead, *supra* note 389, at 124 (noting that "a 'beliefification' of religion is also evident in other [non-Christian] world religions in modern times").

420. BATNITSKY, *supra* note 22, at 41.

421. LANGMUIR, *supra* note 403, at 6.

the same kind of basic human activity, as 'religion,' despite the obvious differences in the beliefs and actions of Jews and Christians, they should recognize that they themselves are deciding what they mean by religion."[422] Daniel Boyarin, for example, suggests that the categorization of Judaism as a religion is wholly artificial when he says "it is not the case that Christianity and Judaism are two separate and different religions, but that they are two different kinds of things altogether."[423]

C. A Supreme Irony?

At first blush it seems that the Supreme Court of Israel's apparently unwitting importation of Christian norms into Israeli jurisprudence is enormously ironic (particularly given some of the venomous language in *Rufeisen* and *Beresford* about how awful Christians have been to Jews over the years). The more the Court attempted to distance itself from *halakhic* rules in favor of what it understood to be "secular" concepts, the more it stumbled into Christian norms concerning religion and even Judaism. But the Court's apparent lack of interest in critically examining the concepts applied is perhaps not entirely unjustified. In other words, the adoption of Christian norms may have served some useful purpose notwithstanding the Court's lack of critical analysis of the category itself.

1. Forging an Identity

"The new Jewish culture which developed in Eretz Israel in the first half of the twentieth century was modern, Western and secular."[424] The young state, including the Supreme Court, had a mandate to reflect that culture. Thus, in *Rufeisen*, all of the Justices expressed a view that *halakhic* rulings would not control the outcome.[425] The Court went to pains to show that Israel was not a theocratic state, and that the civil courts would not defer to rabbinic rulings on matters of civil law (even where civil law imported what might be religious concepts or terminology). Israel wanted to show it was modern and enlightened, more European than Levantine, and that meant a civil legal system separate from and superior to religious tribunals.

Beyond this urgency to cabin any potential criticism that Israel would

422. *Id.* at 46. Even so, this is still how religion is generally understood, even in the academy. *See* Evans, *supra* note 397, at 8 (noting that "[f]or most of the authors [in an edited volume], religion is primarily a set of beliefs—beliefs that are capable of being adopted, rejected, modified or refined at the will of the believer"); Woodhead, *supra* note 389, at 123 ("One of the most popular conceptions of religion today—if one takes as evidence not only academic work but the discourse of politicians, legal professionals, journalists, and everyday talk—is of religion as belief. On this account, being religious has to do with believing certain things, where that amounts to subscribing to certain propositions and accepting certain doctrines.").

423. BOYARIN, *supra* note 393, at 13.

424. MAUTNER, *supra* note 20, at 29.

425. *See* JACOBSON, *supra* note 78, at 64.

become a Jewish theocracy, there was at the same time a struggle to forge a national identity. During the 1950s,

> significant efforts were invested in the creation of national symbols and a national identity: "The creation of Israel and the tripling of its population in three years led state leaders to feel that the country must be completely integrated; that the value-belief systems separating the various camps must be abolished and replaced by a unified symbol system uniting the entire Jewish population in support of the state and its institutions."[426]

"This ideology . . . in many respects . . . acquired the role of a civil religion for Israel."[427] Even apart from matters of security, the Court clearly had more pressing concerns than the historical nuances of widely shared concepts.

2. The Relationship Between Nation-State and Religion

Moreover, at the same time that Israel was trying to define itself as a state, it also had the task of defining the state's relationship with religion. This posed a unique challenge. European nations defined religion in Christian terms (and their former colonies had it so defined for them). This meant that in Europe, religion was not just internal, individual, private, voluntary, and separable from other categories of existence (as Christianity is) but also that Christians, as a community, did not constitute a political entity. Indeed, the idea of religion as it is understood in modern states assumes a lack of political control. In the modern state, "citizenship meant the subordination of any communal identity to the state and the relegation of religion to the sphere of private sentiment."[428] This distribution of power—with the nation-state governing external actions and serving as a locus for communal identity, while religion governs internal beliefs and is primarily concerned with the individual—fits comfortably when the religion in question was Christianity.

For Jews living in Europe, the separation of religion from temporal authority posed a problem because the pre-emancipation Jewish communities *were* to a significant extent self-governing. They *did* hold political power over their members, and they claimed primary importance in constituting their members' identities.[429] "The whole concept of Jewish

426. BARAK-EREZ, *supra* note 2, at 36 (quoting CHARLES S. LIEBMAN & ELIEZER DON-YEHHIYA, CIVIL RELIGION IN ISRAEL: TRADITIONAL JUDAISM AND POLITICAL CULTURE IN THE JEWISH STATE 82 (1983)).

427. *Id.* The Israeli national identity is thus "inspired by religious history but detached from religion as such." *Id.* at 37. And today, there is "a growing detachment among the Israeli secular public from traditions that had previously also been respected by non-religious Jews, together with a declining willingness to view religious elements of the culture as having national significance." *Id.* at 3.

428. *Id.* at 33.

429. ABRAMOV, *supra* note 13, at 98-99 ("The political framework of the corporate medieval

identity, in its traditional sense, is founded upon the Covenant (*Brit*) between God and the Jewish *people*. . . . It is this Covenant which . . . because of its continuity, defines a Jew independently of his own personal belief."[430]

"[B]efore Jews received the rights of citizenship, Judaism was not a religion, and Jewishness was not a matter of culture or nationality. Rather, Judaism and Jewishness were all of these at once: religion, culture and nationality."[431] Graetz explained that

> Judaism is not a religion of the individual but of the community. That actually means that Judaism, in the strict sense of the word, is not even a religion—if one understands thereby the relationship of a man to his creator and his hopes for earthly existence—but rather a constitution for a body politic.[432]

In order to secure the place of Jews in the modern nation-state, Judaism surrendered much of its political authority.[433] "Jewish modernity most simply defined represents the dissolution of the political agency of the corporate Jewish community and the concurrent shift of political agency to the individual Jew who also became a citizen of the modern nation-state."[434] The emancipation of individuals came at the cost of collective political autonomy. "It "meant that Jews were free as individuals, but that Jewishness and even a full embrace of Judaism could not be freely expressed within German culture. The notions of being German and citizenship in the modern state excluded the possibility of other types of

state allowed for the Jewish enclave to be in the state but not of the state. The disciplined Jewish community lived largely by its own law, which the rabbis, through their interpretations, applied to concrete situations in changing circumstances."); Salo Baron, *Ghetto and Emancipation: Shall We Revise the Traditional View?*, XIV THE MENORAH J. 515, 519 (1928) ("Like other corporations, the Jewish community enjoyed full internal autonomy. . . . Thus the Jewish community of pre-revolutionary days had more competence over its members than the modern Federal, State, and Municipal governments combined.").

430. Rubenstein, *supra* note 131, at 85.

431. BATNITSKY, *supra* note 22, at 186. *See also* Rubenstein, *supra* note 131, at 85 ("Judaism does not conform to the ordinary rules of nations and religions"); BATNITSKY, *supra* note 22, at 1-2 ("To appreciate the novelty of the idea of Jewish religion, we need to understand a bit about the nature and structure of medieval and early modern Jewish communities. Prior to modernity [emancipation] Judaism was not a religion, and Jewishness was not a matter of culture or nationality. Rather, Judaism and Jewishness were all these at once: religion, culture, and nationality.").

432. BATNITSKY, *supra* note 22, at 45. *See also id.* at 46 ("Granting Judaism a political dimension means, as Graetz indicates, that Judaism does not quite fit the category of religion."); Dan, *supra* note 1, at xxviii ("The use of the term 'religion' in a Jewish context is, therefore, an external imposition rather than an authentic expression of the intrinsic nature of Judaism."). *But see* BATNITSKY, *supra* note 22, at 43 (discussing Hirsch's creation of Jewish orthodoxy in the German Protestant model).

433. ABRAMOV, *supra* note 13, at 98-99 ("The French Revolution and the Emancipation brought about the disintegration of Jewish autonomous life in Europe."); Baron, *supra* note 429, at 524 ("When the modern State came into being and set out to destroy the medieval corporations and estates to build a new citizenship, it could no longer suffer the existence of an autonomous Jewish corporation.").

434. BATNITSKY, *supra* note 22, at 4; *see also id.* at 92 ("Mendelssohn . . . invented the idea that Judaism is a religion in order to make room for the emergence of the modern nation-state.").

collective belonging."[435] Thus, the French politician Comte de Clermont-Tonnerre claimed that "[o]ne must refuse everything to the Jews as a nation, but one must give them everything as individuals; they must become citizens."[436]

The nascent Israeli state had the arduous task of reconciling a dominant non-Christian religion with its existence as a nation state. Being a modern nation-state required "religion" to occupy a private, internal space subordinate to the state and with little, if any, temporal political power. Anything less would risk charges of theocracy. A move toward an understanding of Judaism as a religion in the sense that religion is understood in Christian states avoided that difficulty.

3. *Zionism as Normalization*

Finally, the influence of Zionism must be considered. If the *raison d'être* of Zionism is to normalize the situation of the Jews,[437] then perhaps it makes sense that Israel should understand religion in Christian terms independently of the state's desire to minimize religious authorities' influence over the affairs of state. Normalization means to be a nation among the other nations of the world,[438] and if the international community generally views religion in one (Protestant) way, then why not assume that viewpoint if it furthers that goal of Zionism? On the other hand, if the point of Zionism is to allow Jews full political participation with full Jewish experience, it is difficult to see how a full Jewish experience is possible where religion is not understood by the nominally Jewish state on Jewish terms.

VI. RECONCEPTUALIZING SECULARIZATION

So far, I have suggested that the understanding of "religion" employed by the Supreme Court of Israel is one premised primarily, if not exclusively, on belief, and that this understanding is moored in Christian theology. I have also explained why this might be so, and tentatively explored the extent to which the highest court in the "Jewish state" might have adopted, even if unwittingly, Christian normativity in its conception

435. *Id.* at 49; *see also id.* at 111 ("[I]f Judaism is a religion, it is something different in kind from the supreme political authority of the sovereign state."); Baron, *supra* note 429, at 524 ("Political equality also meant the dissolution of the autonomous communal organization: the Jews were no longer to be a nation within a nation; they were to be thought of and to think of themselves as individuals connected only by ties of creed—Frenchmen, Germans, Englishmen of the Jewish 'Confession.'").

436. *Id.* at 33.

437. Rubenstein, *supra* note 131, at 85 ("Zionism sought to solve the Jewish problem by 'normalising' the Jews.").

438. *Id.* ("In a sense, political Zionism attempted to do on a national basis what Jews sought in vain to do individually, *i.e.* to be like all the other *Goyim*.").

of "religion." In this final part, I will attempt to place these findings in the larger context of the debate over secularization.

A. The Secularization Debate

Like "religion," the notion of "'[t]he secular' was, in fact, originally a religious concept, a product of traditional religious epistemological frameworks."[439] The word "finds its original meaning in a Christian context. *Saeculum*, the ordinary Latin word for century, or age, took on a special meaning as applied to profane time, the time of ordinary historical succession which the human race lives through between the Fall and the Parousia."[440]

The noun "secularization" is likewise a Christian and specifically Protestant construction.[441] This usage originated in France where it signified, in the second half of the sixteenth century (during the Reformation), "the transfer of goods from the possession of the Church into that of the world."[442] It was brought into German no later than 1646, and gained wide acceptance quickly in connection with the closure of monasteries and liquidation of goods of the Roman Catholic Church.[443]

"The notion of secularization has a long history in the social sciences, tracing back at least to Auguste Comte's argument that a rational modern society would render religion obsolete."[444] "Weber and Durkheim both forecast the marginalization of religion in modern societies, and their successors built the decline of religion into their models of social

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439. Nomi Stolzenberg, *The Profanity of Law*, *in* LAW AND THE SACRED 29, 30 (Austin Sarat et al. eds., 2007).

440. Charles Taylor, *Modes of Secularism*, *in* SECULARISM AND ITS CRITICS 31, 31-32 (Rhajeev Bhargava ed., 1998). The Parousia is "the Second Coming of Christ that would precede the Last Judgment." Jakob de Roover, *Secular Law and the Realm of False Religion*, *in* AFTER SECULAR LAW 43, 46 (Winnifred Fallers Sullivan et al. eds., 2011).

441. *See generally* Yelle, *supra* note 397; *see also* Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041, 1057 (2010) ("[T]he idea of a realm of the secular, split off from a spiritual realm, was originally a religious idea, derived from the premises of religious—in particular, Christian—theology."); Taylor, *supra* note 440, at 31 ("'Secular' itself is a Christian term . . . ."); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 813 (1997) ("Even within Christianity, the dualistic connotation of 'religion' as standing in opposition to the 'secular' (that is, nonreligious) is rooted in a very Protestant understanding of a world divided into Luther's Two Kingdoms.").

442. Jan N. Bremmer, *Secularization: Notes Toward a Genealogy*, *in* RELIGION: BEYOND A CONCEPT 432, 433 (Hent de Vries ed., 2008) (internal quotation omitted); Kevin M. Schultz, *Secularization: A Bibliographic Essay*, THE HEDGEHOG REVIEW, Spring & Summer 2006, at 170, 172.

443. Bremmer, *supra* note 442, at 433-34. But apparently *saecularisatio* was not the term used in canon law prior to this date, instead using *profanatio* or *alienatio/alienare* to mean transfer to lay persons, and *saecularisatio* to refer to transfer from religious orders to secular clergy. Veit Bader, *Religion and the Myths of Secularization and Separation*, RELIGARE WORKING PAPER NO. 8, 2011, at 8.

444. Buckser, *supra* note 416, at 206. *See also* Philip S. Gorski & Ateş Altınordu, *After Secularization?*, 34 ANN. REV. SOC. 55, 56 (2008); Jeffrey K. Hadden, *Toward Desacralizing Secularization Theory*, 65 SOC. FORCES 587, 587, 590-91 (1987).

modernization."[445] But not until "about 1963, when two Central Europeans, Peter Berger and Thomas Luckmann, started publishing studies regarding secularization, did the term receive more or less its modern meaning."[446]

"The secularization thesis, advocated by seminal social thinkers in the nineteenth and twentieth centuries, asserted that religion would gradually fade in importance and even cease to be significant with the advent of modern society."[447] The traditional formulation of secularization, the phenomenon, holds that "'the political ends of citizens, organizations, and societies themselves are no longer as explicitly religious as they once were or are no longer explicitly religious at all.'"[448]

Today, "there seems to be a nearly universal consensus that the so-called 'secularization thesis' has failed."[449] The theory, which previously had been closer to a mathematical postulate,[450] began to deteriorate in response to events such as the Iranian revolution and the rise of the Christian right in the United States.[451] In short, "[c]ontinued religiousity became a nagging problem."[452] And ". . . by the 1990s, [when] it became evident that religion just wasn't going away; critiques of secularization

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445. Buckser, *supra* note 416, at 206-07.

446. *Id. But see* William H. Swatos, Jr. & Kevin J. Christiano, *Secularization Theory: The Course of a Concept*, 60 SOC. RELIGION 209, 209-10 (1999) (suggesting the term was coined by Max Weber).

447. PAUL CLITEUR, THE SECULAR OUTLOOK: IN DEFENSE OF MORAL AND POLITICAL SECULARISM 1-2 (2010); STEVE BRUCE, SECULARIZATION 1 (2011) ("The secularization paradigm aims to explain one of the greatest changes in social structure and culture: the displacement of religion from the centre of human life."); Swatos & Christiano, *supra* note 446, at 214 ("The principle thrust in secularization theory has [been] . . . that, in the face of scientific rationality, religion's influence on all aspects of life—from personal habits to social institutions—is in dramatic decline."). The secularization debate, as a (postulated) sociological phenomenon is distinct from secularism as a normative value in ethics, politics, morals, etc. *See* CLITEUR, *supra*, at 3.

448. CLITEUR, *supra* note 447, at 3 (quoting Daniel Philpott, *The Challenge of September 11 to Secularism in International Relations*, 55 WORLD POL. 66, 69 (2002)); Gorski & Altınordu, *supra* note 444, at 56 ("[M]ost would have agreed with the general thrust of the argument: that modernity was somehow undermining the social significance of religion.") (internal citation omitted); Evans, *supra* note 397, at 1 ("It was not so long ago that confident predictions were being made about the eventual demise of religion. Religious people complained that liberal states had privitised religion; excluding it from the public square until such time as developments in science, education and philosophy rendered religion entirely obsolete.").

449. CLITEUR, *supra* note 447, at 1.

450. *See generally* Hadden, *supra* note 444.

451. Buckser, *supra* note 416, at 207; Gorski & Altınordu, *supra* note 444, at 56 (Influential events include "[t]he rise of the Moral Majority, the Iranian Revolution, the collapse of communism qua secular religion, the rapid spread of Pentecostalism in the global South, communal violence in South Asia. These and other developments challenged the confident pronouncements of religious decline that humanists, rationalists, and social scientists had been repeating since the days of Hume, Voltaire, and Comte, to name only the best known.") (internal citations omitted).

452. Schultz, *supra* note 442, at 170. *See also* Mark Chaves, *Intraorganizational Power and Internal Secularization in Protestant Denominations*, 99 AM. J. SOC. 1, 2 (1993) ("[N]ew religious movements continue to arise; older movements like Pentecostalism and Mormonism are expanding; and, at least in the United States, huge segments of the population continue to say that they believe in God and continue to participate in orthodox organized religion.").

theory proliferated."[453]

"The central claim of the critique is that, if secularization is defined as the decline of religious beliefs and practices in modern societies, the theory of secularization is bunk."[454] "Not only has religion persisted (and the evidence is incontrovertible) but the theory also implies that the past was more religious than today, which, it turns out, is not so easy to prove."[455]

Some scholars have attempted "to salvage the idea behind the theory but to soften its predictive capacity, or to shift the definition of secularization by emphasizing different aspects of what secularization means."[456] Mark Chaves, for example, has suggested that secularization most appropriately refers to a decline in religious authority, apart from individual belief.[457] Charles Taylor sees a change in the conditions of belief; that is, secularization concerns a change in what it means to believe and to be a believer.[458] Alexandra Walsham discards the term entirely in favor of "desacralization" when discussing the decline in belief in divine immanence.[459]

The process of secularization, therefore, has a multiplicity of understandings, including at a minimum the pre-modern transfer of property; the classical understanding of decline in religiosity, belief, or observance; the decline of religious authority, per Chaves; the change in the significance of religious observance, per Taylor; and the desacralization or disenchantment, per Walsham. These are certainly not the only ways secularization could be understood.[460]

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453. Schultz, *supra* note 442, at 174.

454. *Id.*

455. *Id.*; Mark Chaves, *Secularization as Declining Religious Authority*, 72 SOC. FORCES 749, 753 (1994) ("[I]t is no longer possible to truthfully assert that 'modernity' is incompatible with religious belief."); Chaves, *supra* note 452, at 2 ("'[C]lassical' secularization theory . . . is no longer tenable."); Buckser, *supra* note 416, at 208 (Some of the problems of applying secularization theory to the Jewish experience stem from "the largely Christian orientation of secularization theory, which has generally followed the Protestant tradition of privileging belief over other modes of religious engagement.").

456. Schultz, *supra* note 442, at 175; Buckser, *supra* note 416, at 207 ("Critiques of secularization began to emerge, and in response a number of sociologists developed more precise and sophisticated models of the process."). For a thorough discussion of the current sociological approaches to secularization, see Gorski & Altınordu, *supra* note 444, at 58-62.

457. Chaves, *supra* note 455, at 754-56; Chaves, *supra* note 452, at 7-8.

458. CHARLES TAYLOR, A SECULAR AGE 3 (2007).

459. Alexandra Walsham, *The Reformation and 'The Disenchantment of the World' Reassessed*, 51 HIST. J. 497, 504 (2008). Walsham contrasts "desacralization" as concerned "with the decline of belief in divine immanence" with "secularization," which she describes as "the rejection or marginalization of religion per se." *Id.*

460. *See generally* Olivier Tschannen, *The Secularization Paradigm: A Systematization*, 30 J. SCI. STUD. RELIGION 395 (1991) (discussing theoretical diversity of approaches to studying secularization from the sociological perspective).

B. Disassociation as Secularization

Here I suggest that one form of secularization may be seen where (originally) religious concepts are stripped of their religious character. The concept becomes disassociated with religion and assumes a cloak of neutrality, possibly even approaching objective detachment. A general example of this phenomenon can be seen in what N.J. Demerath III has called the "paradoxical decline of liberal Protestantism."

Demerath notes that "the decline of liberal Protestantism seems paradoxical. It can be construed as evidence both for and against the once-reigning model of long-term 'secularization.'"[461] "Insofar as any churches are waning, this would seem *ipso facto* evidence of secularization."[462] "However, because some liberal churches have suffered more than many conservative groups, it is conceivable that just the opposite trend is at work."[463]

Demerath suggests that "[t]he decline of liberal Protestantism may actually stem from its success"[464] and that "liberal Protestants have lost structurally at the micro level precisely because they have won culturally at the macro level."[465] In other words, the decline of liberal Protestantism "may be the painful structural consequence of Protestantism's wider cultural triumph."[466] A church that promotes individualism, freedom, pluralism, and tolerance does so at its own organizational peril because holding these values may "reduce any organization's compelling claims by making its virtues relative."[467] Similarly, promoting democracy "attenuates power" and promoting intellectual inquiry may be "corrosive for keeping the faith," particularly propositional faith.[468] In its drive to emancipate the world, mainline liberal Protestantism may have "emancipated its own membership."[469] Liberal Protestantism's cultural victory put itself out of business. In fact, De Roover sees this secularization-as-universalization as typical of Christianity more generally.[470]

The same sort of phenomenon may be at work in how religion has come

461. N.J. Demerath III, *Cultural Victory and Organizational Defeat in the Paradoxical Decline of Liberal Protestantism*, 34 J. SCI. STUDY RELIGION 458, 458 (1995).

462. *Id.*

463. *Id.* at 458-59.

464. *Id.* at 459-60.

465. *Id.* at 463.

466. *Id.* at 460.

467. *Id.* at 461.

468. *Id.*

469. *Id.* at 462.

470. *See* de Roover, *supra* note 440, at 51 ("Christian religion . . . expands . . . through a moment of secularization, whereby it achieves universalization in fact by progressively losing its specific form."). *Cf.* Stolzenberg, *supra* note 439, at 31 ("The concept of the secular has itself, ironically, been secularized.").

to be seen as an a-religious category. As nonreligious bodies adopted Liberal Protestant values, the religious roots of concepts like "human rights" faded from memory.[471] Here, the success of Christianity and the domination of European states universalized the understanding of religion as belief to such an extent that its religious origins have been largely forgotten. Secularization as "de-religifying," rather than merely desacralization, may be a useful line of further inquiry because, as I have suggested in this Article and elsewhere,[472] misunderstanding and inequalities persist precisely because of ignorance of the religious roots of common concepts.

VII. CONCLUSION

Margaret Davies has explained that

> [a]t a subtle and therefore insidious level . . . , the situatedness of law within a cultural context and history means that certain principles based on religion rather than reason or practicality are embedded in law: these can be difficult to remove or challenge, even when there is very good reason to do so.[473]

Here, I have tried to show that one principle based on religion (here, Christianity) is the very notion of religion itself. I have also tried to lay out some of the reasons why even a non-Christian state such as Israel might encounter significant difficulties in defining religion, itself a Christian concept, on anything other than Christian terms, and suggest how such an understanding might come to be assumed by courts to be neutral, objective, and secular.

"The concept of religion has never been uncontentious."[474] In the trio of cases addressing who is a Jew, many Justices have explicitly assumed that Judaism (or, at least, the status of being a Jew) is a "religion" in the same sense that Christianity is a religion; that is, by defining membership largely, if not exclusively, on the content of beliefs,[475] and assuming that religion and nationality are separable.[476] Daphne Barak-Erez suggests that there was "an expectation that Israel's character as the state of the Jewish people would be reflected in its legal system and its public sphere."[477]

471. *See* PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 4-20 (1998).

472. *See generally* Petty, *supra* note 6.

473. Davies, *supra* note †, at 79. *See also* Marc Galanter, *Secularism East and West*, *in* SECULARISM AND ITS CRITICS 234, 254 (Rhajeev Bhargava ed., 1998) ("[T]here may be 'predominant religious aspects' in situations in which the actors are mainly unaware of them.").

474. Woodhead, *supra* note 389, at 121.

475. *See Rufeisen*, *supra* note 196, at 20-22 (opinion of Landau, J.); *id.* At 24, 31-32 (opinion of Berinson, J.); *Beresford*, *supra* note 340, at 56 (opinion of Barak, J.).

476. *See supra* notes 277, 287-88, 295, 300, and accompanying text (discussing *Shalit*).

477. BARAK-EREZ, *supra* note 2, at 34.

With respect to how the state understands religion, the Supreme Court of Israel has left that expectation largely unfulfilled.

ACCOMODATING "RELIGION"

Aaron R. Petty*

[T]here is reason to be concerned that bias might operate in judicial efforts to define religion.†

I. INTRODUCTION

"Religion is a highly complex concept."[1] It is both a member of the everyday English lexicon and a constitutional term of art. Recently, several commentators have suggested that "religion," as the term is understood and applied by courts, primarily refers to beliefs or systems of beliefs.[2] This conventional understanding privileges some religions at the expense of others.[3] Specifically, the notion that religion is chiefly a matter of adherence to a set of propositions reflects a Christian and largely Protestant worldview; this understanding measures whether something is a religion or not by the extent to which it resembles Protestant Christianity.[4] How

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† FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 116 (1995).

1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: VOLUME 1: FREE EXERCISE AND FAIRNESS 139 (2006); *see also* Jonathan Z. Smith, *God Save This Honorable Court: Religion and Civic Discourse*, *in* JONATHAN Z. SMITH, RELATING RELIGION 375-90, 375 (2004) ("the study of religion is the only humanistic field in the American academy whose subject matter is explicitly governed by the United States Constitution.").

2 *See* Lourdes Peroni, *Deconstructing 'Legal' Religion in Strasbourg*, 3 OX. J.L. & REL. 235 (2014) (addressing European law); Aaron R. Petty, *The Concept of "Religion" in the Supreme Court of Israel*, 26 YALE J.L. & HUMAN. 211 (2014) (addressing Israeli law) (hereinafter *The Concept of "Religion"*); Aaron R. Petty, *"Faith, However Defined": Reassessing* JFS *and the Judicial Conception of Religion*, 6 ELON L. REV. 117 (2014) (symposium article) (addressing British law) (hereinafter *"Faith, However Defined"*). *See also* BENSON SALER, CONCEPTUALIZING RELIGION: IMMANENT ANTHROPOLOGISTS, TRANSCENDENT NATIVES, AND UNBOUNDED CATEGORIES 22 (1993) ("Public agencies in the United States have tended to make theistic 'belief' central to their conceptions of religion. Doing so is in keeping with hoary Western traditions that dispose them to convert religious imaginings and sensitivities into systems of propositions.").

3 Indeed, "the danger of bias in Religion Clause jurisprudence is a very real one given that "[n]o Jewish, Muslim or Native American plaintiff has ever prevailed on a Free Exercise claim before the Supreme Court." GEDICKS, *supra* note † at 116.

4 Petty, *The Concept of "Religion," supra* note 2; Petty, *"Faith, However Defined," supra* note 2, Linda Woodhead, *Five Concepts of Religion*, 21 INTERNATIONAL REVIEW OF SOCIOLOGY-REVUE INTERNATIONALE DE SOCIOLOGIE, 121, 123-24 (2011) ("[T]he conception of religion as a matter of

should the law account for this imbalance, where the very constitutional foundation of religious liberty—the idea of religion itself—is not a level playing field? As Lori Beaman put it, "[i]f the very notion of religion is imbued with a Christian definitional bias, how can law interpret religious claims outside that framework?"[5]

The subject of how (or whether) "religion" ought to be defined for legal purposes, or even how it should simply be understood as a general matter, is well-trodden.[6] At this point, there is little to be

belief is a distinctly modern one with a bias toward modern Christian, especially Protestant, forms of religion.").

[5] Lori G. Beaman, *Defining Religion: The Promise and the Peril of Legal Interpretation*, *in* LAW AND RELIGIOUS PLURALISM IN CANADA 192-216, 196 (Richard Moon, ed., 2008).

[6] *See, e.g.*, Lael Daniel Weinberger, *Religion Undefined: Competing Frameworks for Understanding "Religion" in the Establishment Clause*, 86 U. DET. MERCY L. REV. 735 (2009); Beaman, *supra* note 5; Barbra Barnett, *Twentieth Century Approaches to Defining Religion: Clifford Geertz and the First Amendment*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 93 (2007); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123 (2007); GREENAWALT, *supra* note 1; W. Cole Durham, Jr. & Elizabeth A. Sewell, *Definition of Religion*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 3-83, 10 (James A. Serritella, et al., eds. 2006) ("In addressing the question of the definition of religion, scholars in the field appear to agree only on their disagreement."); L. Scott Smith, *Constitutional Meanings of "Religion" Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89 (2004); Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181 (2002); Jeffrey L. Oldham, *Constitutional "Religion": A Survey of First Amendment Definitions of "Religion"*, 6 TEX. F. ON C.L. & C.R. 117 (2001); Eduardo Peñalver, *The Concept of Religion*, 107 YALE L.J. 791 (1997); James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L.J. 23 (1995); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309 (1994); Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMBERLAND L. REV. 1 (1991/1992); Ben Clements, *Defining "Religion" in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of Religion*, 71 GEO. L.J. 1519 (1983); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); Steven D. Collier, *Beyond Seeger/Welch: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973 (1982); Timothy L. Hall, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982); Sharon L. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 PEPPERDINE L. REV. 2 (1980); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Anita Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163 (1977); Note, *Defining Religion: Of God, the Constitution, and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965).

gained by suggesting yet another definition or by proposing a novel comparative approach.[7] Several commentators have convincingly argued that true religious freedom in the United States is "impossible"; that the religion clauses are hopelessly in tension with each other; that free exercise cannot be protected in the absence of cultural (and hence theological) understandings about the nature of religion; that legal pronouncements on religious freedom necessarily entail choosing between competing background assumptions about what religion is; and that definitions of religion inherently limit religious freedom by saying what is and what is not *really* religion.[8]

[7] *See* Brian C. Wilson, *From the Lexical to the Polythetic: A Brief History of the Definition of Religion*, *in* WHAT IS RELIGION?: ORIGINS, DEFINITIONS, AND EXPLANATIONS 141-62, 141 (Thomas A. Idinopulos & Brian C. Wilson, eds., 1998) ("During the last hundred years or so, dozens, if not hundreds of proposals have been made, each claiming to solve the definitional problem in a new and unique way."); W. Richard Comstock, *Toward Open Definitions of Religion*, 52 J. AM. ACAD. OF RELIGION 499, 499 (1984) ("There is no want of proposals as to how religion might be defined."); WILFRED CANTWELL SMITH, THE MEANING AND END OF RELIGION 21 (1962) ("there has been in recent decades a bewildering variety of definitions; and no one of them has commanded wide acceptance."). *See also* Val D. Ricks, *To God God's, to Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1053 n.1 (1993) (noting that "[s]o much has been written on the subject that authors apparently have begun to standardize certain parts of the discussion.").

[8] *See* Ino Augsburg, *Taking Religion Seriously: On the Legal Relevance of Religious Self-Concepts*, 1 J. OF LAW, RELIGION & STATE 291, 292 (2012) ("[I]n order to prevent state authorities . . . from interfering in religious affairs, the law must determine and at the same time must not determine what religion or religiously motivated forms of behavior are."); Arif A. Jamal & Farid Panjwani, *Having Faith in Our Schools: Struggling with Definitions of Religion*, *in* LAW, RELIGIOUS FREEDOMS AND EDUCATION IN EUROPE, 69-86, 69 (Myriam Hunter-Henin, ed., 2011) ("when courts are asked to consider religious definitions . . . there emerges a fundamental, and perhaps irreconcilable, tension between freedom of religion or religious expression, on one hand, and the need for adjudication about religion or religious expression on the other."); Winnifred Fallers Sullivan, et al., *Introduction*, in AFTER SECULAR LAW 1-19, 6 (Winnifred Fallers Sullivan, et al., eds. 2011) ("Indeed, the bare question of 'what constitutes religion' in the secular state necessarily involves the law in a process of theologizing, demonstrating the 'impossibility of religious freedom' and of a complete separation between law and religion."); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 807 (2009) ("[I]n order to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are entitled to special treatment as 'religious' while others are not, we are creating a sphere of orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore."); GREENAWALT, *supra* note 1 at 125 ("Any judicial test of what counts as 'religious' is worrisome; it is intrinsically difficult to apply and creates a danger that judges will favor the familiar over the unorthodox."); WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 68 (1995) ("In adopting a theory of religious freedom that is consistent with some background principles, but not with others, therefore,

But for better or worse, the religion clauses are a part of the American jurisprudential legacy.[9] We must be able to address the religion clauses in some measure if for no other reason than "[b]ecause the constitution says so."[10] And to address the religion clauses, we must at least engage with the term "religion." In this Article, I hope to illuminate some of the problems in defining religion for legal purposes by taking a step back and examining the problems with definitions of religion more generally and, indeed, definitions generally. I aim to begin a discussion of how the word "religion" in the First Amendment is best understood, given the understanding, still relatively new to the legal world, that "religion" is not a neutral category.[11]

At the very least, a critical review of our constitutional terms of art seems overdue. "The anxious obsessiveness of scholars of religion over the appropriate referent of the word 'religion' can be of service to a group—American lawyers and judges—which has spent a lot of words on the subject but which, in general, has not had the inclination or training to analyze carefully the discourse about religion that they employ."[12] Drawing on definitions attempted in

government (or the judge or the legal scholar) must adopt, or privilege, one of the competing secular or religious positions."); Worthing, *supra* note 7 at 345-46 ("If a government can define what is a 'church,' it can also define what is not a church, and can do so in a manner that excludes religions that are not favored by government officials."); Jonathan Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593, 604 (1964); Francis J. Conklin, S.J., *Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252, 277 (1963) ("Since any attempt by a court to define or interpret the word 'religion' in the first amendment must, of necessity, imply the exclusion of some opinions which a small minority may choose to call religion, the plain implication in this opinion is that any such attempt is automatically unconstitutional.").

[9] Benson Saler, *Cultural Anthropology and the Definition of Religion*, *in* THE NOTION OF «RELIGION» IN COMPARATIVE RESEARCH: SELECTED PROCEEDINGS OF THE XVI IAHR CONGRESS 831-36, 831 (Ugo Bianchi, ed. 1994) ("For the time-being, however, religion remains with us as a term and as a category.").

[10] Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996). *See also* Durham & Sewell, *supra* note 6 at 5 ("the power to define is the power to confer differential dignity and legitimacy."); GREENAWALT, *supra* note 1 at 125 ("sometimes defining religion or religious is unavoidable"); SULLIVAN, *supra* note 8 at 148 ("When law claims authority over religion, even for the purpose of ensuring its freedom, lines must be drawn."); JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE 124 (1999) ("It is not possible for the law simply to avoid the use of the word, for it appears in the First Amendment, which is the ruling text in the field, and also, in one form or another in important statutes.").

[11] I am not the first to ask these antecedent questions, but there are few such studies in the legal field. *See, e.g.*, Freeman, *supra* note 6 at 1520 ("Surprisingly, no court or commentator has yet addressed the logically prior question: Can 'religion' be defined?").

[12] Winnifred Fallers Sullivan, *Competing Theories of Religion and Law in the Supreme Court of the United States: An Hasidic Case*, 43 Numen 184, 185 (1996).

the field of religious studies and other disciplines, I ask whether religion should be defined for legal purposes? If so, how? And if not, what alternatives are available?[13]

In Part II, I briefly review the concept of religion with particular reference to the common understanding of religion as belief. I note that using belief as a criterion for identifying religion has several shortcomings, both internally and externally. Part III discusses various types of definitions and evaluates their utility in defining religion. Part III.A covers "essentialist" definitions, including several prominent examples while Part III.B introduces "multifactor" strategies including polythetic classification/ numerical phenetics, family-resemblance theory, prototype theory, and other open-ended approaches. Part IV turns to application of definitions of religion in legal contexts. Part IV.A traces the development of the Supreme Court's struggle with the definition of religion in modern cases. Part IV.B addresses some of the leading academic thought on how to deal with the definitional quandary. In light of the many drawbacks and difficulties faced by all of the various approaches, Part V suggests potential avenues for avoiding the issue, at least in part, when possible. Part V.A discusses the largely abandoned theory of understanding "religion" differently in the Free Exercise Clause and the Establishment Clause. Part V.B applies decisional sequencing to suggest that in Free Exercise cases, where the religious status of the claimant is in doubt, judges address whether the Free Speech Clause might resolve the issue without reaching the question of "religion" when it is possible to do so. Part VI offers a brief conclusion.

II. THE CONCEPT OF RELIGION: BEYOND BELIEF

"'Religion' is a heavily, perhaps even over, theorized term."[14] But it is commonly assumed "to be a ubiquitous human

See also id. at 185-86 ("By and large, legal debates about the First Amendment fail to deal serious with how to talk critically about the church that is being kept separate or the religion that is being accommodated. There is a tendency in legal discourse to have 'religion' be a place holder in the sentence. No content is ascribed to the word. It is simply filled . . . without examination."); ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 43 (2013) ("the vagueness of the legal understanding of 'religion' is troubling. It is surprisingly uncertain what is the object of all this protection.").

[13] STEVEN D. SMITH, FOREORDAINED FAILURE vii (1995) ("Contemporary legal scholarship . . . is pervasively normative; its analysis is typically oriented toward, and culminates in, some sort of prescription for the proper resolution."). *See also id.* at 5 ("It may be that the source of our present frustrations in the area of religious freedom is not that judges and scholars have given careless answers, but rather that that they have asked the wrong questions.").

[14] Michael L. Satlow, *Defining Judaism: Accounting for "Religions" in the Study of Religion*, 74 J. OF THE AM. ACAD. OF RELIGION 837, 837 (2006).

phenomenon."[15] We are told that "[i]t is customary nowadays to hold that there is in human life and society something distinctive called 'religion': and that this phenomenon is found on earth at present in a variety of minor forms, chiefly among outlying or eccentric peoples, and in a half-dozen or so major forms."[16] Further, some have suggested that scholars of religion have largely been derelict in directing critical attention to these assumptions.[17]

One important example is "[t]he widely shared assumption . . . that the larger category into which religion is, or is not, to be subsumed, is that of belief."[18] "On this account, being religious has to do with believing certain things, where that amounts to subscribing to certain propositions and accepting certain doctrines."[19] And although it is "undeniable . . . that propositional beliefs typically play a significant role" in many religions,[20] this assumption has influenced how scholars have approached fundamental questions about what religion is and how it works. Even "many anthropologists tend to think of religion largely in terms of certain sorts of 'beliefs.'"[21] And individuals outside of the social sciences, "[t]o the extent that they may voice a definition at all . . . are likely to emphasize belief—'belief in,' traditionally, a 'Supreme Being' or a 'God' or 'Gods.'"[22] Many legal professionals are among them:

[15] BRENT NONGBRI, BEFORE RELIGION: A HISTORY OF A MODERN CONCEPT 1-2 (2013); Jonathan Z. Smith, *Religion, Religions, Religious*, *in* CRITICAL TERMS FOR RELIGIOUS STUDIES 269-84, 269 (Mark C. Taylor, ed. 1998).

[16] SMITH, *supra* note 7 at 19. *See also id.* at 1 (noting familiarity with "world religions" belies a "rather monumental assumption that is pervasive as it is unexamined, namely, that religion is a universal, or at least ubiquitous phenomenon to be found anywhere in the world at any time in history, albeit in a wide variety of forms and with different degrees of prevalence and importance.").

[17] TOMOKO MASUZAWA, THE INVENTION OF WORLD RELIGIONS 6-7 & n.9 (2005) (noting several exceptions that "highlight the overwhelming obtuseness of the subject matter all the more").

[18] Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041, 1046 (2010).

[19] Woodhead, *supra* note 4 at 123. *See also* Stolzenberg, *supra* note 18 1041 n.2 & 1045 (on the ubiquity of the assumption that religion is primarily belief); Weiss, *supra* note 8 at 604 (as an example, noting "religion is traditionally an area of faith and assent").

[20] Victoria S. Harrison, *The Pragmatics of Defining Religion in a Multi-Cultural World*, 59 INT'L J. FOR PHILOSOPHY OF RELIGION 133, 134 (2006).

[21] Benson Saler, *Religio and the Definition of Religion*, 2 CULTURAL ANTHROPOLOGY 395, 395 (1987). *See also* MANUEL A. VASQUEZ, MORE THAN BELIEF: A MATERIALIST THEORY OF RELIGION 1 (2011) ("Up until very recently, our discipline has taken for granted the view that religion is primarily 'private and interior, not shamelessly public; mystical, not ritualistic; intellectually consistent and reasonable; not ambivalent and contradictory.'").

[22] SALER, *supra* note 2 at 21-22.

> Legal accounts of religion often take a similarly belief-based view of religion, as in the common tendency in the USA to define religion (broadly) in terms of "sincerely held religious, moral, or ethical beliefs," and (narrowly) as beliefs asserted in an "authoritative sacred text' and 'classic formulations of doctrine and practice."[23]

James Boyd White notes "the view of religion as propositional is not eccentric."[24] He explains that:

> It is supported by at least two tendencies in our culture. One is the Christian tradition, which has focused so much attention on the Creed. . . . The other is the contemporary secular assumption . . . that real thought takes the form of propositions, the utterance of assertions about the way the world is.[25]

But "[a]n emphasis on isolating various beliefs and making them central to an analytically distinct department of culture termed *religion* is not a markedly ancient tradition."[26] Rather, "the conception of religion as a matter of belief is a distinctly modern one with a bias toward modern Christian, especially Protestant, forms of religion."[27] "The most obvious feature of the cognitive

[23] Woodhead, *supra* note 4 at 123. *See also* Peroni, *supra* note 2 at 236 ("[B]ackground assumptions about religion as primarily a matter of conscience or belief appear throughout the [European Court of Human Rights'] freedom of religion case law."); T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189, 189 & 203-04 (2003) (noting "'belief in a supreme being remains a necessary characteristic of religion for the purposes of English charity law'" and "religious belief is perhaps the most readily understandable facet of religion" for Western asylum adjudicators); SALER, *supra* note 2 at 22 ("Public agencies in the United States have tended to make theistic 'belief' central to their conceptions of religion"); *But see* Frederick Farré, *The Definition of Religion*, 38 J. AM. ACAD. Religion 3, 9 (1970) ("[T]he public and the Congress (more so fortunately, than the higher judicial branches of government) tend still to define religion in terms of some form of belief.").

[24] WHITE, *supra* note 10 at 132.

[25] *Id.*

[26] Saler, *supra* note 21 at 395 (italics in original).

[27] Woodhead, *supra* note 4 at 123 ("The 'confessionalization' of religion in the post-Reformation period tended to define and distinguish different forms of religion (particularly Christianity) in terms of distinctive 'confessions' of faith."). *See also* Christian Smith, et al., *Roundtable on the Sociology of Religion: Twenty-three Theses on the Status of Religion in American Sociology—A Mellon Working-Group Reflection*, 81 J. AM. ACAD. RELIGION 903, 922 (2013) ("In American sociology, we can easily recognize the legacy of certain kinds of Protestant theology, whose heavily creedal and voluntaristic natures, along with their relatively narrow, privatized accounts of divine involvement in history and life, have defined the way most Americans understand religion."); Nelson Tebbe,

conception of religion is its inward nature, the fact that it resides within the recesses of the individual human mind."[28] This feature, when applied as a defining characteristic, is also immensely problematic.

To "focus on individual beliefs is not the only way to understand religion, faith, or religious freedom."[29] Perhaps the most common objection is that "defining religion in terms of belief that has a particular kind of object, such as God, entails that certain belief systems which are routinely characterized as religious—Theravada Buddhism, for example—would have to be classed as non-religious."[30] In more general terms, "the cognitive model of religion as conscience" excludes or distorts non-creedal, non-cognitivist views.[31] For example, "in many religious traditions, the needs and identity of the community would take precedence and religious practice would play a bigger role. Religious communities with tightly formed authority and creeds may place a lower valence on individual conscience and belief."[32] But even with respect to creedal religions, belief is a difficult criterion to employ.

A. Belief as an Internally Problematic Criterion

Belief is a troublesome yardstick to measure what is a religion because belief itself is an amorphous concept. "The nature and

Nonbelievers, 97 VA. L. REV. 1111, 1133 (2011) (noting an "implicit orientation toward Protestant culture" marked by "individual belief or private inwardness."); Harrison, *supra* note 20 at 134 ("such definitions would seem to be particularly suited to Protestant forms of Christianity, which do tend to portray religion as essentially the affirmation of a set of beliefs.").

[28] Stolzenberg, *supra* note 18 at 1046.

[29] Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441, 449 (1998). *See also* Saler, *supra* note 9 at 142 (citing PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 102 (1958)) ("Ritual statements . . . must be understood within their contexts of expression. There is no general norm for intelligibility and rationality of religious statements against some universal standard of judgment but only against the standards contained in the 'form of life' in which they are expressed.").

[30] Harrison, *supra* note 20 134. *See also* Durham & Sewell, *supra* note 6 at 6-7 (collecting authority); WHITE, *supra* note 10 at 138 ("[T]he assumption that religion invokes belief in a Supreme Being who issues commands, enforced by sanctions, perhaps eternal ones, corresponds with only some kinds of religious experience. There are religious people who have no belief in a Supreme Being at all—Buddhists and some Quakers, for example, not to mention individual members of churches that have an official belief the person does not share.").

[31] Stolzenberg, *supra* note 18 at 1045. *See also* Woodhead, *supra* note 4 at 124 ("Above all, it seems to be bound up with a scientism and empiricism which assumes that all knowledge is primarily a matter of (testable) propositional belief, and with a shift of attention from the oral and practiced to the literate and encoded.").

[32] Sullivan, *supra* note 29 at 449.

boundaries of belief are hard to trace,"[33] and "philosophers continue to argue about how to conceptualize belief," whether it is "a mental state, act, or event, or a disposition to act of feel in certain ways under certain conditions, or perhaps something else."[34] Benson Saler suggests that the "debate over the status of belief ought to prove troubling for the easy acceptance of . . . any . . . definition of religion that makes belief essential to religion and does not provide a cogent account of the significance of 'belief.'"[35]

Moreover, belief alone is rarely the sum total of religious identity and other aspects of one's religiousness may be antagonistic to professed beliefs. Mark Chaves notes that "attitudes and behavior correlate only weakly, and collections of apparently related ideas and practices rarely cohere into logically unified, mutually reinforcing, seamless webs."[36] Instead, "people's religious ideas and practices generally are fragmented, compartmentalized, loosely connected, unexamined, and context dependent."[37] So the assumption that belief can function as a proxy for all indicia of religious affiliation or adherence does not hold. What one believes and what one does do not necessarily align.

From the perspective of the faithful, treating religion as essentially propositional faith is incomplete, if not outright false, because it treats religion as though it was composed of a collection of facts, subject to verification.[38] This places "religion on the same plane of human knowledge"[39] as any other facts. It reifies religion, rather than treating it as lived experience.[40]

[33] WHITE, *supra* note 10 at 135.

[34] SALER, *supra* note 2 at 91.

[35] *Id.* at 92.

[36] Mark Chaves, *Rain Dances in the Dry Season: Overcoming the Religious Congruence Fallacy*, 49 J. FOR THE SCIENTIFIC STUDY OF RELIGION 1, 2 (2010). *See also* WHITE, *supra* note 10 at 135-36 (suggesting that religion as practiced is far more nuanced and fluid than when limited to a belief/nonbelief dichotomy).

[37] *Id*.

[38] WHITE, *supra* note 10 at 132. *See also* Will Durant, *Freedom of Worship*, THE SATURDAY EVENING POST, Feb. 27, 1943, at 12 ("religion, like music, lives in a world beyond words, or thoughts, or things").

[39] Stolzenberg, *supra* note 18 at 1044.

[40] WHITE, *supra* note 10 at 127. *See also* Petty, *"Faith, However, Defined," supra*, note 2 at 139 ("John Calvin, for example, propounded doctrines, practices, and interpretations of biblical passages that he hoped *would induce* a personal relationship with God.") (emphasis in original); Woodhead, *supra* note 4 at 121 ("Christian theologians have long objected that 'religion' is a modern concept which carries a baggage of secular presuppositions, and which narrows, distorts, and sucks the living truth out of that which it attempts to dissect."). This distortion may be particularly acute for those whom "religious beliefs are instilled by a higher authority and are not products of individual choice." William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 386 (1996).

Finally, belief may not be as important to people's religious commitments as it appears from official statements of doctrine. People engage in religious activities for a variety of reasons, not all having to do with what they believe. "Many and perhaps most people engage in religious practice out of habit; adherence to custom; a need to cope with misfortune, injustice, temptation, and guilt; curiosity about religious truth; a desire to feel connected to God; or happy religious enthusiasm."[41] What religion means to particular individuals may be quite different from the creeds they profess.[42] In short, belief is neither coterminous with nor necessarily representative of "religion" more generally.

B. Belief as an Externally Biased Category

Even assuming belief could be used as shorthand for religion, it would face insuperable problems as applied to many "religions." As I have previously observed,[43] "we cannot study an ancient category called religion"[44] because "[i]t is only western modernity that knows this category of religion."[45] Indeed, "[i]n the academic field of religious studies, the claim that religion is a modern invention is not really news."[46] "[O]ur construct *religion* is of relatively recent provenance,"[47] and "lacked a taxonomical counterpart in antiquity."[48] Thus, "Josephus cannot talk about Apion as a member of another *religion* because the category did not yet exist."[49]

The current understanding of religion "was stimulated in significant measure by the Reformation, with its sectarian doctrinal controversies over justification, the resistibility or irresistibility of grace, and the like."[50] "Protestants sought to cut out (or at least

[41] Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 964 (2010).

[42] *See* Beaman, *supra* note 5 at 194 ("Like law, religion as it is written and religion as it is lived are two rather different pheonomena.").

[43] Petty, *The Concept of "Religion," supra* note 2; Petty, *"Faith, However Defined," supra* note 2.

[44] Steve Mason, *Jews, Judeans, Judaizing, Judaism: Problems of Categorization in Ancient History*, 38 J. FOR THE STUDY OF JUDAISM 457, 482 (2007).

[45] *Id.* at 488. *See also* James Boyd White, *Introduction*, *in* HOW SHOULD WE TALK ABOUT RELIGION?: PERSPECTIVES, CONTEXTS, PARTICULARITIES (James Boyd White, ed. 2006) 1-10, 3 ("Why should Westerners assume that the Japanese or Indonesians, say, have cultural formation that parallels what we call 'religion?'").

[46] BRENT NONGBRI, BEFORE RELIGION: A HISTORY OF A MODERN CONCEPT 3 (2013).

[47] Saler, *supra* note 21 at 395.

[48] Mason, *supra* note 44 at 480.

[49] *Id.*

[50] Saler, *supra* note 21 at 395. *See also* Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1876-77

downsize) the middle man, so to speak, and to encourage a more direct relation between the individual and God."[51] "In the 'priesthood of all believers' anyone could read the Bible for himself or herself and could commune with God directly without the intercession of priests, saints, or sacraments."[52]

"[T]he development of that construct was carried further, and forged into a recognizably modern form, by the Enlightenment."[53] As Thomas Paine said, "my own mind is my own church."[54] Jefferson and Madison advocated for religious freedom on openly theological grounds stressing the sanctity of conscience.[55] The term religion, as it is employed today, was not particularly useful until the eighteenth century when it acquired a sense of "objective reality, concrete facticity, and utter self-evidence."[56]

Thus, "religion" is "an intellectual construction, a device through which the rationalist passion for classifying and pigeonholing expresses itself."[57] And it is indisputably the product of the West.[58] "'In most societies, religion is not a separate category

(2008) ("Although the sanctity of conscience was recognized in medieval Catholic teaching and canon law, the Protestant Reformation altered the significance of conscience in a way that profoundly affected, and to some extent redirected, historical commitments to the separation of church and state.").

[51] *Id.* at 1877.

[52] *Id.*

[53] Saler, *supra* note 21 at 395.

[54] Smith, *supra* note 50 at 1878.

[55] *Id.* at 1880.

[56] MASUZAWA, *supra* note 17 at 2.

[57] Russell T. McCutcheon, *The Category "Religion" in Recent Publications: A Critical Survey*, 42 NUMEN 284, 286 (1995) (internal citation omitted). *See also* SALER, *supra* note 2 at ix ("Religion is a Western folk category that contemporary Western scholars have appropriated."). *Cf.* JONATHAN Z. SMITH, IMAGINING RELIGION: FROM BABYLON TO JONESTOWN xi (1982) ("Religion is solely the creation of the scholar's study. It is created for the scholar's analytic purposes by his imaginative acts of comparison and generalization. Religion has no existence apart from the academy."). *But see* Steve Bruce, *Defining Religion: A Practical Response*, 21 INTERNATIONAL REVIEW OF SOCIOLOGY-REVUE INTERNATIONALE DE SOCIOLOGIE 107, 107 (2011) (criticizing "various post-modern approaches which argue that there is actually no such thing as religion because 'religion' is a modern social construct.").

[58] *See* Petty, *The Concept of "Religion," supra* note 2; Petty, *"Faith, However Defined," supra* note 2; Woodhead, *supra* note 4 at 121-22 ("the concept of religion has ethnocentric imperialist biases, and fails to do justice to non-Western cultures by forcing them into a Western straightjacket."); Koppelman, *supra* note 41 at 975 ("the term religion denotes an anthropological category, arising out of a particular Western practice of encountering and accounting for foreign belief systems associated with geopolitical entities with which the West was forced to deal."); Bryan Rennie, *Daniel Dubuisson, The Western Construction of Religion: Myths, Knowledge, and Ideology*, 87 THE JOURNAL OF RELIGION 315, 315 (2007) (noting "'only an incredible ethnocentric illusion would authorize us to recognize it as still have true scientific vocation today'" and "Religion is in fact the West's most characteristic and most valued concept, without equivalent in other cultures.

of experience and action. There is, rather, a *religious dimension* to every part of social life.'"[59]

Given that the idea of religion as a universal category is a Western construct, both legal and non-legal scholars have observed the difficulty, perhaps impossibility, of satisfactorily defining it.[60]

It is the legitimate daughter of Christianity, and questions relative to it are exclusively Western.") (quoting DANIEL DUBUISSON, THE WESTERN CONSTRUCTION OF RELIGION: MYTH, KNOWLEDGE, AND IDEOLOGY 5 (2003)); Smith, *supra* note 15 at 269 (Religion "is a category imposed from the outside on some aspect of native culture."); Sullivan, *supra* note 29 at 443 ("Indiscriminate use of the word 'religion' as well as other reifying categories describing religious cultural phenomena—including Christianity, Hinduism, and Buddhism—have been widely and thoroughly criticized in religious studies because their use makes indefensible claims about the existence of referents for those labels."); Stewart Elliott Guthrie, *Religion: What Is it?*, 35 J. SCI. STUDY OF RELIGION 412, 418 (1996) (Religion "is a concept stemming from a particular culture at a particular time."); McCutcheon, *supra* note 57 at 285-86 ("How useful is this category, given its clearly European and largely Christian-influenced heritage?") (citing Tim Murphy, Wesen und Erscheiung *in the History of the Study of Religion: A Post-Structuralist Perspective*, 6 METHOD AND THEORY IN THE STUDY OF RELIGIONS 119 (1994)) (suggesting "universalized categories as 'religion'—defined as essence or manifestation—are part of the baggage of Occidental Humanism.")); Saler, *supra* note 21 at 395 ("Common contemporary acceptations of the word *religion*, it is generally recognized, derive from Western cultural traditions and experiences.") (italics in original); SMITH, *supra* note 7 at 43 ("Religion as a systematic entity, as it emerged in the seventeenth and eighteenth centuries, is a concept of polemics and apologetics.").

[59] SALER, *supra* note 2 at 28 (quoting PHILIP K. BOCK, MODERN CULTURAL ANTHROPOLOGY: AN INTRODUCTION 380 (1969)). And this "accords with the views of numbers of anthropologists." *Id.*

[60] Smith, *supra* note 27 at 923 ("we need more clarity on what 'religion' even is."); Bruce, *supra* note 57 at 110 ("Much of our difficulty in defining religion comes from arguments about which of a largely agreed set of characteristics should be constitutive."); Woodhead, *supra* note 4 at 121 ("Controversy over the definition of religion is a constant . . . . The concept of religion has never been uncontentious and its critics have never been quiet . . . . It has proved impossible to fox on a definition which all—or even a majority—can agree."); Stolzenberg, *supra* note 18 at 1041 (noting the "notorious difficulty" of defining religion); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 NOTRE DAME L. REV. 865, 880 (2009) ("Religion is a category that is hard to delimit."); Smith, *supra* note 50 at 1883 n.72 ("The challenges of saying what 'religion' even is has vexed judges and scholars."); Harrison, *supra* note 20 at 133 ("Given that most of us have no trouble recognizing such traditions as religious, it is perhaps surprising that there is little agreement about what religion is or, indeed, if 'it' is anything distinctive at all . . . . Elementary though this may seem, it has proven difficult to formulate a definition of religion that can command wide assent."); Satlow, *supra* note 14 at 838 ("defining a 'religion' is no easy matter."); WHITE, *supra* note 10 at 125 ("By what criteria, then can 'religion' possibly be defined, and the line between it and 'nonreligion' be drawn?"); Smith, *supra* note 15 at 281 ("It was once a tactic of students of religion to cite the appendix of James H. Leuba's *Psychological Study of Religion* (1912), which lists more than fifty definitions of religion, to demonstrate that the effort to define religion in short compass is a hopeless task.") (internal quotation omitted); Sullivan, *supra* note 29 at 453 ("The difficulties of tightly defining the borders of religion and

How religion is, or is not, defined can be critical because "many arguments or seeming disagreements about theoretical issues pivot on, or sometimes reduce to, variant definitional commitments."[61]

III. THE DEFINITIONS OF RELIGION

Many commentators have called for a judicial definition of religion and many have lamented the purported inability of courts to satisfactorily apply the religion clauses in the absence of one.[62]

religious practice are familiar to religion scholars."); Guthrie, *supra* note 58 at 412 ("Scholars agree broadly that no convincing general theory of religion exists" and that "writers in every discipline concerned with religion admit that even the definition of the term still eludes consensus"); GAVIN LANGMUIR, HISTORY RELIGION, AND ANTISEMITISM 69 (1990) ("Few words are so deeply freighted as 'religion'; and few raise so many questions"); John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 779 (1985) ("We have only recently abandoned the assumption, which may never have been true, that Americans share a common understanding of language about God and transcendent values. That understanding made it unnecessary to define for nonspeakers a meaning that even believers have trouble putting into words."); Comstock, *supra* note 7 at 499 ("Augustine's famous observation about time applies with equal force to religion; if not asked, we know what it is; if asked, we do not know."); Choper, *supra* note 6 at 579 ("Giving the concept of 'religion' a precise meaning is a formidably complicated task."); Martin Southwold, *Buddhism and the Definition of Religion*, 13 MAN, NEW SERIES 362, 362 (1978) ("Religion is not . . . an institution with sharp boundaries."); SMITH, *supra* note 7 at 21 (noting religion "is notoriously difficult to define.").

[61] Saler, *supra* note 21 at 395. As Winnifred Fallers Sullivan has noted, "[p]roblems of definition arise when decisions are made by prisoners as to the regulation of inmate religious observance; by zoning commissions when decisions are made as to the placement of places of worship, by taxing authorities when decisions are made as to exemptions from taxation, by schools when children claim a right to be excused from requirements on grounds of religious conscience, by cities when they celebrate ethno-religious holidays, by legislatures that are asked to regulate religious butchering, by military authorities administering a chaplaincy program, by judges who are asked to substitute religious ex-offender programs for other kinds of rehabilitation efforts.") SULLIVAN, *supra* note 8 at 148-49.

[62] Oldham, *supra* note 6 at 123 ("The lack of a definition seems to make policing the First Amendment all but impossible in marginal cases."); WHITE, *supra* note 10 at 124 ("The most obvious problem here is that of understanding and defining the central term, *religion*."); Feofanov, *supra* note 6 at 313 ("Simply put, we need a definition of religion because it determines what is protected and what is not."); Clements, *supra* note 6 at 553 ("[T]he plain language of the religion clauses suggests the need for a definition. . ."); Garvey, *supra* note 60 at 781 ("It is impossible to apply the religion clauses without first defining the term 'religion.'"); Collier, *supra* note 6 at 975 ("A clear definition of religion is essential to any case based solely on the religion clauses."); Hall, *supra* note 6 at 160 ("[G]iving effect to the protections of the free exercise clause requires at least some definition of religion."). *But see* Bruce, *supra* note 57 at 107 (maintaining, with respect to non-legal definitions, that "if we are looking for an academic pursuit that merits the insult ['academic'] then the obsession of some students of religion with the definition of their subject matter would be a strong candidate.").

These authors suggest that "[w]hile a 'definition of cannot take the place of inquiry . . . in the absence of definitions there can be no inquiry.'"[63] Others have retorted that "[a]ny definition of religion reflects a particular theory about what religion is or . . . what religions are,"[64] or that "[d]efinitions of religion are not tools for inquiry, but the results of inquiry, prejudicing (not aiding) thinking, and begging (rather than clarifying) our questions."[65] Complicating matters are competing imperatives that legal definitions of religion should align with either contemporary understanding,[66] or consideration of what the Framers' understanding might have been.[67]

Attempts at definitions have been grouped into two broad categories. The first, termed "essentialist," aims to identify those characteristics that are shared by all "religions." Under an essentialist definition, potential religion that lacks an essential element would not qualify as a religion. Essentialist definitions can be further subdivided into substantive definitions and functional definitions, which identify as essential characteristics what a religion is and what it does, respectively.

Other attempts at defining religion may not deem any one characteristic a necessary condition. These "multifactor" approaches to the definitional problem consider the issue from a more holistic perspective and apply a variety of methods to determine whether a given candidate should properly be considered a member of the group. "Contemporary multi-factorial approaches are inspired largely by Wittgenstein's discussion of 'family

[63] SALER, *supra* note 2 at 76 (quoting Melford E. Spiro, *Religion: Problems of Definition and Explanation*, *in* ANTHROPOLOGICAL APPROACHES TO THE STUDY OF RELIGION 90 (Michael Banton, ed. 1966)).

[64] Farré, *supra* note 23 at 4. *See also* Benjamin L. Berger, *Key Theoretical Issues in the Interaction of Law and Religion: A Guide for the Perplexed*, 19 CONST. F. 41, 47 (2011) ("[T]he adjudication of religious freedom inevitably involves the imposition of some juridical conception of what religion is, or what about religion really matters, and, in so doing, imposes a legal filter on what 'counts' as protected religion.").

[65] Farré, *supra* note 23 at 4.

[66] SALER, *supra* note 2 at 77 ("It ought not to contradict major established meanings."); Kent Greenawalt, *Religion as as Concept in Constitutional Law*, 72 CAL. L. REV. 753, 757 (1984) ("we should be surprised to learn that what is religious for the law is widely at variance with what otherwise counts as religious").

[67] WHITE, *supra* note 10 at 124-25 ("[T]o decide what meaning it should be given is deeply problematic, particularly with respect to the First Amendment, where it must have a very different meaning for us now from any that was current in the population to which that text was originally addressed. . . . Then it would have referred mainly to different branches of Christianity, indeed to different branches of Protestantism."). *But see* SMITH, *supra* note 8 at 17, 21 (suggesting the religion clauses were understood by the Founders to be entirely a grant of jurisdiction over religious matters to the states).

resemblances' or by so-called 'polythetic classification' in the biological sciences."[68] Both essentialist and multifactor approaches have significant limitations as applied to religion.

A. Essentialist Definitions

A "contrivance for bounding religion"[69]

"Ideally [essentialist definitions] ought to specify what is distinctive of the phenomena defined, what separates them from all other phenomena."[70] "But what, if anything, makes religion distinctive among other ideologies, cultural formations, and social organizations that warrants particular attention?"[71] "Attempts to ascertain the essence of 'religion' are based on the assumption that 'religion' must indicate a distinctive set of data determined by some feature that all members of the set supposedly possess in common."[72]

"Essentialist definitions constitute the great majority of definitions explicitly proffered"[73] and they "typically take monothetic form:[74] they attempt, that is, to state a set of necessary and sufficient conditions for recognizing phenomenal instances of the category and maintaining category boundaries."[75] In other words, essentialist definitions "stipulate[] a single feature or set of conjunctive features that specifies what a category term basically means" and "specif[y] a set of necessary and sufficient features or conditions for identifying instances of the group of objects comprehended by the category."[76] "If any one stipulated feature or condition is missing with respect to some candidate for inclusion in the group, that candidate cannot be properly admitted."[77]

Essentialist definitions can be further divided into substantive definitions and functional definitions.[78] Substantive definitions

[68] Saler, *supra* note 9 at 832.
[69] SALER, *supra* note 2 at 226.
[70] *Id.* at 87.
[71] Smith, *supra* note 27 at 924.
[72] Comstock, *supra* note 7 512.
[73] SALER, *supra* note 2 at 24. *See also id.* at 81 ("monothetic (essentialist) definitions are legion."). For a recent example of an attempt at an essentialist definition of religion in the legal context, *see* Peter W. Edge, *Determining Religion in English Courts*, 1 OX. J.L. & RELIGION 402, 403 (2012) (defining religion by relation to "metaphysical reality").
[74] With respect to definitions of religion, "all monothetic definitions are essentialist definitions." SALER, *supra* note 2 at 80.
[75] Saler, *supra* note 9 at 831.
[76] SALER, *supra* note 2 at 79.
[77] *Id.*
[78] *Id.* at 24 ("They typically gravitate toward one of two poles, the substantive ('religion *is* such and such') or the functional ('religion is that which *does* this and

"bring together analytically similar phenomena, aspects of which we believe we can explain the same terms."[79] A substantive definition of religion tells us what religion fundamentally *is*, what it is composed of (for example, beliefs of a certain sort or beliefs of a certain sort plus certain kinds of behaviors)."[80] For example, Frederick Farré defines religion substantively as "one's way of valuing most intensively and comprehensively."[81] Steve Bruce takes a different substantive approach:

> I will define religion substantively, as beliefs, actions, and institutions based on the existence of supernatural entitites with powers of agency (that is, Gods) or impersonal processes possessed of moral purpose (the Hindu and Buddhist notion of karma, for example) that set the conditions of, or intervene in, human affairs.[82]

Most anthropological definitions of religion "are essentialist: they purport to capture the presumptively abiding and universal characteristic(s) of religion."[83] Hideo Kishimoto is typical of a substantive anthropological definition: "Religion is an aspect of culture centered upon activities which are taken by those who participate in them to elucidate the ultimate meaning of life and to be related to the ultimate solution of all its problems."[84]

Functional definitions, in contrast, define their object by reference to its consequence or function.[85] "A functional definition states what religion *does*, what consequences it has . . . (for example, it expresses and facilitates coping with existential concerns, or it promotes social solidarity)."[86] One of the most influential

that')."") (italics in original). *See also* Saler, *supra* note 9 at 831 ("Essentialist definitions span a spectrum from 'substantive' to 'functional.'"); Beaman, *supra* note 5 at 193 ("For the most part, definitions can be divided into substantive and functional accounts of religion, succinctly described as what religion is and what religion does.").

[79] Bruce, *supra* note 57 at 111-12.

[80] SALER, *supra* note 2 at 79-80. *See also* Steve Bruce, *The Pervasive World-view: Religion in Pre-modern Britain*, 48 BRIT. J. OF SOCIOLOGY 667, 667-68 (1997) ("Substantive definitions identify religion in terms of what it is: for example, beliefs and actions which assume the existence of supernatural beings or powers.").

[81] Farré, *supra* note 23 at 11 (original in italics).

[82] STEVE BRUCE, SECULARIZATION 1 (2011).

[83] Saler, *supra* note 9 at 831.

[84] Hideo Kishimoto, *An Operational Definition of Religion*, 8 NUMEN 236, 240 (1961).

[85] Bruce, *supra* note 57 at 111-12.

[86] SALER, *supra* note 2 at 80. *See also* Bruce, *supra* note 80 at 667 ("Functional definitions identify religion in terms of what it does: for example, providing solutions to 'ultimate problems,' or answering fundamental questions of the human condition.").

functional definitions of religion of the twentieth century was that of Emile Durkheim, who proposed that religion is a "division of the world into two domains, the one containing all that is sacred, the other all that is profane."[87] Durkheim was interested "in what religion did"—not just its substantive characteristics, but also "its characteristic social function.[88]

Initially, "monothetic definitions may seem attractive."[89] After all, "[p]henomena are often complex" and we must "select which of a range of characteristics we shall regard as definitive." Additionally, "[m]onothetic definitions have a certain utility."[90] They may be pedagogically useful in marking a field of study; heuristically useful in "stimulating research"; and they have some "orientational value" as starting points for inquiry.[91]

But monothetic or essentialist definitions have a variety of difficulties as well. Perhaps most obviously, they are both over and under inclusive.[92] They take no account of prominent features that are not part of the definition because crafting an exhaustive list is impossible; on the other side, they often do take account of characteristics that are not truly universal.[93] These limitations are present in both functional and substantive essentialist definitions.

"A church is a complex and dynamic organization, often including believers with a variety of view on important questions of faith, morals, and spirituality."[94] Functional definitions, therefore, "may count as religious things which do not on the face of it look terribly religious and which their adherents regard as secular."[95] "They tend to be so elastic—universalism is typically purchased by decreasing the specifics of content—that it is sometimes difficult to be certain what they actually exclude."[96] And "to define religion in

[87] Wilson, *supra* note 7 at 150-51 (internal quotation omitted).

[88] *Id.*

[89] SALER, *supra* note 2 at 87.

[90] *Id.* at 156.

[91] *Id.*

[92] GREENAWALT, *supra* note 1 at 763 ("No specification of essential conditions will capture all and only the beliefs, practices, and organizations regarded as religious in modern culture."); Durham & Sewell, *supra* note 6 at 11 (noting that Tillich's 'ultimate concerns' is likely over-inclusive because it could include sports, work, or whatever is subjectively the 'ultimate concern' of an individual, while simultaneously being under-inclusive because it might exclude some forms of Buddhism that do not attempt to address 'ultimate concerns.'). I address this common misreading of Tillich below.

[93] Harrison, *supra* note 20 at 134.

[94] Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1391 (1981).

[95] Bruce, *supra* note 80 at 668.

[96] Saler, *supra* note 9 at 832. *See also* Harrison, *supra* note 20 at 138-39 (noting Durkheim, Weber, and Geertz all fail to differentiate religious from non-religious phenomena).

terms of social or psychological functions is to beg the question of just what functions this or that religion performs in this or that setting."[97] Functional definitions may also primarily account for observable side effects, rather than the origins, of phenomena.[98]

Substantive definitions are problematic for other reasons. They "tend to narrow religion to one or two explicit variables."[99] And those variables tend be those that are seen in the dominant religious culture. Lori Beaman observes that "[o]ne of the most serious problems with substantive definitions of religion is their tendency to reify dominant conceptualizations of religion"[100] and those concepts "may not be cognitively salient among some peoples."[101] For example, "when we seek to unpack the notion of 'superhuman' or 'supernatural,' we find difficulties with some non-western or traditional cultures."[102] "Applying the concept across cultures thus requires adjustments such as abandoning boundaries and, perhaps, replacing them with family resemblances."[103]

Overall, essentialist definitions focus attention away from complexities and subtleties.[104] "[O]verly rigid boundaries between religion and non-religion"[105] "facilitate . . . the dubious conflation of those categories and terms with presumptive 'things out there in the world.'"[106] And this reification "gives rise to interminable arguments about so-called 'borderline' cases."[107] In the legal context, this is enormously problematic. The marginal cases are the most important because they mark the reach of the law.

B. Multifactor Approaches

Seeking to pin a label on the nonexistent . . . is cosmic futility[108]

"Some students of religion have come to suspect or suppose that no single distinguishing feature, or no specific conjunction of distinguishing features, can universally be found in what, on various

[97] Bruce, *supra* note 80 at 668

[98] Wilson, *supra* note 7 at 155.

[99] Saler, *supra* note 9 at 831-32.

[100] Beaman, *supra* note 5 at 195.

[101] Saler, *supra* note 9 at 831-32.

[102] Bruce, *supra* note 80 at 668. *See also* SALER, *supra* note 2 at 156-57 (noting monothetic definitions may depend on non-native categories); Farré, *supra* note 23 at 7 ("Especially in the theistic West there is a tendency to import, at least implicitly, theistic or supernaturalistic characteristics into the list of defining characteristics that determine the essence of religion.").

[103] Guthrie, *supra* note 58 at 418.

[104] SALER, *supra* note 2 at 156-57.

[105] *Id.*

[106] *Id.* at 157.

[107] *Id.* at 156-57.

[108] Farré, *supra* note 23 at 4.

grounds, we may wish to identify as 'religious.'"[109] Saler goes so far as to claim that "the task of identifying the essence or universal core of religion has largely been a failure."[110] He suggests that "[t]he phenomena commonly comprehended by applications of the word 'religion' are too complex and variable, and often too enmeshed with other phenomena in a larger universe, to be confined analytically within sharp, impermeable boundaries."[111]

"In the early 1960s, Wilfred Cantwell Smith argued that the attempt [to define religion] was misguided, and could not succeed, because the term 'religion' does not pick out phenomena that are naturally grouped together."[112] Talal Asad suggested that W.C. Smith's "attempt to address the old question of the nature of religion by denying that it has any essence was truly original."[113] It "was the first to argue against essentialist definitions of religion."[114] His recommendation against using "religion" as a reified concept has gained acceptance.[115] His work is "widely cited by historians of comparative religion"[116] and "until recently . . . constituted one of the more notable critiques of the concept of 'religion' as it is used by scholars."[117] The problem with essentialist definitions, in a nutshell, is that "nobody's definition works very well."[118] "[T]here is just too much variety."[119] Less charitably, "religious traditions cannot be essentialized without being misrepresented."[120] As Paul Valéry put it, "everything simple is false."[121]

[109] *Id.* at 158. *See also* KOPPELMAN, *supra* note 12 at 45 ("Arising thus out of a specific historical situation, and evolving in unpredictable ways thereafter, 'religion' would be surprising if it had any essential denotation."); Koppelman, *supra* note 41 at 975 (same).

[110] SALER, *supra* note 2 at x.

[111] *Id.* at 197.

[112] Harrison, *supra* note 20 at 140.

[113] Talal Asad, *Reading a Modern Classic: W.C. Smith's The Meaning and End of Religion*, 40 HISTORY OF RELIGIONS 205, 206 (2001). It was not. Benson Saler notes that as early as 1902, "William James, for example, remarks that 'As there . . . seems to be no elementary religious emotion, but only a common store-house of emotions upon which religious objects may draw, so there might conceivably also prove to be no one specific and essential kind of religious act.'" SALER, *supra* note 2 at 158 (quoting WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 27 (1929) [1902]). Saler continues, quoting James: "we are very likely to find . . . 'no one essence, but many characters which may alternately be equally important to religion.'" *Id. See also* Saler, *supra* note 9 at 832 (quoting James).

[114] Asad, *supra* note 112 at 205.

[115] McCutcheon, *supra* note 57 at 286.

[116] Asad, *supra* note 112 at 205.

[117] McCutcheon, *supra* note 57 at 285.

[118] Koppelman, *supra* note 41 at 973.

[119] Bruce, *supra* note 57 at 113.

[120] Jamal & Panjwani, *supra* note 8 at 70.

[121] PAUL VALERY, NOTRE DESTIN ET LES LETTRES (1937). A similar sentiment is found in PAUL VALERY, ŒUVRES II 864 (1942) (« Ce qui est simple est toujours

The alternative is not to make any one characteristic or set of characteristics determinative. The three most prominent examples of this "polythetic classification" are numerical phenetics (grouping by outward similarity); family resemblance (which looks to the number and strength of shared characteristics); and prototype theory (in which membership in a category is judged by relative similarity to a prototype of the category). Other non-essentialist definitional strategies include having no definition, and permitting groups to define themselves. As with essentialist definitions, however, each of these approaches to determining what is a "religion" have difficulties of their own.

1. Polythetic Classification/Numerical Phenetics

"In biology the idea of polythesis is an organizing concept in an approach to classification by 'overall similarity.'"[122] "[N]o single feature is essential for membership in a polythetically defined taxon nor is any feature sufficient for such membership."[123] Frequently, not a single character is present in every member of the category.[124] "[W]ith every polythetic class there is associated a bundle of attributes," and some attributes are possessed by every member of the category.[125] Saler explains:

> For analytical purposes we may conceptualize [religion] in terms of a pool of elements that more or less tend to occur together in the best exemplars of the category. While all of the elements that we deem to pertain to the category religion are predictable of that category, not all of them are predictable of all the phenomena that various scholars regard as instantiations of religion.[126]

faux. Ce qui ne l'est pas est inutilisable. »). *See also* Jeremy Webber, The Irreducibly Religious Content of Freedom of Religion, in DIVERSITY AND EQUALITY: THE CHANGING FRAMEWORK OF FREEDOM IN CANADA 192 (Avigail Eisenberg, ed., 2006) ("The more detailed they are the less complete they seem.").

[122] Saler, *supra* note 9 at 834.

[123] Rodney Needham, *Polythetic Classification: Convergence and Consequences*, 10 MAN, NEW SERIES 349, 357 (1975) (internal quotation omitted).

[124] *Id.*

[125] Southwold, *supra* note 60 at 370. *See also* SALER, *supra* note 2 at 158 ("'This must allow for the possibility that in any one case not every element in the configuration will be present, and that every element present will not necessarily be there to the same degree.'") (quoting Raymond Firth, *Problem and Assumption in an Anthropological Study of Religion* 89 J. ROYAL ANTHRO. INST. 129, 131 (1959)).

[126] SALER, *supra* note 2 at 225.

"This 'polythetic' model accounts for a wide diversity of actual religious manifestations while at the same time requiring the development of the basic map of characteristics that underlie a single 'religion.'"[127] But, like essentialist definitions, it also has significant limitations, both generally and as applied to social phenomena such as religion.

"Polythetic taxa in the biological sciences are especially (though not exclusively) associated with an approach to classification once known as numerical taxonomy and now more generally called numerical phenetics."[128] Numerical phenetics is essentially classification by overall outward similarity. This approach is fundamentally limited, both as applied to religion and more generally. With respect to religion, the first problems appears when attempting to transfer the method from the hard sciences to the social sciences. "The student of religion . . . generally operates with a smaller number of characters and character states than does the numerical pheneticist in biology."[129] With fewer characters, the decision how to group them becomes more difficult and more arbitrary. Additionally, students of religion "are less likely than biologists to agree empirically" on what the relevant character states even are.[130] This may be because the elements themselves are polythetic, rather than elemental as the case is more frequently in the hard sciences.[131]

Even assuming the applicability of numerical phenetics to religion, the theory itself remaains problematic. To begin, it requires one to establish an artificial horizon for comparison. "The researcher . . . must first somehow establish a population of units that are to be subjected to empirical comparison for classificatory purposes. *After* that is done, the members of that population can be sorted into polythetically described groups."[132] Arbitrary selection of a limit on what is being classified may result in less than optimal classification. Better grouping might be possible if the selection is expanded, and particularly salient objects lying just outside the limit could seriously distort groupings. Finally, observed outward similarities may reflect common descent, but also may be nothing more than "similarities produced in other ways, like 'convergent functional adaptations.'"[133] For example, bees and birds both have wings, but few biologists would identify them as closely related because of it. For these reasons, within biology, numerical

[127] Satlow, *supra* note 14 at 845.
[128] SALER, *supra* note 2 at 167.
[129] *Id.* at 219.
[130] *Id.*
[131] Saler, *supra* note 9 at 835.
[132] SALER, *supra* note 2 at 193.
[133] *Id.* at 175.

phenetics is "dead."[134] With respect to polythetic taxa as a means of defining religion, Saler complains:

> I see little prospect of making a responsible and productive use of numerical phenetics, and we would do well to search for other options. Not only have weighty criticisms been entered against numerical phenetics in the biological sciences, and not only has that approach been supplanted by others, but strong reservations respecting its applicability to cultural phenomena are persuasive.[135]

2. Family Resemblance

One alternative to numerical phenetics is family resemblance theory. J.Z. Smith has suggested that family resemblance and polythetic classification "'are built around quite different philosophical presuppositions'" and Richard Paul Chaney claims that one author's "'converging of them veils phenomenal differences.'"[136] "Family resemblances have to do with how we use our words and concepts whereas polythetic classifications . . . refer 'to our data charts.'"[137] Both approaches, however, hold "that no single feature is either necessary or sufficient for assigning candidates to the group comprehended by a category. Rather, candidates are assigned membership on the basis of differentially sharing some, but not necessarily all, of a set of phenomenal values or 'characteristics.'"[138]

"'Family resemblance,' as an established philosophical construct, is preeminently associated with Ludwig Wittgenstein's concept of philosophy as 'a battle against the bewitchment of our intelligence by means of language.'"[139] Wittgenstein illustrates his theory of language by means of the word 'game,' claiming it is

[134] *Id.* at 176.

[135] *Id.* at 196.

[136] *Id.* at 159 (quoting JONATHAN Z. SMITH, IMAGINING RELIGION: FROM BABYLON TO JONESTOWN 136 (1982) and Richard Paul Chaney, *Polythematic Expansion: Remarks on Needham's Polythetic Classification*, 19 CURRENT ANTHROPOLOGY 139, 139 (1978)).

[137] SALER, *supra* note 2 at 170 (quoting Chaney, *supra* note 136 at 139-40)).

[138] Saler, *supra* note 9 at 833. *See also* Harrison, *supra* note 20 at 142 ("Perhaps, instead, 'religion' is a complex concept used to refer to things sharing a number of features—and thereby exhibiting a number of 'family resemblances'—not all of which need be present."); SALER, *supra* note 2 at 164-65 ("While all the members of [a family] need have no feature or quality in common, some pairs of members typically do have features or qualities in common, and their particular commonalities are predictable of them."). *See generally* JOHN HICK, AN INTERPRETATION OF RELIGION: HUMAN RESPONSES TO THE TRANSCENDENT (1989); NINIAN SMART, THE PHENOMENON OF RELIGION (1975).

[139] SALER, *supra* note 2 at 159.

fruitless to search for a single feature that all games have in common."[140]

Generally speaking, family resemblance is attractive because it seeks to avoid the need to essentialize "religion" into one or a few determinative characteristics. But it too suffers from several serious drawbacks. First, to a certain extent, there is a problem of circularity. "What one is prepared to regard as religiously-relevant family resemblance will depend upon what one means by 'religion.'"[141] Similarly, broadening the definition to include marginal cases does not completely correct the assumptions that underlie essentialist definitions, and runs the risk of overinclusion. "Definitions of religion necessarily involve assumptions about its underlying nature. Each and every definition of religion implies at least some theoretical conclusions."[142] Finally, "[i]f we regard as a member of the 'religious family' everything that has some feature in common with standard examples of religion, the concept of 'religion' will have such a wide scope that it may well be analytically useless."[143] To borrow again from Valéry, "Everything complex is unusable."[144]

3. Prototype Theory

Prototype theory presents a nuanced alternative to family resemblance. Prototypes are understood to be "'the clearest cases of category membership defined operationally by people's judgments of goodness of membership in the category.'"[145] In other words, they "provid[e] an image of a commonplace example that then serves as an ideal or typical exemplar of a category with decisions as to whether another object is a member of the same category being based on matching it against features of the prototype (for example, employing a robin as the prototype for 'bird.')."[146] Prototypicality of a religion is determined by "cogent analytical arguments about elements that we deem analogous to those that we associate with our reference religions."[147] "The referents adjudged most prototypical are usually those that are deemed (1) to 'bear the greatest

[140] Harrison, *supra* note 20 at 141.

[141] Harrison, *supra* note 20 at 143.

[142] Gunn, *supra* note 23 at 193 (internal quotation omitted).

[143] Harrison, *supra* note 20 at 143. *See also* FITZGERALD, *supra* note 141 at 72 ("[A] family resemblance theory of religion overextends the notion so badly that it becomes impossible to determine what can and what cannot be included.").

[144] VALERY, *supra* note 120; Webber, *supra* note 120 at 192 ("the more abstract they become, the more empty.").

[145] Saler, *supra* note 9 at 835 and SALER, *supra* note 2 at 206-07 (both quoting Eleanor Rosch, *Principles of Categorization*, *in* COGNITION AND CATEGORIZATION 27, 36 (Eleanor Rosch & Barbara B. Lloyd, eds. 1978)).

[146] Smith, *supra* note 1 at 377.

[147] SALER, *supra* note 2 at 225.

resemblance to other members of their own categories' and (2) to 'have the least overlap with other categories.'"[148]

Prototype theory has the advantage of minimizing the need for definitive category boundaries.[149] "We may explicitly conceive of categories *with reference* to clear cases that best fit them rather than conceptualizing categories monothetically, which implicates stipulated limits."[150] But this requires first identifying clear cases, and "what we regard as our clearest examples of religion are neither timeless nor monolithic."[151] As is usually the case, Western monotheisms are understood to be the most prototypical instantiations of religion.[152] Indeed, Martin Southwold "refers to Christianity as 'the religion prototypical for our conceptions of religion,'" and J.Z. Smith notes "the features of other religions are routinely being matched against some Christian prototype."[153] The analogical prototype approach, thus, may "harm minority religions and new religious movements."[154] It also leaves open the question of to what extent a candidate must share characteristics with the prototype in order to be classified as a religion.[155]

4. Other Definitional Strategies

a. Self-Definition

Thus far, the definitional strategies discussed have focused on objective criteria. But "[w]hat is the role of the claimant's own characterization?"[156] Self-definition may prevent a government from denying legal protections to religious groups or practices by denying their religious character, but at the same time "is highly problematic because . . . [it] presents a clear danger of misuse."[157]

[148] *Id.* at 211 (quoting Eleanor Rosch and Carolyn B. Mervis, *Family Resemblances: Studies in the Internal Structure of Categories*, 7 COGNITIVE PSYCHOLOGY 573, 599 (1975)).

[149] Saler, *supra* note 9 at 835.

[150] SALER, *supra* note 2 at 206.

[151] Saler, *supra* note 9 at 836.

[152] SALER, *supra* note 2 at 225.

[153] *Id.* at 208 (quoting Southwold, *supra* note 60 at 367); Smith, *supra* note 1 at 377.

[154] RUSSELL SANDBERG, LAW AND RELIGION 39 (2011) (internal quotation omitted).

[155] Wilson, *supra* note 7 at 160.

[156] Marc Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WISC. L. REV. 217, 255.

[157] Augsburg, *supra* note 8 at 294. *See also* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 59 (2014) ("If unable to evaluate sincerity, courts would indeed be powerless to identify fraudulent claims."); Durham & Sewell, *supra* note 6 at 30 (noting "a definition with infinitely malleable borders and no protection against strategic behavior would cease over time to have any meaningful substance.").

In 1968 an ordained minister sought to dismiss a criminal indictment against him on the ground that his facially unlawful use of LSD and marijuana were protected religious rites in a new church whose official songs were "Puff, the Magic Dragon" and "Row, Row, Row Your Boat."[158] A decade later, certain federal inmates demanded steak and wine as religious sacraments in their purportedly religious celebration of the coming destruction of prison authority.[159] Neither claim succeeded, but they do highlight both the potential for abuse and the important (if understated) role of sincerity in making claims based on religious grounds.[160]

The word "sincerity" is not found in the religion clauses,[161] but it has been called "'the threshold question'" in cases implicating them.[162] One commentator has even suggested that "[o]ne can hardly imagine a serious argument *against* a sincerity requirement. That a belief is sincerely held obviously must be established before an inquiry into the beliefs nature may proceed."[163] But even here difficulties remain.

First, sincerity is a measure of whether *beliefs* are honestly held, rather than fraudulently expressed for the purpose of obtaining a benefit. And since sincerity concerns beliefs, it brings with it and is limited by the problems associated with using beliefs as a proxy for religion, discussed above. Sincerity also raises several new issues. The most challenging issue is whether sincerity of beliefs can be evaluated without also evaluating the content of the underlying beliefs themselves. "In considering the sincerity of belief, courts cannot help but delve into the content of the beliefs in the process of

[158] Merel, *supra* note 6 at 805 (citing United States v. Kuch, 288 F. Supp. 439, 444 (D.D.C. 1968)).

[159] *Id.* (citing Theriault v. Silber, 391 F. Supp. 578, 582 (W.D. Tex. 1975)). More recent purportedly religious prisoner claims include challenges to restrictions on diet, grooming, housing, conjugal visits, and distribution of literature. Adams & Barmore, *supra* note 157 at 61-62 nn.21-25 and accompanying text. *See also* Ira C. Lupu, *To Control Faction and Protect Liberty: A General Theory of the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 357, 358 (1996) ("[w]e engage in this task with an appropriately skeptical eye when claimants stand to achieve earthly and material gain from the recognition.").

[160] *See* Webber, *supra* note 120 at 194 ("One suspects that sincerity looms so large not merely for its own sake, but because it is self-limiting, posing the issues in a way that involves both judgment and abstention.")

[161] Bowser, *supra* note 6 at 181 ("The word 'sincerity' is not mentioned . . . in the Constitution.").

[162] *Id.* at 181-82 (quoting United States v. Seeger, 380 U.S. 163, 185 (1965)).

[163] Feofanov, *supra* note 6 at 390. *But see* ADAM B. SELIGMAN, ET AL., RITUAL AND ITS CONSEQUENCES: AN ESSAY ON THE LIMITS OF SINCERITY 103-04 (2008) ("Sincerity often grows out of a reaction against ritual. . . . Though the tension between the two usually remains under control, it can also lead to shifts in the balance between ritual and sincerity, as nearly any of the world's religious traditions shows: the Buddhist critique of Hinduism, Christian critique of Judaism . . . and so forth.").

determining the sincerity with which they are held."[164] The more familiar or reasonable the underlying belief, the easier it is psychologically for a judge to find the claimant's belief sincere.[165] This risks an indirect establishment of orthodoxy or, at the very least, makes the sincerity of new, eccentric, or unfamiliar beliefs more difficult to establish. This is particularly problematic in the context of religious experience[166] because "'[r]eligious experiences which are as real as life to some may be incomprehensible to others.'"[167]

But even where claimants are sincere in their beliefs, individual subjective accounts of whether that sincerity is religious presents problems of massive over-inclusiveness.[168] Allowing individuals to determine their own constitutional protection according to their own views of the religiousity of their actions would "obliter[ate] . . . any meaningful distinction between religious and nonreligious."[169] "Self-definition is even more obviously ill-suited for establishment cases for which the perspectives of outsiders are very important."[170] Self-definition is therefore not a viable means to determine the extent of constitutional protections.

b. No Definition

Several authors have suggested that the Constitution itself, either because of establishment concerns, or an overriding neutrality principle, precludes courts from defining religion at all.[171] But not defining religion leads to just as many problems as defining it does. "[H]ow could anyone expect to go about developing a theory of religious freedom without invoking assumptions about, for example . . . the nature of religion . . . ?"[172] The problem here is that "'when

[164] Beaman, *supra* note 5 at 201.

[165] Adams & Barmore, *supra* note 157 at 64 (noting the "dangerous temptation to confuse sincerity with the underlying truth of a claim. Particularly for unorthodox beliefs, the challenge is that "[p]eople find it hard to conclude that a particularly fanciful or incredible belief can be sincerely held.") (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1982)); Ingber, *supra* note 6 at 248 ("Jurors are more willing to accept that a given belief is sincerely held if they also perceive it to be reasonably believable.").

[166] Bowser, *supra* note 6 at 187.

[167] United States v. Seeger, 380 U.S. 163, 184 (1965) (quoting United States v. Ballard, 322 U.S. 78, 86 (1944)).

[168] Ingber, *supra* note 6 at 248.

[169] Ingber, *supra* note 6 at 248-49; Greenawalt, *supra* note 66 at 812. *See also* Adams & Barmore, *supra* note 157 at 64 (quoting United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996) ("Neither the government nor the court has to accept the defendants' mere say-so.").

[170] GREENAWALT, *supra* note 1 at 136.

[171] Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961); Weiss, *supra* note 8 at 604; Worthing, *supra* note 6 at 314-15.

[172] SMITH, *supra* note 8 at 68.

the term "religion" is given no explicit ostensive definition, the observer, perforce, employs an implicit one.'"[173] And the implicit definition may have many of the same problems associated with essentialist definitions described above. "All of us who use the word *religion* have a theory—explicit or implicit—about what religions basically are."[174] Explicitly declining to enter the fray, although ostensibly transparent, would likely conceal more reasoning than it would disclose.

In sum, neither essentialist nor polythetic definitions offer a panacea. Both types of definitions have substantial difficulties defining religion for legal purposes. Essentialist definitions, even where they account for the inadequacy of framing religion as largely a matter of belief, oversimplify the question. Religion cannot be essentialized without being misrepresented. Polythetic definitions, on the other hand, cannot adequately capture only and all "religions," and lack the determinacy that characterize effective legal rules. How, then, should courts handle religious claims when both defining and not defining religion raises such difficult problems?

[173] SALER, *supra* note 2 at 76 (quoting Melford E. Spiro, *Religion: Problems of Definition and Explanation*, *in* ANTHROPOLOGICAL APPROACHES TO THE STUDY OF RELIGION 90 (Michael Banton, ed. 1966)); *see also* Durham & Sewell, *supra* note 6 at 28 ("a non-definition still leaves the question to the courts of dividing a religious sphere, where courts should not intrude, from a nonreligious sphere.").

[174] Farré, *supra* note 23 at 6. *See also* White, *supra* note 45 at 2.

> Our experience, supported we think by that of others, is that it is in fact quite difficult to talk about religion in a satisfactory way, whether we are trying to do so within a discipline such as law or psychology or anthropology, or while speaking in more informal ways with our friends and colleagues. There are many reasons for this: it is in the nature of religious experience to be ineffable or mysterious, at least for some people and some religions; different religions imagine the world and its human inhabitants, and their histories, in ways that are enormously different and plainly unbridgeable; and there is no super-language into which all religions can be easily translated, for purposes either of comparison or mutual intelligibility. What is more, it seems to be nearly always the case that one's religion's deepest truths and commitments, its fundamental narratives, appear simply irrational, even weird, to those who belong to another tradition, or are themselves simply without religion. This means that in any attempt to study and talk about a religion other than one's own there is a necessary element of patronization, at least whenever we are studying beliefs we could not imagine ourselves sharing.

IV. FAIRLY APPLYING A BIASED CONCEPT

How can we talk about religion from a legal point of view?[175]

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court held that both the Free Exercise Clause and the Establishment Clause mandated that generally applicable employment laws could not govern the terms of employment of clergy.[176] Institutions relying on this ruling may soon confront arguments that *Hossana-Tabor* does not apply because the employer is not religious.[177] The autonomy of religious institutions in the selection and terms of employment of their pastoral staff is but one instance of the First Amendment according "special solicitude" to religion where a definition may prove necessary.[178] Special legal status calls out for line-drawing. Given the lack of neutrality inherent in the concept of religion and the difficulties inherent in framing definitions generally, how should religion be defined for constitutional purposes?

Despite the significant investment of the non-legal academy in attempting to define religion, lawyers and judges in the United States have not taken advantage of these efforts. Thus far, "[t]he legal approach to definition in the United States has been independent of the anthropological or even social scientific approaches."[179] And legal scholars, like all the rest, "have written volumes on the subject without reaching anything approaching agreement."[180]

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of

[175] Augsburg, *supra* note 8 at 291.

[176] 132 S. Ct. 694 (2012).

[177] For a more thorough treatment of the problem of identifying religious institutions, *see* Zoë Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181 (2014).

[178] Andrew Koppelman has suggested that the Supreme Court's decisions concerning conscientious objector exemptions from the draft "placed pressure on the definition of religion that was becoming fairly unendurable by the time the Vietnam War ended." *See* KOPPELMAN, *supra* note 12 at 190 n.135.

[179] Donovan, *supra* note 6 at 70. Although legal scholars and judges have made little use of insights from social sciences, the definitions they have proposed can be grouped the same way. *See* Durham & Sewell, *supra* note 6 at 13 ("Definitions of religion in the legal scholarly literature and United States court cases largely follow the types of definitions advanced by social scientists.") & 17 ("Legal definitions of religion have largely followed social science trends.").

[180] Choper, *supra* note 6 at 579. *See also* Greenawalt, *supra* note 66 at 753 ("Academic commentators have come to startlingly diverse proposals."). *But see* Gunn, *supra* note 23 at 190-91 ("It is fairly common for legal analyses of freedom of religion or belief to avoid a serious discussion of the definitional problem, even among the most important works.").

religion, or prohibiting the free exercise thereof."[181] The Establishment Clause "mandates government neutrality between religion and religion, and between religion and nonreligion . . . [while] the Free Exercise Clause, . . . by its terms, gives special protection to the exercise of religion."[182] "It is widely believed that the First Amendment puts courts and legislatures of the United States in a double bind when it comes to religion: requiring them to remain neutral with respect to religious concerns, while simultaneously protecting these same concerns."[183] Obviously "[i]t is not logically possible for the government both to be neutral between religion and nonreligion and to give religion special protection."[184] Thus, "[t]he accommodation of religion gives rise to a puzzle in First Amendment theory: how to reconcile free exercise with establishment principles."[185]

Some have called "the profound tension, indeed paradox, between its religion clauses" the First Amendment's "great achievement."[186] The contradiction "reflects a struggle between two values, both of them crucial, neither of which can be accommodated perfectly."[187] The problem is that "[t]here is no neutral course out of a contradiction."[188]

Perhaps in partial recognition of the paradox, "[t]he Supreme Court has never seriously discussed how religion should be defined for constitutional purposes."[189] And as a result of the Court's demurrer, its jurisprudence has been deemed "incoherent."[190]

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

[182] Andrew Koppelman, *Is It Fair to Give Religion Special Treatment*, 2006 U. ILL. L. REV. 571, 573 (internal quotations omitted).

[183] *Id.* at 571.

[184] Koppelman, *supra* note 60 at 869-70. *See also id.* ("Some Justices and many commentators have therefore regarded the First Amendment as in tension with itself.").

[185] *Id.* at 869.

[186] WHITE, *supra* note 10 at 149. *See also id.* ("[T]he First Amendment has the great merit of insisting simultaneously upon the importance of religion and its danger.").

[187] *Id.* at 149. *See also* Hall, *supra* note 6 at 387 ("The challenge of the religion clauses then is to create a doctrine that can work simultaneously as a protection for religion and as a protection against religion.").

[188] Koppelman, *supra* note 183 at 573.

[189] Choper, *supra* note 6 at 579. *See also* GREENAWALT, *supra* note 1 at 125 ("[T]he Supreme Court understandably has remained relatively silent."); Laycock, *supra* note 94 at 1373 (noting "the Supreme Court's failure to develop any coherent general theory of the religion clauses."); Freeman, *supra* note 6 at 1524 ("Throughout its history, the Supreme Court has had surprisingly little to say about the meaning of religion."); Weinberger, *supra* note 6 at 736.

[190] Smith, *supra* note 50 at 1871; Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 49 (1999) ("The Supreme Court and commentators have been struggling for over a century to find an adequate definition or characterization of the term 'religion' in the First Amendment.").

Steven D. Smith laments, "[v]irtually no one is happy with the Supreme Court's doctrines and decisions in this area or with its explanations of those doctrines and decisions."[191] And "John Mansfield's view was probably representative: the Court's religion clause decisions reflected 'the incantation of verbal formulae devoid of explanatory value.'"[192] For his part, "Douglas Laycock has described the Court's establishment clause formula as 'so elastic in its application that it means everything and nothing.'"[193] Less charitably, the Supreme Court's religion clause jurisprudence "looks like a sort of schizophrenic, constitutional love-hate complex extending to religion both special immunities and special disabilities."[194] Much as it is in the social sciences, "[d]elimiting the term 'religion' in the first amendment . . . is not easily within reach of a practical solution."[195]

A. Legal Background

The Supreme Court's first modern discussion of the boundaries of legal religion came in 1879 in *United States v. Reynolds*.[196] There, a Mormon sought an exemption from a law prohibiting bigamy because it was specifically permitted by his religion.[197] The Court turned to how the Framers of the First Amendment had defined the term and, relying on writings by Jefferson and Madison,

[191] SMITH, *supra* note 8 at v.

[192] *Id.* at 3-4 (quoting John Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 846, 848 (1984)). *See also* SULLIVAN, *supra* note 8 at 155 ("[T]he legal limits to religious freedom are often expressed by rhetorically set boundaries that are strangely unhelpful when it comes to actual cases.").

[193] SMITH, *supra* note 8 at 3 (quoting Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 450 (1986)).

[194] Smith, *supra* note 50 at 1886.

[195] Bowser, *supra* note 6 at 163. *See also* SMITH, *supra* note 8 at 36 ("Extensive analysis has been dedicated to resolving, or at least reducing, this perceived conflict between the clauses.").

[196] 98 U.S. 145 (1879). Prior to this (and even after, for a time), the Court's statements concerning religion expressly "used traditional Western Christianity as a benchmark of religion." Durham & Sewell, *supra* note 6 at 17. In 1844, the Court declared Christianity part of the common law in the "qualified sense" that "it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." Vidal v. Girard's Executors, 43 U.S. (2 How.) 127, 198 (1844). Even more than a decade after *Reynolds*, the Court suggested that "we find everywhere a clear recognition of the same truth . . . that this is a Christian nation." Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1891). And as late as 1931, a majority of the Court was willing to declare that "[w]e are a Christian people . . . acknowledging with reverence the duty of obedience to the will of God." United States v. Macintosh, 283 U.S. 605, 625 (1931).

[197] *Id.* at 161.

concluded that although the Mormon practice of bigamy was religious, the claimant was not entitled to practice it.

A decade later, the Court considered a similar case in *Davis v. Beason*.[198] The Territory of Idaho had enacted law disenfranchising any person who belonged to an organization that supported polygamy.[199] Echoing James Madison's *Memorial and Remonstrance Against Religious Establishments*,[200] the Court declared that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[201] The Court, however, conflated the question of what constitutes religion with whether a religious practice can be legally prohibited.[202]

In 1931 at least four Justices remained committed to a belief-based theistic view of religion, when Chief Justice Hughes, joined by Justices Holmes, Brandeis, and Stone wrote "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[203]

It was not until 1944 that the Court began to retreat from an overtly theistic and specifically Christian formulation of what constitutes religion.[204] Throughout the second half of the nineteenth century, the Court had based its decision "on the reality of God and the truth of individuals' religious claims."[205] In *United States v. Ballard*, Justice Douglas, faced with "massive immigration," "a society increasingly influenced by the technological revolution" and "the changing faces of a pluralistic society,"[206] discarded the Court's increasingly uncomfortable role of arbitrating religious claims, when he wrote that "[m]en may believe what they cannot prove. They

[198] Choper, *supra* note 6 at 587 (citing 133 U.S. 333 (1890)).

[199] *Id.*

[200] *Id.* (citing J. Madison, *Memorial and Remonstrance Against Religious Establishments*, *reprinted in* THE COMPLETE MADISON 302 (S. Padover, ed. 1953)).

[201] *Id.* (citing 133 U.S. at 341-42).

[202] 133 U.S. at 341-42 ("Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind.").

[203] United States v. MacIntosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting).

[204] *See* Anand Agneshwar, *Rediscovering God in the Constitution*, 67 N.Y.U. L. REV. 295, 299 & nn.18-22 (1992) (citing *MacIntosh*, 283 U.S. at 625; Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1891); Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890); Vidal v. Girard's Executors, 43 U.S. (2 How.) 127, 198 (1844)); James McBride, *Paul Tillich and the Supreme Court: Tillich's "Ultimate Concern" as a Standard in Judicial Interpretation*, 30 J. OF CHURCH & STATE 245, 251 (1988).

[205] Agneshwar, *supra* note 205 at 299 n.21.

[206] *Id.* at 299-300.

may not be put to proof of their religious doctrines or beliefs."[207] And just a few years later, he abandoned specific references to Christianity in favor of recognition that "[w]e are a religious people whose institutions presuppose a Supreme Being."[208]

The content of beliefs, rather than belief itself, continued to be a major issue as the Court refined its understanding of religion through the twentieth century. *Torcaso v. Watkins*, decided in 1961, invalidated a Maryland law that required a declaration of a belief in God as a test for holding public office.[209] "In what has become a famous footnote, the Court noted that 'among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.'"[210]

The Court followed *Torcaso* with its seminal decision in *United States v. Seeger*.[211] *Seeger* concerned interpretation of the conscientious objector provisions of the Universal Military Training and Service Act, rather than the constitutional definition of religion for the First Amendment, but it is generally understood that Congress intended the Act to provide all of the protection constitutionally available, and it has been interpreted as essentially a constitutional decision.[212] This is not necessarily the case with all congressional enactments concerning religion. Congress has much greater leeway to define religion more narrowly in the statutory than the constitutional context.[213]

At the time, the Universal Military Training and Service Act provided an exemption from military service for those who:

> by reason of religious training or belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does

[207] 322 U.S. 78, 86 (1944).

[208] Zorach v. Clausen, 343 U.S. 306, 313 (1952).

[209] 367 U.S. 488 (1961).

[210] Ingber, *supra* note 6 at 257 (quoting *Torcaso*, 367 U.S. at 495 n.11).

[211] 380 U.S. 163 (1965).

[212] Malnak v. Yogi, 592 F.2d 197, 204 (3d Cir. 1979) (Adams, J., concurring) ("Although *Seeger* . . . turned on statutory interpretation . . . [it] remain[s] constitutionally significant."); Agneshwar, *supra* note 205 at 302 n.41; Ingber, *supra* note 6 at 260-61; McBride, *supra* note 205 at 250; Note, *Toward a Constitutional Definition of Religion*, *supra* note 6 at 589.

[213] The distinction is sometimes lost, especially on non-lawyers. *E.g.*, Smith, *supra* note 1 at 376 (suggesting that the Internal Revenue Service is "America's primary definer" of religion).

> not include essentially political, sociological, or philosophical views on a merely personal moral code.[214]

Seeger claimed that his opposition to war was based upon his "belief in devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[215] Relying on the writings of several modern theologians, "especially those of theologian Paul Tillich,"[216] the Court concluded that sincere religious belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption" also qualifies.[217] The Court explained that a belief was parallel to the "orthodox belief in God" if it was "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[218] Thus, the Supreme Court adopted an essentialist functional definition of religion by looking to what role it plays in an individual's life.[219]

The Court's reliance on Tillich, a theologian, is noteworthy. Tillich argued that "'Religion' is the state of being grasped by an ultimate concern, a concern which qualifies as all other concerns as preliminary, and which itself contains the answer to the question of the meaning of our life."[220] "Ultimate concern," in turn, he described as "the integrating center of the personal life"[221] to which "all other concerns are subordinated or sacrificed" and which is "experienced as promising 'total fulfillment.'"[222] Tillich also defined ultimate concern as "concern about what is experienced as ultimate,"[223] and he also formulated his definition, in earlier manuscripts, as "concern for the ultimate."[224]

[214] 50 U.S.C. App. § 456(j) (1958). This provision, enacted in response to conflicting decisions by lower courts on how broadly religion was to be understood for conscientious objector status, *see* Greenawalt, *supra* note 66 at 759-60 & n.27 (citing Kent Greenawalt, *All or Nothing at All: The Defeat of Selective Conscientious Objection*, 1971 SUP. CT. REV. 31, 37-38), superseded an earlier provision which granted conscientious objector status only to those who were "members of a well-organized sect or organization." Act of 18 May 1917, ch. 15, para. 4, 40 Stat. 78 (1919). The 1917 law was intended to deny exemptions to those who had private reservations about the war. McBride, *supra* note 205 at 252.

[215] 380 U.S. at 166.

[216] Greenawalt, *supra* note 66 at 760. *See also* Agneshwar, *supra* note 205 at 302; Ingber, *supra* note 6 at 259 n.148.

[217] 380 U.S. at 176.

[218] *Id.* at 166 & 176.

[219] Ingber, *supra* note 6 at 259 n. 149; Choper, *supra* note 6 at 589.

[220] SALER, *supra* note 2 at 106.

[221] *Id.* at 106.

[222] *Id.* at 108.

[223] *Id.* at 107-08.

[224] Smith, *supra* note 15 at 280.

But as James McBride explains, "Tillich's 'ultimate concern' cannot be reduced to an affective attitude alone."[225] Instead, "there exist two poles in 'ultimate concern': objective as well as subjective."[226] "Tillich believed that in true religious faith, 'the ultimate concern is a concern about the truly ultimate; while in idolatrous faith, preliminary, finite realities are elevated to the rank of ultimacy.'"[227] For Tillich, "[t]he best religion, in short, is one in which the central symbols nullify their own candidacies for ultimacy and take their significance only as manifesting and expressing Being Itself, which alone is properly deemed ultimate."[228] For Tillich, this is Christianity.[229] In applying Tillich's formulation of "ultimate concern," but avoiding the objective component of Tillich's theory, the Court distorted Tillich's theologicial views.[230]

Beyond this oversimplification and distortion, the use of Tillich's writings to establish a legal test is questionable. "Tillich's writings occupy volumes and are directed at theologians and lay believers, not lawyers. To extract from them the phrase, 'ultimate concerns,' and instruct judges to apply it as a legal formula seriously underestimates the subtlety of Tillich's thought and overestimates the theological sophistication of the participants in the legal process."[231] Nonetheless, *Seeger*'s holding, including reliance on the modified form of Tillich's theology remains the law.

A plurality of the Supreme Court took *Seeger* one step further in *Welsh v. United States*, by negating the need for an applicant to subjectively believe his views were "religious" to receive conscientious-objector status.[232] Welsh expressly disclaimed that his basis for seeking conscientious-objector status was based on religion, and struck the words "religious training and" from his application, leaving only his "belief."[233] Rather than religious training, Welsh's views were based on his study of history and sociology, his understanding of world politics, and his view that military enterprises were wasteful.[234] Four Justices concluded that although Welsh did not subjectively view his reasons for seeking an exemption as religious, they were tantamount to religious beliefs for purposes of the statute because they "'play the role of a religion and

[225] McBride, *supra* note 205 at 269

[226] *Id.*; *see also* Agneshwar, *supra* note 205 at 308 ("Tillich's conception of religion as an objective as well as a subjective component.").

[227] Agneshwar, *supra* note 205 at 308 (quoting PAUL TILLICH, DYNAMICS OF FAITH 12 (1957)).

[228] SALER, *supra* note 2 at 111.

[229] *Id.* at 109.

[230] Agneshwar, *supra* note 205 at 309.

[231] Choper, *supra* note 6 at 595.

[232] Greenawalt, *supra* note 66 at 760 (citing 398 U.S. 333 (1970)).

[233] Agneshwar, *supra* note 205 at 303 (citing 398 U.S. at 337)).

[234] Greenawalt, *supra* note 66 at 760.

function as a religion in his life.'"[235] In the thirty-five years since *Welsh*, the Supreme Court has addressed the definition of religion only twice, both times in dicta, and has not sought to modify its holding in *Seeger*.[236] In view of the Court's hands-off approach, several commentators have sought to fill the void. The two most notable approaches are those of Jesse Choper and Kent Greenawalt.

B. Academic Approaches

1. Jesse Choper's "Extratemporal Consequences"

Jesse Choper has suggested that the religion clauses protect actions that have "unique significance for believers" that makes it "particularly cruel" for the government to insist on conformation to generally applicable laws.[237] Choper contends that focusing on "extratemporal consequences,"[238]—essentially the threat of damnation—is more in line with the "conventional, average-person concept of religion" than Tillich's "ultimate concern."[239] Choper recognizes the danger of "parochialism and intolerance" in how judges might apply his framework,[240] but counters that it is superior to content-based approaches; it provides for the minimum content called for by the religion clauses in singling out religion; it has a substantial pedigree; and it fits with at least some doctrines of most major religions.[241]

Several commentators have been sharply critical of Choper's approach. Stanley Ingber has responded that "Choper's definition of religion, even by conservative standards, is grossly underinclusive."[242] Douglas Laycock notes that "many activities that obviously are exercises of religion are not required by conscience or doctrine."[243] Similarly, John Garvey explains that Choper's definition "might not apply to many matters of worship

[235] *Id.* (quoting 398 U.S. at 339)).

[236] Agneshwar, *supra* note 205 at 304-05. *See also* Peñalver, *supra* note 6 at 799 ("Subsequent Supreme Court decisions have not dealt directly with the issue of defining religion.").

[237] JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 74 (1995); Choper, *supra* note 6 at 597.

[238] CHOPER, *supra* note 237 at 77; Choper, *supra* note 6 at 599.

[239] Choper, *supra* note 6 at 599; *see also* CHOPER, *supra* note 237 at 77.

[240] CHOPER, *supra* note 237 at 77; Choper, *supra* note 6 at 599.

[241] CHOPER, *supra* note 237 at 78-80; Choper, *supra* note 6 at 599-601.

[242] Ingber, *supra* note 6 at 276.

[243] Laycock, *supra* note 94 at 1390. *See also* Garvey, *supra* note 60 at 793-94 ("The problem with Choper's suggestion . . . is that it threatens to remove coverage from a fairly broad range of cases that most of us think should get first amendment protection.").

whose abandonment, although undesirable, would not be visited with 'damnation or some like consequence.'"[244]

Ingber also observes that by limiting the inquiry to extra-temporal consequences, Choper *ipso facto* focuses on Western religions, excludes those (both Western and non-Western) that believe in the possibility of forgiveness in the afterlife (whether universal or specific),[245] and call on courts to immerse themselves in theological questions about whether and to what extent a particular action or inaction is compelled by fear of divine retribution.[246] Even taking the simplest example, "[m]any Christians are deeply unsure about the precise relation of sins in this life to the nature of existence in a possible afterlife."[247]

Choper's definition is not a functional one simply because it avoids the subjective inquiry into whether a particular belief is deeply and sincerely held. Rather, Choper presents us with a substantive definition in which he has defined out the substance of many (perhaps most) religions and religious actions.

2. Kent Greenawalt's Prototype Approach

In contrast to Choper's essentialist proposal, Kent Greenawalt and George Freeman have separately suggested analogical approaches to defining religion.[248] Greenawalt proposes a prototype analysis, suggesting that "courts should decide whether something is religious by comparison with the indisputably religious in light of the particular legal problem involved."[249] As with any polythetic definition, "[n]o single characteristic should be regarded as essential to religiousness,"[250] because "[n]o specification of essential conditions will capture all and only the beliefs, practices, and organizations that are regarded as religious in modern culture and should be treated as such under the Constitution."[251] Andrew

[244] Garvey, *supra* note 60 at 794.

[245] The doctrine of universal reconciliation (also called universal salvation or *apokatastasis*) continues to be an influence with the Universalist Unitarian movement, *see* Richard Bauckham, *Universalism: A Historical Survey*, 4 THEMELIOS 47 (1978), and among Trinitarian Christians has supporters including the noted Anglican bishop and scholar John A.T. Robinson, *see* JOHN A.T. ROBINSON, IN THE END GOD (1969); John A.T. Robinson, *Universalism—Is It Heretical?*, 2 SCOT. J. THEOL. 139 (1949).

[246] Ingber, *supra* note 6 at 276-77.

[247] Garvey, *supra* note 60 at 794.

[248] GREENAWALT, *supra* note 1 at 139; Greenawalt, *supra* note 66; Freeman, *supra* note 6. Greenawalt explains that he became aware of Freeman's article only after a final draft of his had been completed, and that they differ at several points in their methods and conclusions. Greenawalt, *supra* note 66 at 753 n.2.

[249] Greenawalt, *supra* note 66 at 753.

[250] *Id.*

[251] *Id.* at 763.

Koppelman has called these types approaches "[t]he best modern treatments of the definition problem."[252]

Eduardo Peñalver, on the other hand, has criticized Greenawalt's approach, claiming that the degree of commonality between the entity to be classified and religion depends a great deal on what is chosen as the paradigm.[253] Greenawalt acknowledges the criticism and responds by suggesting that beginning the analysis with "major world religions" rather than those most familiar in the United States may "at least moderate the tendency" of bias "toward features of Western religions."[254] Both Peñalver and Ingber also worry that the open-endedness of Greenawalt's approach is not sufficient to guide judges in making these determinations. Ingber claims that "without the ability to identify necessary and sufficient characteristics, courts would have no articulable basis for distinguishing between religious and nonreligious beliefs."[255] Ingber concludes that "[e]ach court thus is left to determine *sui generis* which beliefs qualify as 'religious' on the basis of whether or not they 'feel' religious."[256] He dismisses Greenawalt's approach as "not legal in nature."[257] Peñalver and Anand Agneshwar level a similar complaint, that Greenawalt's definition does "nothing to constrain the decisionmaking processes of individual judges. They would leave each judge completely free to determine whether or not a belief system is a religion according to the presence or absence of any single characteristic (or combination of characteristics) the judge chooses."[258]

Ingber, Peñalver, and Agneshwar go too far. A prototype analysis does not devolve automatically into completely unbridled discretion. As noted above, even where no single characteristic is

[252] KOPPELMAN, *supra* note 12 at 44; *see also* Koppelman, *supra* note 60 at 880.

[253] Peñalver, *supra* note 6 at 815.

[254] GREENAWALT, *supra* note 1 at 140 & n.57. *See also* Lupu, *supra* note 159 at 358 ("This methodology creates risks of discrimination against new faiths.").

[255] Ingber, *supra* note 6 at 274.

[256] *Id.*

[257] *Id.* This criticism is unfair. A test need not be essentialist to be "legal." First-year law students learn that "[p]roperty law has long recognized that property is a 'bundle of rights.'" Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 660 n.79 (2013). *See also* United States v. Craft, 535 U.S. 274, 278 (2002) (noting that "property" may be composed of a collection of individual rights which may be found in various combinations); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746 (1917) ("'Property' . . . consists of a complex aggregate of rights (or claims), privileges, powers, and immunities.").

[258] Peñalver, *supra* note 6 at 816. *See also* Agneshwar, *supra* note 205 at 316-17 ("The judge, in essence, is free to impose his or her own view of what should count as religion. This standard will lead courts to take practices of familiar religions as the 'norm.'").

essential, judges will still employ implicit understandings of what religion generally entails to arrive at a conclusion in a particular case.[259] Moreover, Greenawalt's prototype analysis may be more sensitive to religion as an element of culture or as lived experience, apart from its capacity to be linguistically compartmentalized. As Charles Taylor has noted, sometimes "the 'rule' lies essentially in the practice. The rule is what is animating the practice at any given time, and not some formulation behind it."[260]

That said, fair criticisms have been leveled at both Choper and Greenawalt's approaches. On the whole, each is subject to the same general limitations and problems to which the type of definition each proposes is generally subject. Choper's essentialist definition is too narrow, oversimplifies its object, and views religion from a Western, Christian, belief-based perspective. Greenawalt's approach is vague, permits judges a great deal of discretion, allows for the possibility of inconsistent results, and merely moves the question of Western bias from the definition itself to the selection of the prototype and the determination of salient characteristics. In light of the difficulties in defining religion generally, and especially as a legal term of art, perhaps the better solution is to avoid relying on the religion clauses in the first place where it is possible to do so.[261]

V. Avoidance Strategies

A. Dual Definitions

One attempt to avoid the difficulty, suggested initially by Lawrence Tribe and, later, a student writer in the Harvard Law Review, was to define religion differently in the Free Exercise Clause and the Establishment Clause. Tribe, writing in 1978, suggested that a more expansive understanding of religion in the free exercise context was necessary to accommodate the growing number of "recognizably legitimate" forms of religion, while a narrower understanding of religion under the establishment clause was necessary to preserve "humane" government programs from

[259] *See* Farré, *supra* note 23 at 6; SALER, *supra* note 2 at 76; Durham & Sewell, *supra* note 6 at 26-27.

[260] KOPPELMAN, *supra* note 12 at 44 (quoting Charles Taylor, *To Follow a Rule*, *in* PHILOSOPHICAL ARGUMENTS (1995)).

[261] I do not mean to suggest that we should continue to rely on the religion clauses without defining religion, as discussed *supra* at Part III.B.4.b. I am suggesting that we avoid the need to rely on the clauses where they can be avoided by seeking resolution of claims under other provisions of law without reaching the need to address that claim under the religion clauses.

being constitutionally impermissible.[262] Tribe's proposal was to treat anything "arguably religious" as religious under the Free Exercise Clause, and anything "arguably non-religious" as not religious for purposes of the Establishment Clause.[263] The Harvard Note suggested that a bifurcated definition would "respond more sensitively to the values underlying the religion clauses," would "perform[] the heuristic function of distinguishing and highlighting the purposes of each clause" and would "reduce the analytic tension between those clauses" thereby minimizing any judicial concern with spillover from one clause to another.[264]

Overtly defining religion differently for the two clauses, however, has always been controversial, most obviously because the word "religion" appears in the First Amendment only once.[265] As Justice Rutledge observed, "The word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty."[266]

Additionally, defining religion differently in the two clauses would create a three-tiered system of ideas:

> those that are unquestionably religious and thus both free from government interference and barred from receiving government support; those that are unquestionably non-religious and thus subject to government regulation and eligible receive government support; and those that are only religious [for purposes of the Free Exercise Clause] and thus free from governmental regulation but open to receipt of government support.[267]

Thus, borderline religious beliefs and new religious movements would be in a more advantageous position than old, well-established religions.[268] In other words, the dual definition approach "clearly discriminates against traditional religion" because what may be

[262] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 826 (1st ed. 1978).

[263] *Id.* at 828.

[264] Note, *supra* note 6 at 1085-86.

[265] Durham & Sewell, *supra* note 6 at 14. *See also* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof.").

[266] Everson v. Bd. of Educ., 330 U.S. 1, 32 (1946) (Rutledge, J., dissenting).

[267] Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979) (Adams, J., concurring).

[268] Durham & Sewell, *supra* note 6 at 14; Feofanov, *supra* note 6 at 338-39; Ingber, *supra* note 6 at 288-91; Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 834-35 (1984).

conventionally viewed as secular beliefs may win free exercise protection without corresponding establishment limitations.[269] This would be "free from governmental regulation but open to receipt of government support."[270]

Finally, several authors have suggested that two definitions may be unnecessary because the legal tests for each clause differ, and the Establishment Clause focuses more on the conduct of the government than the nature of a group claiming a privilege or exemption.[271] Indeed, the Supreme Court may already understand "religion" more narrowly in the establishment context.[272] In the face of this criticism, Tribe "withdrew his suggestion from the subsequent edition of his hornbook."[273]

B. Free Exercise as Free Speech

A more promising avenue, at least for free exercise cases,[274] is to avoid the need to define religion by instead evaluating the case under the Free Speech Clause. "Since at least 1890, the free exercise clause has been construed to protect forms of public expression, as well as the mere possession of religious belief."[275] "The freedom of expression and association guarantees of the first amendment impose some significant, albeit as yet sketchily defined, limitations on the government's ability to support, or require citizens to support, particular beliefs or groups."[276]

Many, perhaps all, religious activities are a form of expression, and therefore protected by the Free Speech Clause.[277] Choper has observed that "almost all decisions of the Supreme Court that have

[269] Agneshwar, *supra* note 205 at 312.

[270] Malnak v. Yogi, 592 F.2d 197, 212 (Adams, J., concurring).

[271] Durham & Sewell, *supra* note 6 at 15 (collecting authority).

[272] Galanter, *supra* note 156 at 265.

[273] Ricks, *supra* note 7 at 1059 n.22.

[274] Some Establishment Clause claims may also raise Free Speech issues, such as blasphemy legislation, but there is a more substantial overlap between Free Exercise and Free Speech protections. *See* GREENAWALT, *supra* note 1 at 152.

[275] Merel, *supra* note 6 at 819.

[276] Choper, *supra* note 6 at 610.

[277] GREENAWALT, *supra* note 1 at 29 ("The right to engage in religious expression involves both free speech and free exercise") & 230 (citing Marshall, *supra* note 40 at 392-401). *See also* SULLIVAN, *supra* note 8 at 149 (noting that many religious activities are protected by the Free Speech clause); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 121 (2002) ("[m]any religious activities have an expressive dimension."); Choper, *supra* note 6 at 581 ("Under well developed constitutional principles, however, most free exercise cases either could have been, or were in fact, resolved under constitutional provisions other than either of the religion clause."); Merel, *supra* note 6 at 820 ("The coextensiveness of the free speech and free exercise provisions is strongly suggested in the Supreme Court's recent decision in *Wooley v. Maynard*.").

vindicated individual rights by invoking the Free Exercise Clause would just as easily have been resolved under other provisions of the Constitution and thus require no definition of religion at all."[278] And in fact, "[s]ometimes the Court has bracketed the two freedoms [religion and speech] together to make them functionally equivalent. . . [this] is so common that it has led one commentator to conclude that free exercise has no independent content—that all religious liberty claims can be solved as free speech claims in disguise."[279] William Marshall has gone so far as to suggest that the only consistency in the Court's free exercise jurisprudence is its "extraordinary reluctance to vindicate free exercise claims outside those protected under the speech clause."[280] Alan Brownstein similarly observes that "when we scrutinize case law during [the 1990s], most of the protection provided religious activity occurred under the auspices of the Free Speech Clause, not the Free Exercise Clause."[281]

Marshall has also suggested that freedom of religion issues might benefit from being subject to a Speech Clause analysis, and notes several cases in which the overlap was substantial.[282] Analyzing ostensibly religious claims under a Free Exercise rubric is not new. As early as 1943, the Supreme Court invalidated a compulsory flag-salute requirement that conflicted with the religious tenets of Jehovah's Witnesses. The Court framed the issue as a matter of speech, regardless of the underlying religious basis for the objection,[283] and concluded that the First Amendment as a whole was intended to "reserve from all official control" "the sphere of intellect and spirit."[284]

Unlike Brownstein, however, Marshall advocates for construing free exercise as a subset of speech.[285] Public prayer and proselytization are literally speech; other religious practices

[278] CHOPER, *supra* note 237 at 64.

[279] Garvey, *supra* note 60 at 782 (citing William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983)).

[280] William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE WESTERN U.L. REV. 357, 366 (1989). *See also* Marshall, *supra* note 279 at 545-56 ("Indeed, the relationship between religious exercise and expression is so extensive that in nearly all cases in which the Court has sustained a litigant's religious objections to a religiously neutral law or regulation, it has done so with reference to freedom of expression.").

[281] Brownstein, *supra* note 277 at 143.

[282] Marshall, *supra* note 40 at 392-93 (citing Rosenberger v. Univ. of Va., 115 S. Ct. 2510 (1995); Capital Square Review & Advisory Bd v. Pinette, 115 U.S. 2440 (1995); Wooley v. Maynard, 430 U.S. 705 (1977); Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[283] Marshall, *supra* note 280 at 364 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634-35 (1943)).

[284] *Barnette*, 319 U.S. at 642.

[285] Marshall, *supra* note 279 at 546.

including observing dietary norms, standards of grooming and dress, and participation in rituals contain a communicative element.[286] If nothing else, it communicates to co-religionists the commitment of the individual, and may identify the individual to outsiders.[287] Thus, Marshall contends, construing free exercise as a subset of speech would avoid the need to draw lines between religious belief and nonreligious ideologies or communities because such government compulsion is prohibited "whether or not their teachings or tenets are generally considered to be 'religious.'"[288]

"[T]he subsuming of religion under the rubric of speech[] has been accepted largely uncritically,"[289] and Brownstein contends that "[e]valuating burdens on religious practices as the regulation of speech has some virtues, but the problems with this approach may outweigh its benefits."[290] He contends that "[f]ree speech doctrine undercuts Establishment Clause holdings in two key respects. First speech doctrine is grounded on a non-discrimination principle that precludes, or at least requires a compelling justification for, treating one message differently from another because of its communicative impact. . . . Second, free speech doctrine is conventionally understood and accepting a more limited understanding of state action than Establishment Clause cases recognize."[291]

In *Employment Division v. Smith*, the Supreme Court held that (with two narrow exceptions) "the exercise of religion received no constitutional protection against neutral laws of general applicability."[292] Brownstein views *Smith* as insufficiently protective of religious freedom and suggests that post-*Smith*, the general application of rational-basis review has shifted the protection of religious liberty to Congress and state legislatures. In this context, where protection of religious freedom by the political branches has become more important than it previously was, "conceptualizing religion as speech . . . creates a particularly difficult issue for legislative accommodations and exemptions of religious practice."[293] In other words, after *Smith*, if free exercise is speech, then statutory religious exemptions become difficult to justify and uphold. "[A]n expansive vision of the religion as speech

[286] Choper, *supra* note 6 at 582 ("[T]here is no doubt that most rituals, rites, or ceremonies of religious worship—such as fasting, confessing, or performing a mass—that may be denominated as constituting 'action' rather than 'belief' or 'expression,' fall squarely within the protection the Court has afforded to nonverbal 'symbolic speech.'").

[287] Brownstein, *supra* note 277 at 121.

[288] Choper, *supra* note 6 at 610.

[289] Brownstein, *supra* note 277 at 120.

[290] *Id.* at 120.

[291] *Id.* at 145.

[292] Brownstein, *supra* note 277 at 138 (citing Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872, 877 (1990)).

[293] Brownstein, *supra* note 277 at 164.

that is subsumed under and protected by the Free Speech Clause precludes the adoption of many religion-only exemptions and accommodations and requires more even-handed treatment between religious and secular beliefs and viewpoints."[294]

Brownstein concedes, however, that "there is enough of a speech dimension to many religious activities, and religions play an important enough role in the marketplace of ideas" to suggest that religion should be characterized as speech and protected under the Free Speech clause "sometimes" and "with caution."[295] In short, "most violations of the free exercise protection may be vindicated without reference to the free exercise clause and thus require no constitutional definition of 'religion' at all."[296]

"Any judge faces two sets of choices in a case. First she must decide how to resolve each of the issues before her. Second, she must also decide the order in which she will resolve these issues."[297] This "decisional sequence is critical in several respects."[298] A busy judge may discuss the simplest theory, issue a judgment, and decide not to reach the alternatives. A more thorough judge may wish to discuss each alternative, investing more time initially, but hedging against the possibility that an appellate court might disagree with her view of a single basis for disposition. "Presently, no doctrine constrains the judge's discretion to choose" when deciding whether to discuss one outcome-dispositive legal theory among several, or multiple independently dispositive legal theories.[299]

James Boyd White has suggested that "'the wisest position for the law is a frank recognition that it cannot understand or represent religious experience with anything like fullness or accuracy.'"[300] At

[294] *Id.* at 169. The passage of the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4), which intended to re-establish the pre-*Smith* standard of review, 42 U.S.C. § 2000bb(b)(1), only partially alleviates Brownstein's concerns. The Supreme Court held the RFRA unconstitutional as applied to the states, City of Boerne v. Flores, 521 U.S. 507, 511 (1997), but continues to enforce it against the federal government, Gonzales v. O Centro Espírita Beneficiente União do Vegetal, 548 U.S. 418, 423-24 (2006). *See generally*, Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 161-62 (2014).

[295] *Id.* at 182.

[296] Choper, *supra* note 6 at 581.

[297] Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 2 (2010).

[298] *Id.* at 3.

[299] *Id.* at 21.

[300] Augsburg, *supra* note 8 at 293 (quoting WHITE, *supra* note 10 at 130). *See also* Jamal & Panjwani, *supra* note 8 at 76:

> When courts cannot avoid dealing with religious definitions, however, they must encounter the fact that they are very ill-equipped to make such determinations for two reasons: (1) legally, because rights to freedom of religion are subjectively defined and based, ultimately, on individual perception and conviction, without there being any sort of objective metric

least in some cases, the Free Speech Clause may provide a way for a court to adjudicate religiously-based claims without having to attempt to understand or define religion or religious experience. And given that judges generally have discretion to tackle issues in the order that seems best, when there is a nonfrivolous claim or defense in a Free Exercise case that places a party's status as a religion in question, judges should first analyze the claim under the Free Speech Clause to avoid the need for a definition if possible.

VI. Conclusion

"The First Amendment . . . is more than an exercise in social engineering. It is an imported cultural symbol in the society that helps define who we are as a nation."[301] But its neutral application requires us to recall that "law is embedded in and indissociable from its cultural context . . . far from being neutral it is ideologically grounded in politically weighty presuppositions."[302] Therefore, "any account of religious freedom will necessarily depend on—and hence will stand or fall along with—more basic background beliefs concerning matters of religion and theology."[303] Critical and informed reflection on the idea of religion itself is necessary to fairly apply a legal category of "religion."[304] Any attempt to define religion fairly must account for the tendency of judges and courts to view "religion" through a Protestant lens focused on belief, as well as the origin of the idea of religion itself in Christian apologetics.

But attempts to define "religion" for legal purposes suffer from the same limitations as attempts to define religion for other purposes, along with many of the same disabilities faced by definitions generally. While some attempts may be better suited to particular contexts, or more sensitive to particular concerns, definitions of religion as a whole are uniformly inadequate.[305]

> that the courts could use to assess religious definition; and (2) sociologically, because there is no way to interrogate a religious tradition as to its terms, meanings, or definitions since religious traditions can speak only through individual adherents.

[301] Marshall, *supra* note 40 at 402.

[302] Margaret Davies, *Pluralism in Law and Religion*, *in* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 72-99, 72 (Peter Cane et al., eds. 2008).

[303] SMITH, *supra* note 8 at 63.

[304] Berger, *supra* note 64 at 42 ("Meaningful study of the relationship between law and religion also resists disciplinary boundaries, inviting and perhaps demanding the insights of history, philosophy, sociology, and anthropology.").

[305] Jamal & Panjwani, *supra* note 8 at 76:

> When courts cannot avoid dealing with religious definitions, however, they must encounter the fact that they are very ill-equipped to make such determinations for two reasons: (1) legally, because rights to freedom of religion are subjectively defined and based, ultimately, on individual

Although it is far from a complete solution, shifting the inquiry, where possible, to the Free Speech Clause alleviates some of the pressure on the religion clauses to define religion. At the same time, "religious studies can help lawyers and judges to acknowledge the religiousness of Americans without establishing it—by recognizing the instability of religion as a category for American law."[306]

perception and conviction, without there being any sort of objective metric that the courts could use to assess religious definition; and (2) sociologically, because there is no way to interrogate a religious tradition as to its terms, meanings, or definitions since religious traditions can speak only through individual adherents.

[306] Sullivan, *supra* note 29 at 442.

RELIGION, CONSCIENCE, AND BELIEF IN THE EUROPEAN COURT OF HUMAN RIGHTS

Aaron R. Petty[*]

Religions are not treated equally by the law; religion is not absent from the substance of the law.[†]

Europe is suffused with Christianity, or at least memories of its past influence. [‡]

I. INTRODUCTION

Historically, Europeans have not always been especially kind to each other, especially when there are religious differences between them. Religion has been the cause of controversy and war in Europe for centuries.[1] The last hundred years alone has seen attempts at exterminating substantial parts of populations identified by their religious difference: Armenian Christians, Ashkenazi Jews, and Bosnian Muslims have all faced systemic state-sponsored violence. Indeed, some European states exist as the result of "violent conflicts that once had their origins in religious enmity."[2] But the history of religion in Europe is not wholly dark. Partly in response to this history of bloodshed, the modern notion of human rights developed in Europe as well. "[T]he charter myth of modern law . . . describes a progressive growth of freedom, above all freedom of and from religion, following the European wars of religion that took place in

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[†] Anthony Bradney, *Faced by Faith*, *in* FAITH IN LAW: ESSAYS IN LEGAL THEORY 89-105, 89 (Peter Oliver, et al. eds., 2000).

[‡] Andrew Higgins, *A More Secular Europe, Divided by the Cross*, N.Y. TIMES, June 18, 2013, at A1.

[1] Gordon A. Christenson, *"Liberty of the Exercise of Religion" in the Peace of Westphalia*, 21 TRANS. L. & CONTEMP. PROBS. 721, 722 (2013) ("Violence and the wars of religion before and after the Protestant Reformation and Catholic Counter-Reformation, in particular, exhausted Europe. . . . [and afterward] sectarian violence actually increased inside states from 1550 to 1750."). *See also* Mark Weston Janis, *The Shadow of Westphalia: Majoritarian Religions and Strasbourg Law*, 4 OX. J.L. REL. 75, 75 (2015) ("From the Roman Empire to our times, the Continent has witnessed one after another fierce religious struggle."); BENJAMIN J. KAPLAN, DIVIDED BY FAITH: RELIGIOUS CONFLICT AND THE PRACTICE OF TOLERATION IN EARLY MODERN EUROPE 2-7 (2007).

[2] Peter Cumper & Tom Lewis, *Introduction: Freedom of Religion and Belief—The Contemporary Context*, *in* RELIGION, RIGHTS AND SECULAR SOCIETY: EUROPEAN PERSPECTIVES 1-16, 5-6 (Peter Cumper & Tom Lewis, eds., 2012).

the sixteenth and seventeenth centuries."[3] But while religion was the cause of conflict, the idea of human rights as a means to control and prevent conflict drew heavily upon religious ideas as well.

Today, Europe's relationship with religion remains "a complicated matter."[4] Within many states, "religion itself has been a formative element in the creation of the national identities."[5] At the same time, however, "Europe has long been religiously and culturally diverse,"[6] and this diversity prompts continuing debate over the proper role of religion in European integration.[7] "Especially since the terrorist outrages of 9/11—and in Europe itself, 11 March 2004 in Madrid and 7 July 2005 in London—there has been something of a moral panic not just about jihadist Islam but more generally about the role of religion in public life."[8]

The Maastricht Treaty calls for European nations to "'contribute to the flowering of the cultures of the member states . . . and at the same time bring[] the common cultural heritage to the fore.'"[9] Is that common heritage "rooted in religion as claimed by some?"[10]

[3] Robert Yelle, *Moses' Veil: Secularization as Christian Myth*, *in* AFTER SECULAR LAW, 23-42, 23 (Winnifred Fallers Sullivan, et al. eds., 2011).

[4] Cumper & Lewis, *supra* note 2 at 1 (internal quotation omitted).

[5] *Id*. at 6. *See also id*. ("there seems little doubt that Christianity has had a considerable impact on European public life, as illustrated by the fact that Europe's working week and public holidays tend to be reflective of the Christian calendar.").

[6] Lourdes Peroni, *On Religious and Cultural Equality in European Human Rights Convention Law*, 32 NETH. Q. HUMAN RTS. 231, 231 (2014); *see also* Silvio Ferrari, *Law and Religion in Europe*, *in* RELIGION IN THE 21ST CENTURY: CHALLENGES AND TRANSFORMATIONS 149-59, 149 (Lisbet Christoffersen, et al. eds., 2010) ("Religious plurality is a well-known fact in Europe.").

[7] Cumper & Lewis, *supra* note 2 at 6 ("there exists a kaleidoscope of diversity on the status of religion in European societies"); Lucian N. Leustean & John T.S. Madeley, *Introduction*, *in* RELIGION, POLITICS AND LAW IN THE EUROPEAN UNION 1-16, 1 (Lucian N. Leustean & John T.S. Madeley, eds., 2010) ("[A] number of the most controversial issues associated with the ongoing project of European integration have indeed involved deep disagreement about the role of religion in politics and public life.").

[8] Leustean & Madeley, *supra* note 7 at 6. Jihadist Islam, however, remains at the forefront of the public discussion. *See* Paul Cliteur, et al., *The New Censorship: A Case Study of Extrajudicial Restraints on Free Speech*, *in* FREEDOM OF SPEECH UNDER ATTACK 291-315 (Afshin Ellian & Gelijn Molier, eds. 2015). And given the *Charlie Hebdo* shooting in January 2015 and the attempted train shooting in August 2015, this appears unlikely to change in the near-term. *See also* Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. 663, 744 (2011) ("Since 2001, the Article 9 jurisprudence of the European Court of Human Rights has raised anew the question of the relationship between religion and the public order.").

[9] Lucia Faltin, *Introduction: The Religious Roots of Contemporary European Identity*, *in* THE RELIGIOUS ROOTS OF CONTEMPORARY EUROPEAN IDENTITY, 1-13, 6 n.14 (Lucia Faltin & Melanie J. Wright, eds., 2007).

[10] Leustean & Madeley, *supra* note 7 at 1.

Many would see Europe's Christian roots as an obvious necessary element of European identity, shaping even secular or "post-Christian" society.[11] The question, then, is how to resolve the tension between Europe's Christian roots, its current diversity, and the ambition of liberal states to avoid discriminating in matters of religion. More than half a century ago, the ratification of the European Convention on Human Rights (ECHR or Convention) was a notable, but incomplete, step toward resolution. To move forward we must now ask whether Europe "can attend to human rights claims arising from this cultural and religious diversity in more inclusive and egalitarian ways."[12]

Here, I suggest that a more critical view toward the notion of "religion" under Article 9 by the European Court of Human Rights (ECtHR or Court) would take an important step toward a more inclusive and egalitarian human rights jurisprudence. In other work, I have shown that "religion" as a legal term of art is generally understood by judges to refer primarily to belief, and that this understanding privileges Christianity (specifically Protestant Christianity, and to a lesser extent other confessional religions such as Islam) at the expense of others, such as Judaism and Hinduism,[13]

[11] Grace Davie, *Understanding Religion in Europe: A Continually Evolving Mosaic*, *in* RELIGION, RIGHTS AND SECULAR SOCIETY: EUROPEAN PERSPECTIVES 251-270, 253 (Peter Cumper & Tom Lewis, eds., 2012) ("The role of Christianity in shaping European culture is undisputed."); Camil Ungureanu, *Europe and Religion: An Ambivalent Nexus*, *in* LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 307-333, 309 (Lorenzo Zucca & Camil Ungureanu eds., 2012) ("The history of Europe and Christianity are inextricably intertwined."); Danchin, *supra* note 8 at 689 (quoting Charles Hirschkind, *Religious Difference and Democratic Pluralism: Some Recent Debates and Frameworks*, 44 TEMENOS 123, 126 (2008)) ("'Christian heritage is essential to the civilizational identity of Europe.'")).

Additionally, this dissonance can be seen in "[t]he quarrel over the exclusion of Christianity's contribution to Europe's heritage in the proposed European constitutional treaty[, which] sparked much debate and commentary. A reference to Christianity was absent from the initial draft of the preamble, which claimed that modern European civilization's values of freedom, equality of persons, reason, and the rule of law were derived from Europe's classical heritage and the Enlightenment. European governments and the late Pope John Paul II raised voices of dissent and argued that this represented an attempt by European intellectuals and European political leaders to airbrush fifteen hundred years of Christian history from Europe's political memory and was tantamount to 'an exercise in self-afflicted amnesia.'" *See* Paul E. Kerry, *The Quarrel over the Religious Roots of European Identity in the European Constitution and the Nature of Historical Explanation: A Catholic Coign of Vantage*, *in* THE RELIGIOUS ROOTS OF CONTEMPORARY EUROPEAN IDENTITY, 168-178, 168 (Lucia Faltin & Melanie J. Wright, eds., 2007).

[12] Peroni, *supra* note 6 at 231. If nothing else, familiarity with the foundations of religious identity in Europe is required for informed discourse in confronting ideological extremism. Faltin, *supra* note 9 at 2.

[13] I recognize the terms are anachronistic, but for present purposes they are sufficient to convey the meaning I intend.

that place greater emphasis on community, practice, ethics, or ritual.[14]

In this paper, I suggest that the notion of "religion" as the term is used in Article 9, and as applied by the Court (and previously by the European Commission of Human Rights) is biased in favor of Christianity. As Timothy Macklem observes, "[w]e are concerned here, not to know how the term religion *is* used, whether in the world at large or in the legal community, but to know how the term religion *should* be used, in the interpretation, the application, and the justification of a fundamental freedom."[15]

In Part II, I begin by reviewing the position of religion in Europe and the special role of religion in the origin of the Westphalian system, the emergence of liberalism and, ultimately, modern human rights. In Part III, I turn to the specific right at issue, that of religion or belief under the ECHR. I discuss the origin of the Convention, review the structure of the Court and Commission it created, and take account of the analytical approach applied in addressing claims arising under Article 9.

Part IV suggests that Christian bias may be observed both in the terms of the Convention itself, and in its application by the Court. I begin in Part IV.A with text of the Convention and its *traveaux préparatoires*. I suggest that in addition to the overt religious statements of some of the participants in the drafting process, the final language used in the text of the Convention introduces inequality between religions based on the relative centrality of belief by tacitly equating religion with "belief" and with a similarly vague and belief-based notion of "conscience."

Part IV.B discusses how the Court has exacerbated the problems inherent in the convention through Court-made doctrines. Part IV.B.1 addresses the *forum internum* and *forum externum*, a historical theological dialectic the Commission repurposed as a legal doctrine. Here, I suggest that the broad notion of "religion" evidenced by some of the Commission's decisions is seriously undermined by the Court's focus on the *forum internum*, although this could be improved with more nuanced understanding. Part IV.B.2 suggests that other general doctrines the Court follows, including the margin of appreciation, consensus, and subsidiarity combine to make both a pan-European understanding of religion, and judicial remedies for wronged individuals difficult to obtain.

[14] Aaron R. Petty, *Accommodating "Religion"*, 83 TENN. L. REV. ___, 1-2 & 5-8 (forthcoming 2016); Aaron R. Petty, *The Concept of "Religion" in the Supreme Court of Israel*, 26 YALE J.L. & HUMAN. 211, 254-59 (2014); Aaron R. Petty, *"Faith, However Defined": Reassessing* JFS *and the Judicial Conception of "Religion"*, 6 ELON L. REV. 117, 135-42 (2014).

[15] Timothy Macklem, *Reason and Religion*, *in* FAITH IN LAW: ESSAYS IN LEGAL THEORY 69-87, 70 (Peter Oliver, et al. eds., 2000).

Part IV.B.3 discusses difficulties in defining religion under Article 9.

Part V steps outside of the European perspective to reflect on how the current ECHR system reflects a Western and ultimately Christian understanding of religion, and suggests that this understanding is inherently in tension with the liberal human-rights objective of protecting freedom of religion. Both the modern Westphalian state and modern international law—including principles of religious freedom—were founded on the understanding that religion was primarily a private, internal matter of belief. The protection of freedom of religion by the state is therefore subject to, if not contingent on, the degree to which the religion in question resembles Protestant Christianity. Part VI offers a brief conclusion.

II. EUROPE, THE WESTPHALIAN STATE, AND THE ORIGIN OF HUMAN RIGHTS

A. Religion in Europe

The significance of Christianity in modern Europe is both formative and unifying and, simultaneously, marginalized in a continuing march toward secularization. From an American perspective, "[i]n a continent divided by many languages, vast differences of culture and economic gaps . . . centuries of Christianity provide a rare element shared by all of the . . . members of the fractious union."[16] American journalists are hardly alone in this view. To the contrary, Western Christianity as a *sine qua non* of European identity is long standing:

> The first time medieval chroniclers described an event as 'European' was the victory of Christian Frankish forces over a Muslim army at Poitiers in 732 . . . with the crusades of the eleventh century, Western Christianity became synonymous with a European identity which defined itself against the Islamic and Byzantine Orthodox Christian civilizations to its south and east.[17]

Europe "split up into Catholic, Protestant and Orthodox communities, with dividing lines that frequently crossed the same town or the same region. But this plurality was contained within a

[16] Higgins, *supra* note ‡ at A1.

[17] RONAN MCCREA, RELIGION AND THE PUBLIC ORDER OF THE EUROPEAN UNION 18 (2010). This continues today, as "some prominent Christian Democrats . . . have objected [that] Turkey's strong Islamic heritage prevents it from sharing core Christian values which they insist underlie the whole EU construct." Leustean & Madeley, *supra* note 7 at 9.

shared horizon, defined by reference to the same sacred books."[18] In more recent years, "[t]his common horizon has become progressively weaker" due to "immigration, which brought into Europe an increasing number of people who do not know and do not share some central features of the European cultural heritage" and "individualism, which questions assumptions that used to be taken for granted."[19]

On the side of individualism, or liberalism more generally, one can see that "[f]rom 1973, when the Copenhagen Declaration on European Identity was promulgated, the fundamental elements which were identified as corresponding to the 'deepest aspirations' of Europe's people were presented in political, legal and philosophical terms without prejudice to cultural specificities," which is to say, without express reference to a shared Christian heritage.[20] Some have claimed that this "failure to acknowledge the historic debt can be traced directly to a 'Christophobic' mind-set which is all of a piece with the progressive marginalisation of religious influences in Europe's public life."[21]

But neither religion generally nor Christianity in particular have disappeared even as recognition for its role in European identity and culture has been withdrawn. "Religious institutions retain important roles in areas such as healthcare and education in almost all [EU] Member States, while many states retain official links to particular Christian denominations which remain an important element of national identities."[22] Moreover, the incorporation of states formerly members of the Warsaw Pact has changed the landscape as well, and not necessarily in ways that mesh seamlessly with the more secular states of Western Europe.[23] In short, "at a time when

[18] Ferrari, *supra* note 6 at 149. "Of course, Jewish and Muslim communities have been living in Europe for a long time. The Jews, however, were faced early on with the alternative between assimilation or persecution (and they chose the first, without avoiding the second), and the Muslims were confined to a peripheral region of Europe after the Catholic 'reconquista' of Spain in the fifteenth century. As a consequence, religious plurality in Europe has been predominantly intra-Christian." *Id.* at 149.

[19] *Id.* In addition, "[t]here is a widespread intolerance of Islam, a re-emergence of anti-semitism, and heavily majoritarian cultures, often hostile to minority faiths, all over." Janis, *supra* note 1 at 76.

[20] Leustean & Madeley, *supra* note 7 at 6.

[21] *Id.* at 2.

[22] MCCREA, *supra* note 17 at 17. At least a dozen European states formally establish a religion. Janis, *supra* note 1 at 80.

[23] "The increase in the significance of religious factors for the explanation and interpretation of social, political, and international conflicts and changes also applies to Europe, which has changed greatly as a result of the collapse of state socialism and the re-entry of Eastern and Central European countries into European history. In particular, the increased status in Eastern Europe of national churches, religious movements, and ethnic conflicts within the religious sphere is obvious." Detlaf Pollack et al., *Church and Religion in the Enlarged Europe:*

Europe needs solidarity and a unified sense of purpose to grapple with its seemingly endless economic crisis, religion has instead become yet another source of discord."[24]

B. The State

Modern Western notions of religious liberty begin with the separation of political and religious authority. Some have claimed that "[t]he Western tradition of church-state separation and religious freedom is often, and properly, traced back to the dualistic teaching of the New Testament, succinctly expressed in Jesus' admonition to '[r]ender . . . unto Caesar the things which be Caesar's, and unto God the things which be God's.'"[25] More immediately, though, the role of religion as separate from and generally subordinate to the state stems from the Investiture Controversies of the eleventh and twelfth centuries and the Peace of Westphalia at the conclusion of the thirty years' war in 1648. "[S]ystematic theorizing about the relation between church and state began in earnest with the so-called Investiture Controversy of the eleventh and twelfth centuries."[26] The result was that the largely exclusive jurisdictional spheres for temporal and spiritual rulers that emerged from the controversy "distinguished European civilisation from the Caesaro-Papism of the Eastern Orthodox Church and Islamic approaches which did not differentiate between the religious and political domains."[27]

Once separated from the authority of temporal rulers, dissident religious views could be tolerated without threatening the political order. The Peace of Westphalia "tolled the bell both on the Catholic Church's pretension to be the common faith of Western Europe."[28] The Treaty of Münster (one of the constituent treaties of the Peace of Westphalia) guaranteed individuals "the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God."[29] "[T]he non-established religious

Analyses of the Social Significance of Religion in East and West, *in* THE SOCIAL SIGNIFICANCE OF RELIGION IN THE ENLARGED EUROPE: SECULARIZATION, INDIVIDUALIZATION, AND PLURALIZATION 1-26, 1 (Detlaf Pollack, et al. eds., 2012).

[24] Higgins, *supra* note ‡ at A1.

[25] Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1873 (2009) (quoting Luke 20:25).

[26] *Id.* at 1873.

[27] MCCREA, *supra* note 17 at 18.

[28] Janis, *supra* note 1 at 76.

[29] Christenson, *supra* note 1 at 741 (quoting PEACE TREATY BETWEEN THE HOLY ROMAN EMPEROR AND THE KING OF FRANCE AND THEIR RESPECTIVE ALLIES (Treaty of Münster) Oct. 24, 1648, 1 CTS 271, Art. XXVIII).

confessions, whether Protestant or Roman Catholic, were given the right to assemble and worship as well as the right to educate their children in their own faith. Thus a principle of religious toleration was established between Lutherans, Calvinists, and Roman Catholics."[30]

Toleration of minority religions was a major turning point because "until the last few centuries, there was a general assumption that minority faiths and religious dissenters posed a threat to the very existence of the state."[31] The shift of religion from public to private life, as in Grotius's phrase *etsi Deus non daretur*, was meant to "make possible the coexistence in the same country of subjects with a different religious faith" and put an end to the wars of religion that engulfed Europe in the sixteenth and seventeenth centuries.[32]

But toleration is a far cry from substantive neutrality. Under this conception of religious toleration, "[t]he state is far from neutral about religious doctrine and practice in general, but the strategy of toleration in which certain doctrines previously vilified as heretical are treated instead as not threatening to public order provided they remain in their proper place."[33] But the "proper place" was in private, in the spiritual life, in the minds of individual believers. It was not public, did not claim temporal power, and certainly did not endanger the religious justifications underpinning the legitimacy of temporal rulers. Thus, "[t]he constitution of the modern state required the forcible redefinition of religion as belief, and of religious belief, sentiment, and identity as personal matters that belong to the newly emerging space of private (as opposed to public) life."[34] But while the banishment of religion to the life of

[30] HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 101 (2003).

[31] Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 14 (2007).

[32] Ferrari, *supra* note 6 at 151.

[33] Janis, *supra* note 1 at 78 (internal quotation omitted). *See also* Ungureanu, *supra* note 11 at 308 ("within this constitutional framework, the state is not 'purely' neutral, but has a positive obligation to protect pluralism and enhance a culture of mutual tolerance, respect and dialogue amongst citizens.").

[34] TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 205 (1993); *see also* Suzanne Last Stone, *Conflicting Visions of Political Space*, *in* MAPPING THE BOUNDARIES OF LEGAL RELIGION: RELIGION AND MULTICULTURALISM FROM ISRAEL TO CANADA 41-55, 41 (René Provost, ed., 2014) ("Keeping religion and politics apart is an idea with a history, and that history is primarily a Christian one, rooted in the experience of European Christendom and made possible because Christians, virtually from the beginning, viewed church and state as conceptually separate entities, with different jurisdictions and powers, and even a different logic."); Richard Moon, *Christianity, Multiculturalism, and National Identity: A Canadian Comment on* Lautsi and Others v. Italy, *in* THE LAUTSI PAPERS: MULTIDISCIPLINARY

the mind made room for the modern state to claim a monopoly on temporal power, it did not entirely resolve the problem that "religious beliefs sometimes have public implications."[35]

C. *Liberalism*

Given that official pronouncements of religious toleration came into being in conjunction with the emergence of the modern liberal state from under the authority of the church, "Religious Freedom may be the oldest as well as the most problematic human right."[36] The loss of political authority for the church led to "the gradual spiritualization of religion."[37] At the same time, official state toleration of dissenting beliefs required "the public sphere [be] reconceived in terms of a moral theory of justice and religious liberty grounded in a complex (and unstable) notion of freedom of conscience."[38] This new religious freedom was "premised on distinctive (Protestant) conceptions of the individual, freedom, and religion."[39] As a result, the privatization of religion became (and remains) a feature of the liberal state.[40] Accordingly, "the neutrality of the public sphere (whether national or supranational) and the scope of the right to religious freedom should be understood as culturally and historically contingent and neutral toward neither religion in general nor distinct religious traditions in particular."[41] But religious liberty is not, in practice, understood this way. Instead, "[t]he 'secular' nature of the modern European state and the 'secular' character of European democracy serve as one of the foundational myths of the contemporary European identity."[42] Prima facie official neutrality among religions is assumed, but religious liberty assumes a particular type of religion.

REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 251 (Jeroen Temperman, ed., 2012) ("State neutrality in matters of religion is possible only if religion can be treated simply as a private matter—as separable from the public concerns addressed by the state.").

[35] Moon, *supra* note 34 at 243

[36] Janis, *supra* note 1 at 75

[37] Danchin, *supra* note 8 at 670

[38] *Id.*

[39] *Id.*

[40] Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law*, 49 HARV. INT'L L.J. 249, 252 (2008).

[41] Danchin, *supra* note 8 at 670 ("historically, secularism has entailed the regulation and reformation of religious beliefs, doctrines, and practices to yield a particular normative conception of religion (that is largely Protestant Christian in its contours)"). *See also* Lourdes Peroni, *Deconstructing "Legal" Religion in Strasbourg*, 3 OX. J.L. REL. 235, 246 (2014) (internal quotation omitted).

[42] José Casanova, *Religion Challenging the Myth of Secular Democracy*, *in* RELIGION IN THE 21ST CENTURY: CHALLENGES AND TRANSFORMATIONS 19-36, 21 (Lisbet Christoffersen, et al. eds., 2010).

D. The Rise of International Law and Human Rights

Human rights, another foundational element of contemporary European identity, has a clear religious heritage and sometimes even speaks in what could be heard as religious language. As Zachary Calo observes, "[t]he idea of human rights, particularly the underlying idea of human dignity, is replete with echoes of the sacred."[43] And like some religious doctrines, "[h]uman rights are traditionally understood as . . . universal [and] . . . inalienable. . . . Almost by definition, they are supposed to be applicable everywhere and anytime, not to depend on a specific political system or culture."[44] Yet, again, much like the idea of religion,[45] "the notion of religious freedom as an 'international right' has a particular history—a time and place of origin."[46] Human rights "have been slowly established and defined in a precise historical and cultural context, mainly in England and the United States, in the wake of the Enlightenment."[47]

Oliver Roy & Pasquale Annicchino suggest that the Christian origin of the idea of human rights is obvious:

> we can characterize this Christian anthropology through the following criteria: a human being is defined by an autonomous individual soul that is not under the control of the state or society, both entitled only to control the body; a '*for interieur*' (inner core, heart of hearts) that can deliberate for itself, the sacred nature of the body as a template of the divine creation; the equal dignity (in God, not in society) of all human beings; and free will.[48]

Archbishop Rowan Williams adds that any inherent legal rights belonging to all people would "require[] both a certain valuation of the human as such and a conviction that the human subject is always

[43] Zachary R. Calo, *Religion, Human Rights and Post-Secular Legal Theory*, 85 ST. JOHN'S L. REV. 495, 495 (2011).

[44] Oliver Roy & Pasquale Annicchino, *Human Rights Between Religions, Cultures, and Universality*, *in* THE CULTURAL DIMENSION OF HUMAN RIGHTS 13-25, 13 (Ana Filipa Vrdoljak, ed., 2013).

[45] Petty, *Faith*, *supra* note 14 at 254-57; Petty, *Israel*, *supra* note 14 at 135-42.

[46] Peter G. Danchin, *The Emergence and Structure of Religious Freedom in International Law Reconsidered*, 23 J.L. & RELIGION 455, 456 (2007-08).

[47] Roy & Annicchino, *supra* note 44 at 13.

[48] *Id.* at 15. *See also* Calo, *supra* note 43 at 496 ("There were many intellectual sources that shaped the idea of human rights, but none were more foundational than Christianity."); Danchin, *supra* note 40 at 262 ("International human rights law imagines an internal or personal sphere of 'belief' that is in some sense pre- or extra-social, political, and legal and hence absolutely 'inviolable' or 'sovereign.'").

endowed with some degree of freedom over against any and every actual system of human social life. Both of these things are historically rooted in Christian theology."[49]

But from the eighteenth century, European legal systems began to see themselves as "potentially universal," pursuing the law of reason of the Enlightenment, unmoored from their Christian origins.[50] The Christian foundations of the legal systems remained, of course, albeit silently. Even into the twentieth century, "religion—the history of Christianity, in particular—has been the dominant force in the formation and shaping of the international legal system."[51] As a result, "mainstream accounts of human rights in international law are insensitive, and in some cases even blind, to the communal dimensions of goods such as religion."[52] One place in which the silent influence Christianity is manifested is in Article 9 of the European Convention on Human Rights.

III. THE TREATY FRAMEWORK

A. The Council of Europe

The Council of Europe, founded in 1949, promotes cooperation among European countries in the areas of legal standards, human rights, democratic development, the rule of law, and advancement of culture. The Preamble to the Statute of the Council of Europe affirmed "the need for greater unity between like-minded European countries for the sake of economic and social progress."[53] It exists entirely outside the European Union treaty framework (though all EU member states are also members of the CoE[54]) and the EU has recognized the CoE's role in enforcing human rights throughout Europe.[55]

[49] Rowan Williams, *Civil and Religious Law in England: A Religious Perspective*, 10 ECC. L.J. 262, 272 (2008).

[50] Faltin, *supra* note 9 at 8 n.18 (citing JOSEPH RATZINGER, CHURCH, ECUMENISM AND POLITICS 224 (1987)).

[51] *Id.* at 501

[52] Danchin, *supra* note 46 at 460.

[53] Danny Nicol, *Original Intent and the ECHR*, [2005] PUBLIC LAW 152 at 155.

[54] EU Relations with the Council of Europe, http://eeas.europa.eu/organisations/coe/index_en.htm.

[55] Memorandum of Understanding Between the Council of Europe and the European Union, para. 10 (May 23, 2007) ("The Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe."), http://ec.europa.eu/justice/international-relations/files/mou_2007_en.pdf

"[T]he first and principal achievement of the Council of Europe" was the European Convention on Human Rights.[56] The Convention "was signed in 1950 and has been successively amended by several protocols."[57] It "was intended to build upon the work undertaken in the United Nations and aims at 'securing the universal and effective recognition and observance of the rights' contained in the Universal Declaration of Human Rights."[58]

B. The Origin of Article 9

As the ECHR aimed to implement the rights identified in the Universal Declaration, [59] it is appropriate to begin examination of Article 9 of the ECHR by reviewing its predecessor in the Universal Declaration, Article 18. "Article 18 of the Universal Declaration is the primary article dealing with freedom of religion."[60] Article 18 reads:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 18 is limited by Article 29(2), which provides that:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations are as determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 18 of the Universal Declaration reflects "the basic approach that has been followed in most other international, and

[56] Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587, 587 (2005).

[57] *Id.*

[58] CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 8 & 34 (2001) ("One of the purposes of the Convention, as set out in the Preamble, was to 'take the first step for the collective enforcement of certain Rights stated in the Universal Declaration."); *see also* PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 7 (2005).

[59] TAYLOR, *supra* note 58 at 7 (citing the Preamble to the European Convention).

[60] EVANS, *supra* note 58 at 35

many other regional, human rights instruments. That approach is based on the idea that religion or belief is essentially a matter of individual choice and that everyone should have the freedom to hold whatever form of belief (religious or otherwise) that they wish."[61]

Following this approach, the text of Article 9 of the ECHR "was drawn almost verbatim from Article 18 of the Universal Declaration of Human Rights."[62] And like Article 18, "Article 9 recognizes the freedom of thought, conscience and religion, and enumerates the limitations that may be imposed on the manifestations of this freedom."[63]

Article 9 provides:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[64]

Several observations may be made from the text of Article 9 alone. First, Article 9 contains "several overlapping terms" with "subtle distinctions." "Freedom to *change* one's 'religion or belief' is singled out from the right of 'freedom of thought, conscience and religion' in Article 9(1). The right under Article 9(2) to *manifest* one's religion does not extend to manifesting one's freedom of thought or conscience."[65] Second, "Article 9 protects religious

[61] Malcolm Evans, *Advancing Freedom of Religion or Belief: Agendas for Change*, 1 OX. J.L. REL. 5, 8 (2012).

[62] T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES, PART 2, 305-330, 308 (John Witte, Jr. & Johan D. van der Vyver, eds., 1996); *see also* TAYLOR, *supra* note 58 at 7.

[63] Martínez-Torrón, *supra* note 56 at 588. Although "[t]hree provisions of the ECHR deal with religion," *id.* at 587, I will address only Article 9.

[64] "[T]he limitations applicable to the freedom of thought, conscience and religion, as described in Article 9, are largely coincident with the limitations applicable to the freedoms protected by other Articles of the Convention, namely Articles 8, 10 and 11." *Id.* at 589.

[65] REX ADHAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 140 (2d ed. 2013).

freedom as an individual right, but also as a group right; enjoyment of religious freedom comprises a right to manifest and practice the religion, alone or with others."[66] Third, "[i]n all cases, limitations on freedoms must be: 1) prescribed by law; 2) necessary in a democratic society; 3) proportionate to reach some of the aims itemized in par[agraph] 2 of the corresponding Article, which are the only legitimate aims within the ECHR framework."[67] How these overlapping concepts are given concrete meaning in individual cases is a task assigned to the Court.

C. The European Court and Commission of Human Rights

The interpretation and application of the Convention "corresponds, specifically and exclusively, to the European Court of Human Rights. . . located in Strasbourg, France, which has jurisdiction over every state that has signed the Convention,"[68] and has been in operation since February 1959.[69] "The ECHR system has been described, with justice, as the most effective human rights regime in the world."[70]

One reason for this level of prestige and success is that the judges of the Court are "recruited in a way which provides only a

[66] Mark Freedland & Lucy Vickers, *Religious Expression in the Workplace in the United Kingdom*, 30 COMP. LAB. L. & POL'Y J. 597, 602 (2009).

[67] Martínez-Torrón, *supra* note 56 at 589-90. "With regard to freedom of religion or belief, the list of permissible aims is even narrower than with regard to other freedoms. *Id.* at 590.

[68] *Id.* at 587.

[69] Brett G. Scharffs, *Symposium Introduction: The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal Moral, Political and Religious Perspectives*, 26 J.L. & RELIGION 249, 253 (2010-11).

[70] Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, 9 HUM. RTS. L. REV. 397, 403 (2009) (internal quotation omitted). "Generally speaking, the Court enjoys a high degree of prestige and support from national judicial institutions, the political branches of the CoE, as well as legal academia." *Id.* "The European Court of Human Rights in Strasbourg . . . is probably the court that enjoys the most authority and prestige around the globe in the realm of human rights. It is a well-deserved prestige. By and large, the Court has done a great job in the defence of human rights in Europe, both in general and in the particular case of freedom of religion and belief." Javier Martínez-Torrón, *The (Un)protection of Individaul Religious Identity in the Strasbourg Case Law*, 1 OX. J.L. REL. 363, 363 (2012). In the 65 years since it was signed, the ECHR "has evolved into 'the most effective transnational human rights institution on earth.'" Effie Fokas, *Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of the European Court of Human Rights Religious Freedom Jurisprudence*, 4 OX. J. L. REL. 54, 55 (2015) (quoting W. Cole Durham and David Kirkham, *Introduction*, in ISLAM, EUROPE, AND EMERGING LEGAL ISSUES 1, 2 (W. Cole Durham, et al. eds., 2012)).

partial control of Contracting States over the selection outcomes:"[71] judges are elected by the Parliamentary Assembly of the Council of Europe from a list of candidates presented by each member state.[72] And "while on the bench, the judges benefit from guarantees providing a real independence from pressure from their (or other) governments."[73] As a result, the Court "displays features of a genuinely independent supranational tribunal."[74]

Because of its independence and prestige, "[i]t has become fashionable to press the claim that the Court has become (or is becoming) a sort of 'constitutional court' for Europe."[75] "Its decisions are binding on Contracting States deemed to have violated the Convention,[76] and are enjoying, through a growingly accepted custom, an authority of *erga omnes* nature, at least as far as the interpretive value of its judgments is concerned."[77] "Judgments of the European Court of Human Rights . . . . ha[ve] become an indelible source of inspiration for judges in national courts around the globe."[78] It's "jurisprudence enlightens not only national judges but also judges and committee members of the other international human rights organs."[79] Wojciech Sadurski goes as far as suggesting that "the Court has successfully staked its claim as the final and authoritative interpreter of the Convention."[80] More remarkably still, this reputation has developed over a relatively short time.

Until very recently another body, "[t]he European Commission of Human Rights[,] served a screening function for the Court and was authorized to resolve many of its cases."[81] But in Article 9 cases, the Commission resembled an impenetrable wall more than a screen. Indeed, "[u]ntil 1989, the Commission concluded in almost all cases brought under Article 9 that the facts did not disclose any violation; applications were therefore deemed inadmissible and

[71] Sadurski, *supra* note 70 at 403.

[72] Silvio Ferrari, *The Strasbourg Court and Article 9 of the European Convention on Human Rights: A Quantitative Analysis of the Case Law*, *in* THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 13 & n.2 (Jeroen Temperman, ed., 2012).

[73] Sadurski, *supra* note 70 at 403.

[74] *Id.*

[75] *Id.* at 398.

[76] George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OX. J. LEGAL STUD. 705, 707-08 (2006) (citations omitted) ("a Contracting State that breaches the ECHR has a duty under international law to abide by the final judgment of the Court and to award just compensation to the victim.").

[77] Sadurski, *supra* note 70 at 403-04.

[78] Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U J. INT'L L. & POL. 843 (1999).

[79] *Id*. "It has set standards of protection that have had an impact far beyond European borders." Martínez-Torrón, *supra* note 70 at 363.

[80] Sadurski, *supra* note 70 at 403.

[81] Scharffs, *supra* note 69 at 253.

never reached the Court."[82] Protocol 11 to the Convention, adopted in 1998, abolished the Commission and "[f]rom that time, all cases have gone directly to the European Court for consideration."[83]

"The role of the Court [with respect to Article 9] is to define common standards on religious freedom in a religiously diverse Europe."[84] And it is "distinctive, if not quite unique, as an international law body in that it provides a mechanism for individuals—citizens, nationals, and even visitors—to bring a claim in a transnational court that the host country has violated their basic human rights."[85] However, "[t]here is no review of national law and the determinations of courts under national law, and the asserted violation must be caused by a responsible state party: applicants cannot bring a complaint against another private or corporate party."[86] Furthermore, "the applicant must exhaust local remedies

[82] Julie Ringelheim, *Rights, Religion, and the Public Sphere: The European Court of Human Rights in Seach of a Theory?*, *in* LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 283-306, 284-85 (Lorenzo Zucca & Camil Ungureanu, eds., 2012).

[83] Scharffs, *supra* note 69 at 253. *See also* Fokas, *supra* note 70 at 60 & n.30 ("Until 1989, almost all cases brought under art 9 were deemed inadmissible."). One reason for the delay may be that the aim of the ECHR signatories was "solely to prevent the descent into dictatorship threated by fascist revival or pro-Soviet coup." Nicol, *supra* note 53 at 152. As Yannis Ktiskakis has argued, "the founders of the Strasbourg system were more concerned with constituting a political weapon of juxtaposition to the atheistic proposal of Communists than in moderating 'the peaceful coexistence of Christian states.'" Janis, *supra* note 1 at 92 (quoting Yannis Ktiskakis, *The Protection of the Forum Internum Under Article 9 of the ECHR*, *in* THE EUROPEAN CONVENTION OF HUMAN RIGHTS AS A LIVING INSTRUMENT: ESSAYS IN HONOUR OF CHRISTOF L. ROZAKIS 285, 286 (Dean Speilmann et al. eds., 2011)).

[84] Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, 30 CARDOZO L. REV. 2575, 2576-77 (2009) (internal quotation omitted).

[85] Scharffs, *supra* note 69 at 250-51 ("Applications against Contracting Parties for human rights violations can be brought before the Court by other states, other parties, or individuals."). "[I]ndividual access to the Court was rendered mandatory for all Contracting Parties only in 1998." Sadurski, *supra* note 70 at 407. "The main concern of citizens who chose to 'go to Strasbourg' to bring up issues for which they could not find a proper remedy in their home countries were no longer at the fringes of the rights enshrined in the Convention but right at its very core." *Id.* at 408.

[86] Scharffs, *supra* note 69 at 252. "A traditional perception of the status and reach of the ECtHR's judgments was that the carried a purely individualised, specific implication. The Court was perceived as a kind of tribunal of last resort, whose role was limited to specific cases of rights violations after the exhaustion of all domestic remedies. According to this view, it did not fall on the Court to assess the validity of domestic *laws* themselves. Its policing role was strictly restricted to the consideration of acts and decisions rather than to the laws allegedly underlying the latter. . . . However, this traditional perception was never completely accurate. Indeed drawing a sharp distinction between bad decisions and bad laws . . . is not very credible." Sadurski, *supra* note 70 at 412. In any event, to the extent that the Court ever was merely a "'fine tuner' of national legal

through the national court level, and must file a claim within six months of the final disposition of the claim at the national level."[87]

Many commentators have claimed "the right to freedom of thought, conscience and religion, enshrined in Article 9 of the European Convention on Human Rights (ECHR), is insufficiently and erratically protected in the courts."[88] Even a summary history of the adjudication of claims under Article 9 reflects significant trepidation on the part of the Court in deciding issues of religious freedom. For decades, they were invariably decided under other provisions of the Convention. "Prior to 1993, there were mainly two relevant cases, both decided in light of Article 2 of the ECHR's First Protocol—*Kjeldsen* (1976), related to conscientious objection to sex education in school, and *Campbell and Cosans* (1983), related to the opposition to having children physically punished at school."[89] In fact, "[i]n its first 34 years of operation as a Court, from 1959 to 1993, the ECtHR did not issue a single conviction against a state on the basis of the main religious freedom provision of the ECtHR, Article 9 on the freedom of thought, conscience, and religion."[90] It "looked for many decades as though it was going to be effectively a dead letter."[91]

The last two decades have seen a small and generally cautious, but nonetheless active, growth in the Court's Article 9 jurisprudence. "Since 1993, with the *Kokkinakis* case, which involved the right to engage in proselytism, the Court began an itinerary of decisions adopted in light of Article 9 or in the light of other articles, but with a clear reference to religion."[92] And "[w]hile in its first judgments the Court demonstrates great caution in approaching religious issues, it has progressively become more

systems," the accession of formerly Communist Eastern European states to the Council of Europe "radically transformed this situation." *Id.* at 401. The Court "was compelled instead to adopt a role of policing the national systems in which serious violations of rights occurred or suffering from important systemic deficiencies as far as the [Council of Europe] standards of rights are concerned." *Id.*

[87] Scharffs, *supra* note 69 at 252.

[88] Alice Donald, *Advancing Debate about Religion or Belief, Equality and Human Rights: Grounds for Optimism?*, 2 OX. J.L. REL. 50, 51 (2013). "For the two decades after *Kokkinakis*, the Strasbourg Court has had very little success in charting a steady course for the interpretation and application of Article 9. It is a commonplace to remark that the court's case law on religious freedom is inconsistent." Janis, *supra* note 1 at 76.

[89] Martínez-Torrón, *supra* note 70 at 364.

[90] Fokas, *supra* note 70 at 60.

[91] Carolyn Evans, *Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Architecture*, 26 J.L. & RELIGION 321, 321 (2010-11).

[92] Martínez-Torrón, *supra* note 70 at 364.

assertive in its defence of religious freedom."[93] Carolyn Evans suggests that "in a relatively short period, the Court has been pushed to develop a jurisprudence of religious freedom to deal with increasingly complex and controversial cases."[94] The Court has dealt with this complexity and controversy, in part, by relying on a standardized analytical process.

"The analytical approach to Article 9 cases can seem quite formulaic, which is helpful to students becoming familiar with the Court, but is unsatisfying to more serious scholars because the Court's reasoning comes to seem somewhat mechanical."[95] First the Court asks "whether there has been an interference with religion, thought or conscience by the state. If the Court holds in the affirmative, the second question is whether the interference was prescribed by law (essentially an enquiry into whether the state has followed the 'rule of law.')."[96] If so, then the Court will inquire "whether the limitation adopted by the state was enacted to pursue and protect a legitimate aim under Article 9."[97] "The final step of the analysis asks whether the limitation is 'necessary in a democratic society.'

"In analyzing necessity, the Court typically—though not always—asks two questions: first, is the limitation justified in principle, i.e., does it correspond to a pressing social need? Second, is it proportionate to the legitimate aim pursued? Perhaps as many as seventy-five percent of Article 9 cases turn on this question of proportionality."[98] "This multi-part enquiry represents the gravamen of most Article 9 jurisprudence."[99]

Lourdes Peroni suggests that "the Court's track record is at best mixed" when it comes to applying the framework to actual controversies.[100] The limitations of the formulaic approach have crystallized "[a]s the case law has multiplied and the issues have diversified . . . it has become clear that the Court has not yet

[93] Ringelheim, *supra* note 82 at 283-84. Mark Weston Janis has observed that "[a]rticle 9 cases after *Kokkinakis* continue to play a relatively minor role in the jurisprudence of the court." This overstates the matter. Article 9 cases occupy less than one percent of the court's docket. In 2011, only five out of 1,157 total judgments rendered concerned Article 9. In 2013, only six out of 919. Janis, *supra* note 1 at 90. *See also* Ferrari, *supra* note 72 at 19 ("the case law concerning Article 9 is relatively small: about 100 decisions, spread over fifty years, is not a high number, especially when compared with the case law that regards other articles of the Convention.").

[94] Evans, *supra* note 91 at 321-22.

[95] Scharffs, *supra* note 69 at 258.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 259.

[99] *Id.*

[100] Lourdes Peroni, *The European Court of Human Rights and Intragroup Religious Diversity: A Critical Review*, 89 CHI.-KENT L. REV. 663, 664 (2014).

developed a sufficiently coherent and principled approach to this area."[101] Carolyn Evans further notes that "the conceptual foundations on which Article 9 case law is built are weak; and difficult cases are beginning to expose the cracks in the intellectual architecture of the Court's religious freedom jurisprudence."[102] This is seen in two general trends. First, the Court "has shifted its focus away from the right of the individual and towards the role of the state in matters of religion."[103] Second, it has "taken such a cautious approach to protecting the manifestation of religion or belief that the law has come to protect 'only a very restrictive and conservative form of religious life,' that is lived behind closed doors rather than in public."[104]

It is this understanding of religion as essentially a private matter that is of primary concern. "'[T]he Commission and the Court have, at times, been accused of being unsympathetic to the claims of those from non-Christian traditions, or religions without a long history in Europe.'"[105] These accusations may flow from "assumptions about religion underlying the Court's understanding of the scope and content of freedom of religion."[106] Specifically, there have been instances where "implicit assumptions about religion as a set of 'theological propositions' to which people adhere . . . surface in the Court's freedom of religion reasoning."[107] Or, put differently, "the Court has some problems in understanding the conceptions of religion which stress the elements of identity and practice over those of freely chosen belief."[108]

[101] Evans, *supra* note 91 at 321-22. In particular, "the intellectual framework that the Court has built around religious freedom cases is sufficient to deal with the relatively simple cases of refusal to treat like with like, but is insufficient to tackle the more complex cases where rights come into conflict and the religious claim is a right to be treated differently rather than identically." *Id.* at 339-40. Part of the difficulty may be the lack of a coherent vision of church-state relations across the continent, with different nations employing different models to varying degrees. *See generally* Paul Cliteur, *State and Religion Against the Backdrop of Religious Radicalism*, 10 INT'L J. CONST. L. 127-52 (2012).

[102] *Id.* at 322

[103] Malcolm D. Evans, *Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tensions*, *in* LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT 291-315, 291 (Peter Cane, et al. eds., 2008).

[104] Donald, *supra* note 88 at 51 (quoting RUSSELL SANDBERG, LAW AND RELIGION 98 (2011)).

[105] MCCREA, *supra* note 17 at 126-27 (quoting Peter Cumper, *The Rights of Religious Minorities: The Legal Regulation of New Religious Movements*, *in* MINORITY RIGHTS IN THE "NEW" EUROPE 165, 174 (Peter Cumper & Steven Wheatley, eds., 1999)).

[106] Peroni, *supra* note 100 at 665.

[107] *Id.*

[108] Ferrari, *supra* note 72 at 33.

In some respects, this is not surprising. The text of the Convention itself favors such an interpretation, which is exacerbated by several of the Court's judge-made doctrines. But this outcome is not inevitable. The case law of the Strasbourg court "both rejects the strictures of the ECHR text in favour of a teleological emphasis on effectiveness, and also treats the ECHR as a living instrument, the interpretation of which it can update in response to changing social conditions."[109] The question is effectiveness in what respect, and for whom? The Court *can* revisit its jurisprudence, but will it?

IV. THE INHERENT BIAS OF ARTICLE 9

A. Difficulties Internal to the Convention

1. The Process of Adoption

"The Court has accepted that Articles 31-34 of the Vienna Convention on the Law of Treaties represent customary international law and that they are thus applicable to interpreting the Convention."[110] It is therefore permissible to review the *travaux préparatoires* in determining the meaning of the Convention text. Furthermore, because Article 9 was based in large part upon Article 18 of the Universal Declaration of Human Rights, (and because Article 9 was agreed to essentially without debate) "it is necessary to look first at the Universal Declaration's drafting history for any light that it can shed on the appropriate interpretation of the Convention."[111] Unfortunately, as a general matter, the *travaux préparatoires* are "neither complete nor particularly revealing."[112] However, they do reflect that many delegates expressly linked Christianity and human rights, and understood the protection of human rights as a Christian duty.[113]

With respect to the Convention itself, not all of the bodies that had input into the drafting kept minutes and, of those that did, not all of the minutes have been published.[114] But the available evidence

[109] Nicol, *supra* note 53 at 152.

[110] EVANS, *supra* note 58 at 51 (citing Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 14 (1975)).

[111] EVANS, *supra* note 58 at 34. *See also* Janis, *supra* note 1 at 78 ("The wording of Article 9 in the 1950 ECHR was immediately drawn from Article 18 of the United Nations' 1949 Universal Declaration of Human Rights."). "The United Nations continued to develop the right to freedom of religion and belief in a number of other international instruments, most notably Article 18 of the International Covenant on Civil and Political Rights and the more detailed Declaration on Religious Intolerance and Discrimination." EVANS, *supra* note 58 at 36-37.

[112] EVANS, *supra* note 58 at 34

[113] *Id.* at 39.

[114] *Id.* at 38.

reveals that the drafters rejected a proposal that would have expressly protected "freedom of religious practice" in favor of a more limited protection "of thought, conscience and religion."[115] This was "presumably aimed at recognizing the importance of religious belief (as compared to practice)."[116]

2. The Convention Text

Apart from the intent of the drafters in rejecting express protection for religious practice, or any religious motivations the framers of the Declaration may have had, the text of Article 9 presents difficulties on its own terms. Article 31(2) of the Vienna Convention on the Law of Treaties provides that treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context."[117] This is not much of a guide, but it does seem clear that "'thought and conscience' must be distinct in some way from 'religion or belief', as there is a non-derogable obligation to protect the right to freedom of thought and conscience, but there is no right to manifest them."[118] "'[B]elief' could include relatively individualistic beliefs that are not part of a structured religion or organization of believers. . . . the Court has explicitly recognized that the protection of the Convention extends to 'free-thinkers' and 'the unconcerned.'"[119] Alternatively, "belief" may be a subset of "thought" or "conscience" or both, the manifestation of which is protected,[120] although it is far from clear

[115] COLLECTED EDITION OF THE "TRAVAUX PREPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975-85), vol. 1, First Session of the Consultative Assembly 168 & 174, (A.H. Robertson, ed., 1985).

[116] EVANS, *supra* note 58 at 40. *But see* BM at 388 ("Perhaps the most that can be said in regards to its drafting is that delegates considered the issue of freedom of religion to be of great importance and that they accepted that the Universal Declaration provided an appropriate model for the protection of freedom of religion.").

[117] Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/Conf.39/27, 8 I.L.M. 679, Art 21(2).

[118] EVANS, *supra* note 58 at 52

[119] *Id.* at 58

[120] *See id.* at 63 ("Another, more minor, difficulty in the wording of Article 9 is the introduction of the world 'belief' in the second part of Article 9(1). It seems to cover conveniently groups such as atheists and agnostics . . . Yet, if this is correct, the exclusion of belief from the first part of Article 9 seems to suggest the strange outcome that an atheist has the right to manifest his or her belief . . . but his or her right to hold this belief is not protected. Probably the best way around this apparent anomaly would be to assume that beliefs are a subset of the broader category of thought and conscience.").

how protected "belief" could be distinguished from a more general, unprotected "thought."[121]

Rather than the differences between these terms, however, the more subtle problem lies in their similarity. Here the difficulty stems from the phrase "religion or belief." Although this phrase in particular appears to have gained currency in international law,[122] and despite its initial appearance of extending the protection offered "religion" to include views such as atheism and agnosticism,[123] the phrase "religion or belief" implicitly limits "religion" to mean something akin to "belief." The maxim *noscitur a sociis*—which holds that a legal term of art may be understood reference to the surrounding terms, so that it is understood to be *of the same kind* as its companions—is à propos.[124] Put differently, "[w]ords . . . are liable to be affected by other words with which they are associated."[125] Essentially, the drafters set up "religion" and "belief" as two of a kind.

This also is not entirely surprising. "[T]he drafters of the Convention . . . tended to assume that the content of religious freedom was not controversial, at least in Europe."[126] And religion in Europe was obviously centered around Christianity, which was (and is) premised on belief. Even today, the U.N. Special Rapporteur on Religious Freedom apparently understands religion in this limited sense,[127] and international instruments continue to focus on "belief," employing it as an umbrella term for both (theistic)

[121] *Id.* at 64 ("the term belief has increased the conceptual confusion in this area and the approach that the Commission has taken to the cases has only magnified this confusion.").

[122] GUIDELINES FOR REVIEW OF LEGISLATION PERTAINING TO RELIGION OR BELIEF, 8 ("International standards do not speak of religion in an isolated sense, but of 'religion or belief.' The 'belief' aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus, atheism and agnosticism, for example, are generally held to be entitled to the same protection as religious beliefs.") http://www.osce.org/odihr/13993?download=true

[123] Carolyn Evans, *Religious Freedom in European Human Rights Law: The Search for a Guiding Conception*, *in* RELIGION AND INTERNATIONAL LAW 385-400, 385 (Mark W. Janis & Carolyn Evans, eds., 1999) ("If the term 'or belief' is added, perhaps we think of atheism or agnosticism. Yet the question about what links these diverse beliefs and ways of life together, so that we recognise them as 'religions', is far less clear."); *see also* EVANS, *supra* note 58 at 64 ("The addition of the term 'or belief' to religion in Article 9 of the Convention may clarify some issues (particularly whether atheists are entitled to the protection of religious freedom))."

[124] *See*, *e.g.,* Yates v. United States, 135 S. Ct. 1074, 1085 (2014).

[125] BLACK'S LAW DICTIONARY (9th ed. 2009), *noscistur a sociis*.

[126] Evans, *supra* note 123 at 388.

[127] Heiner Bielefeldt, *Freedom of Religion or Belief—A Human Right Under Pressure*, 1 OX. J.L. REL. 15, 17 (2012) ("respect is due for the *underlying ability of human beings to have and develop deep convictions in the first place.*") (emphasis in original).

religion and other beliefs unconcerned with the existence (or nonexistence) of supernatural entities.[128]

Beyond this, the primacy of belief over practice in Strasbourg "is not just presupposed; it is represented overtly in language that orders the belief/practice dualism hierarchically."[129] The limitations in Article 9(2) apply only to the manifestation; the right to believe is absolute.[130] And the Court has explained that Article 9 exists primarily to protect religion and belief, and that protection of manifestation of religion and belief is secondary. But it is "hard to imagine how exactly a state may interfere with people's religious beliefs if not by forcing some form of action upon them."[131]

3. The Challenge of "Conscience"

The word "conscience," which the Convention groups with both "religion" and "belief," presents additional difficulties. "Notwithstanding the notorious difficulty of defining religion and the consequent effort on the part of jurists and academics to avoid embracing any particular definition, one model of religion has dominated modern discourse: religion as conscience."[132] But "[w]hen we reverently invoke 'conscience,' 'freedom of conscience' or the 'sanctity of conscience' . . . do we have any idea what we are talking about? Or are we just exploiting a venerable theme for rhetorical purposes without any clear sense of what 'conscience' is or why it matters?"[133] "More generally, what do we understand 'conscience' to be, exactly?"[134]

"Historically, 'conscience' has been a protean notion with different meanings for different people," and these different meanings have evolved over time.[135] "Since the time of Thomas Aquinas, when *conscience* referred to moral judgments about action, and [the American] founding era, when 'freedom of conscience' dominantly referred to individual religious liberty, our understanding has evolved."[136] Even today, "there are various ways

[128] *See, e.g.*, Leustean & Madeley, *supra* note 7 at 5 (discussing "Non-Confessional Organizations" in Declaration 11 to the Treaty of Amsterdam as parallel to churches).

[129] Peroni, *supra* note 41 at 237.

[130] See Martínez-Torrón, *supra* note 56 at 590.

[131] Peroni, *supra* note 41 at 252.

[132] Nomi Maya Stolzenberg, *Theses on Secularism*, 47 SAN DIEGO L. REV. 1041, 1041 (2010).

[133] Steven D. Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 326 (2005).

[134] *Id.* at 327

[135] Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 225 (2009).

[136] Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 901 (2010).

of conceiving what 'conscience' is, for example, Thomist versus Protestant versus secular conceptions, and varying views about whether conscience is strictly a 'religious' faculty or whether it encompasses nonreligious beliefs as well."[137]

As a result of this lack of uniform meaning, "[l]egal theorists have been unclear about the relationship between religion and conscience and whether one or both should be eligible for legal exemptions."[138] Steven D. Smith argues that "the commitment to special legal treatment for religion derives from a two-realm world view in which religion—meaning the church, and later the conscience—was understood to inhabit a separate jurisdiction that was in some respects outside the governance of the state."[139] It "'began as an argument that government must ensure a free response by the individual called distinctively by the Divine within.'"[140] But although it was "recognized in medieval Catholic teaching and canon law, the Protestant Reformation altered the significance of conscience in a way that profoundly affected, and to some extent redirected, historical commitments to the separation of church and state."[141]

In the "centuries since Thomas More and Roger Williams solemnly invoked conscience," the objective metaethical basis for their invocation has been challenged and in some quarters replaced. At the same time, freedom of conscience has become "more widespread and commonplace—even platitudinous—in our public rhetoric."[142] And "if we look closely at the modern invocations of conscience we will find uncertainty, confusion, and perhaps even a kind of degradation."[143] Conscience now "'has come to mean very little beyond the notion of personal existential decision-making.'"[144]

But "what all conceptions that picture religion as conscience have in common is the fundamental assumption that religion is a species of belief."[145] Nathan Chapman explains, "[r]eligious tolerance and cries for liberty of conscience emerged from doctrinal differences within the Christian tradition."[146] "Locke thought that coercing people into religious beliefs was contrary to Christianity and ultimately ineffective because only freely held beliefs led to

[137] Stolzenberg, *supra* note 132 at 1043.

[138] Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1460.

[139] Smith, *supra* note 25 at 1883.

[140] Smith, *supra* note 133 at 326 (quoting Marie A. Failinger, *Wondering After Babel: Power, Freedom and Ideology in U.S. Supreme Court Interpretations of the Religion Clauses*, in LAW & RELIGION, 81, 93-94 (Rex J. Adhar, ed. 2000)).

[141] Smith, *supra* note 25 at 1876-77.

[142] Smith, *supra* note 133 at 358.

[143] *Id.*

[144] *Id.* at 326 (quoting Failinger, *supra* note 140 at 93-94).

[145] Stolzenberg, *supra* note 132 at 1043.

[146] Chapman, *supra* note 138 at 1480.

salvation. This liberty of conscience favored members of protestant groups that stressed individual responsibility and authority on spiritual matters."[147] Today, "[t]here is good reason to be concerned that the model of religion as conscience, which relies on the basic distinction between practice and belief, privileging the latter over the former, threatens to give short shrift to religious practices and institutions."[148]

That is not to say that protecting conscience is necessarily a bad idea:

> As a practical matter, liberty of conscience may advance democratic deliberation. It eliminates some disputes over moral differences that might otherwise monopolize the public life of a pluralistic society . . . . Protecting liberty of conscience also limits the government's pretensions to absolute moral authority. Liberty of conscience enables nonconformist moral thought that undermines moral tyranny.[149]

Additionally, "[c]onscientious exemptions for those who disagree with prevailing norms prolong internal and national dialogues over contested moral issues. This may lead to better public understandings and decisions on morally novel issues such as the best use of new technology or morally profound issues."[150]

But one difficulty is in the evaluation of claims to legal exemptions. "Even if claimants are sincere, other persons are hard put to assess what they mean if they say, 'This is a fundamental conviction of mine.'"[151] "Any such claim must rely on assumptions about political theory, about morality, and perhaps even about theology, but these are rarely stated. 'Conscience' has been something of a black box."[152] Additionally, "conscience can generate exorbitant demands: 'Both good and evil can emanate from conscience: the feeding of the poor, perhaps, but also the purification of the caucasian race.'"[153]

Another challenge is that it is far from clear that conscience fully protects religiously motivated conduct. "An increasingly prominent justification for the reliance on conscience is that conscience is entitled to deference because the person in its grip

[147] *Id.* at 1465.
[148] Stolzenberg, *supra* note 132 at 1065.
[149] Chapman, *supra* note 138 at 1499.
[150] *Id.* at 1500.
[151] Greenawalt, *supra* note 136 at 906.
[152] Koppelman, *supra* note 135 at 216.
[153] *Id.* at 221 (quoting Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1269 (1994)).

cannot obey the law without betraying his deepest, most identity-defining commitments."[154] But Koppelman notes that "[t]he emphasis on conscience focuses excessively on duty,"[155] while "most people engage in religious practice out of habit, adherence to custom, a need to cope with misfortune, injustice, temptation and guilt, curiosity about a religious truth, a desire to feel connected to God, or happy religious enthusiasm rather than a sense of obligation or fear of divine punishment."[156] In a collective setting, "'[c]onscience' is a poor characterization of the desire of a church to expand its building to be able to hold its growing congregation, as in *City of Boerne v. Flores*."[157] "So conscience . . . fails to fit the cases in which most people want to accommodate religion. It is both overinclusive and underinclusive."[158]

B. *Problems of Application and Doctrine*

In addition to the problems already inherent in Article 9, the Court has added to difficulties in its application through judicial doctrines. Parlaying sixteenth-cenutury theology into legal jargon, the *forum internum*/*forum externum* divide artificially splits religion into constituent components, privileging belief over other modes of religiousity. The margin of appreciation, a doctrine of deference to judgments of individual states, and the related doctrine of consensus, which is seen as a prerequisite to announcing Europe-wide legal rules, together diminish uniformity and render judgments concerning the ECHR in one state difficult to enforce in another. Finally, the Court's general avoidance of Article 9 altogether (and its rote analysis when it has addressed it) has impoverished what has the potential to be a substantially richer, more nuanced jurisprudence.

1. *Judicial Focus on the* Forum Internum

"It is almost inconceivable to consider freedom of religion or belief without coming across at least one reference to *forum internum* and *forum externum*."[159] "The case law of Strasbourg emphasizes that it is necessary to distinguish between the internal and external aspects of religious liberty. The former is the freedom

[154] *Id.* at 216.
[155] *Id.* at 222.
[156] *Id.* at 222-23.
[157] *Id.* at 223.
[158] *Id.* at 223-24.
[159] Peter Petkoff, *Forum Internum and Forum Externum in Canon Law and Public International Law with a Particular Reference to the Jurisprudence of the European Court of Human Rights*, 7 RELIGION AND HUMAN RIGHTS 183, 184 (2012).

to believe, which embraces the freedom to choose one's beliefs—religious or non-religious—and the freedom to change one's religion."[160] "This 'inner freedom' (*forum internum*) is complemented by the freedom to act in accordance with the beliefs that one holds, this being achieved by recognizing the additional right to 'manifest' one's religion or belief in a number of ways—through teaching, worship, observance and practice."[161] The *forum internum* "can be exteriorized through rites and acts of cults, but these are in principle accomplished within the family and 'the circle of those whose faith one shares.'"[162]

The dichotomy between the *forum internum* and *forum externum* was first introduced in the Councils of Trent (1545 and 1563),[163] and originally a part of Latin canon law.[164] In the last century, the two forums were implicitly included "in the 1948 Universal Declaration of Human Rights, emerge implicitly within the ECHR narrative and then are confidently rearticulated in the context of the ICCPR, in numerous reports of the UN Special Rapporteur for Freedom of Religion and Belief, and in Strasbourg and domestic Article 9 jurisprudence."[165]

As the Court has made clear, "[t]he internal dimension of religious freedom is absolute, which the external dimension is by its very nature relative. Indeed, Article 9(2) clearly states that the limitations specified therein may be applied only to the '[f]reedom to manifest one's religion or beliefs.'"[166] In short, "[t]he Court has construed freedom of religion in terms of a binary opposition

[160] Martínez-Torrón, *supra* note 56 at 590.

[161] Evans, *supra* note 61 at 8.

[162] Ringleheim, *supra* note 82 at 293 (citing Sahin v. Turkey [GC], App. No. 44774/98, [2005-XI] Eur. Ct. H.R. 173, para. 105).

[163] Petkoff, *supra* note 159 at 201.

[164] *Id.* at 183. "It is interesting to consider why a concept developed by medieval canon law has been adopted by one of the most powerful International Human Rights enforcement systems." *Id.* at 198.

[165] *Id.* at 184-85

[166] Martínez-Torrón, *supra* note 56 at 590. *See also* Ringleheim, *supra* note 82 at 285 (The Commission emphasized "the distinction drawn in Article 9 between two aspects of religious freedom: whereas its internal dimension, namely the right to have or change religion or belief, cannot be subject to any limitation whatsoever, its external aspect, that is, 'the freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance' may be restricted in some circumstances, under the conditions set forth in the second paragraph of Article 9."). In addition, "the *forum internum* is a narrower concept than the commonly understood meaning of the term 'private sphere.' It encompasses the *internal* sphere of *personal* thought, conscience, or belief and not those *external* spheres, even if nonstate and therefore technically 'private,' such as places of worship, the school, or the family, where religious belief may be communicated or acted upon." Danchin, *supra* note 40 at 261.

between belief and practice,"[167] and "views individual religious freedom as a right that is principally private in nature and focuses on an individual right to develop and adhere to a religious identity."[168]

The difficulty is that dividing religiousity between the *forum internum* and *forum externum* presents the question in a biased, historically contingent way without justifying that choice. It "is not religiously neutral" but instead depends upon *a priori* assumptions about "the ordinary forms of religious practice and the proper scope of political action."[169] "The Court and Commission have chosen to emphasise the internal realm in their interpretation of Article 9."[170] This construct "implicitly creates an oppositional and hierarchical relationship between the two."[171] Peter Danchin explains:

> In the conditions of the modern state, religion is thus imagined as having two dimensions: insofar as religion involves actual manifestations of belief and actions in the world, it is subject to regulation and control by the public (political and legal) spheres; insofar as it involves matters of conscience, it is imagined as occupying—in a state of inviolable freedom—the private sphere of personal belief, sentiment, and identity.[172]

"Whether this is a conscious choice or merely an assumption about the 'real' nature of religion is not clear from the cases. What is clear is that the Court and Commission have never justified their approach or shown any awareness that this view is anything but self-evident."[173]

As Javier Martínez-Torrón sardonically notes, this binary and hierarchical understanding of religion "is not the most desirable."[174] It erects an artificial boundary "between two different ways of conceiving and experiencing religion" without a sufficient justification for the choice in privileging one over the other,

[167] Peroni, *supra* note 41 at 236.

[168] MCCREA, *supra* note 17 at 103. *See also* Ringleheim, *supra* note 82 at 293 ("Underlying the Court's case law is the idea that religion is primarily an inward feeling; a matter of individual conscience.") (internal quotation omitted); Martínez-Torrón, *supra* note 70 at 365 ("Freedom of thought, conscience and religion, as all fundamental rights, is primarily an individual right but also has a very significant and visible collective dimension.").

[169] Moon, *supra* note 34 at 256.

[170] Evans, *supra* note 123 at 396.

[171] Peroni, *supra* note 6 at 233.

[172] Danchin, *supra* note 40 at 262.

[173] Evans, *supra* note 123 at 396. *But see* Petkoff, *supra* note 159 at 185-86 ("In *Kosteski* (2006) the Strasbourg Court explained that 'the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions.'").

[174] Martínez-Torrón, *supra* note 70 at 370.

recognizing that belief and practice are mutually dependent, or recognizing that they cannot be neatly separated from each other.[175]

In his analysis of law and literature, James Boyd White distinguished between characters—believable, full, and complex—and caricatures, which reduce subjects to exaggerations, labels, and single roles. The law, he writes, is a literature of caricature.[176] The dubious proposition that all of religion can be neatly packaged into the *forum internum* and *forum externum* may be a prime example.[177]

2. *The Difficulties with Doctrine: Margin of Appreciation, Subsidiarity and Consensus*

Although not tied directly to Article 9 in the same way as the *forum externum* and *forum internum*, the Court's general doctrines of margin of appreciation, subsidiarity, and consensus also play a significant role in how the Court is able to shape its Article 9 jurisprudence.

"The margin of appreciation has a complex role in European Convention case-law."[178] It "is in a way a logical result of the position of the Court being a supranational institution."[179] Generally speaking, it is "a rationale for deferring to State decision-making in areas of controversy or complexity,"[180] which "gives the flexibility needed to avoid damaging confrontations between the Court and Contracting States over their respective spheres of authority and enables the Court to balance the sovereignty of Contracting Parties with their obligations under the Convention."[181]

[175] Silvio Ferrari, *Law and Religion in a Secular World: A European Perspective*, 14 ECC. L.J. 355, 367 (2012).

[176] Lourdes Peroni, *Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising*, 10 INT'L J.L. CONTEXT 195, 195 (2014) (citing JAMES BOYD WHITE, THE LEGAL IMAGINATION 113-14 (1985)).

[177] Caylee Hong & René Provost, *Let Us Compare Mythologies*, *in* MAPPING THE BOUNDARIES OF LEGAL RELIGION: RELIGION AND MULTICULTURALISM FROM ISRAEL TO CANADA 1-21, 2 (René Provost, ed., 2014) ("Lawyers, for whom the erection of such intellectual scaffoldings presents a largely irresistible urge, may be more at risk than most of falling prey to this illusion of coherence in the process of creating and interpreting legal norms meant to regulate diversity in our societies.").

[178] Evans, *supra* note 91 at 332.

[179] Carla M. Zoethout, *Rethinking Adjudication Under the European Convention*, *in* THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 422 (Jeroen Temperman, ed., 2012).

[180] Evans, *supra* note 91 at 332.

[181] R. St. J. MacDonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 123 (R. St. J. MacDonald, et al. eds., 1993). *See also* Letsas, *supra* note 76 at 720 ("Many commentators view the margin of appreciation as a feature of a supranational judicial system, designed to

The margins doctrine "initially responded to concerns of national governments that international policies could jeopardize their national security."[182] The "rationale later was expanded to allow each country wide discretion to select policies that would regulate potentially harmful activities, such as incitement to violence or racist speech, by means benefitting each State's unique circumstances and societal constraints."[183] Today, however, the doctrine has expanded beyond the unique security concerns of individual states to areas "such as the allocation and management of its natural resources, length of national statutes of limitations, or restriction of speech due to public morals."[184] This "reflect[s] an altogether different philosophy, one which is based on notions of subsidiarity and democracy and which significantly defers to the wishes of each society to maintain its unique values and address its particular needs."[185]

Thus, today, one aspect of the doctrine is that "the European Court should often *defer* to the judgment of national authorities on the basis that the ECHR is an *international* convention, not a national bill of rights. The ideas of subsidiarity and state consensus are usually invoked to support the structural use of the margin of appreciation."[186] Thus, "the role of national decision-making bodies has to be given special consideration and domestic authorities should enjoy a large margin of appreciation."[187] At the same time, "certain standards must be universally observed by all contracting states."[188] "[T]he Court developed the doctrine of the 'margin of appreciation' to reconcile the potential tension between universality and subsidiarity."[189]

balance the sovereignty of the Contracting States with the need to secure protection of the rights embodied in the Convention.") & 721 ("It is the idea that the Court's power to review decisions taken by domestic authorities should be more limited than the powers of national constitutional court or other national bodies that monitor or review compliance with an entrenched bill of rights."); "[T]he dynamics of the European Court are very different from, and much more complex than, the dynamics of national constitutional courts." Martínez-Torrón, *supra* note 70 at 364.

[182] Benvenisti, *supra* note 78 at 845; *see also* Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. J. INT'L L. 1, 48 (1995) (noting the doctrine "is particularly generous with regard to actions which domestic authorities regard as critical to the prevention of disorder or crime.").

[183] Benvenisti, *supra* note 78 at 845-46.

[184] *Id.* at 846

[185] *Id.*

[186] Letsas, *supra* note 76 at 706.

[187] Tulkens, *supra* note 84 at 2577-78.

[188] Fokas, *supra* note 70 at 58.

[189] *Id.* Until quite recently, both the subsidiarity principle and the margin of appreciation were established only in the Court's case law. "But as of 2013 both formally entered the ECHR with the introduction of Protocol 15 that inserts a reference to the principle of subsidiarity and the doctrine of the margin of

Subsidiarity "'refers primarily to the subsidiary role of the Convention machinery and entails first of all what may be termed a 'procedural relationship' between the national authorities responsible for implementing the Convention and deciding human rights issues on the one hand and the Convention institutions on the other."[190] "This is the principle that it falls primarily upon the Contracting States to ensure that the rights embodied in the Convention are protected."[191] The Maastricht Treaty provides in Article 1 that decisions should be taken as closely as possible to the citizen, while "'Article 2 then asserts the principle by name: 'The objectives of the Union shall be achieved as provided in this Treaty . . . while respecting the principle of subsidiarity.'"[192]

In addition, the Court has concluded that it "must *defer* to the national authorities whenever they are '*better placed*' than an international judge to decide on human rights issues raised by the applicant's complaint."[193] In other words, "national authorities are not only the first ones to deal with complaints regarding the Convention rights and provide remedies, but also the ones who have . . . more legitimacy . . . to decide on human rights issues."[194] Paola Carozza explains:

> Even though the word 'subsidiarity' entered our political lexicon only in the twentieth century, the idea has an intellectual history as old as European political thought. Chantal Millon-Delsol, whose study of subsidiarity is one of the most comprehensive available and one of the first standard sources for any study of the concept, traces its origins as far back as classical Greece, and finds it later taken up by Thomas Aquinas and medieval scholasticism. . . . It was only in the latter part of the nineteenth century that Catholic social theorists became the principal proponents of the idea of subsidiarity, as they sought some sort of middle way between the perceived excesses of both

appreciation into the Convention's preamble pending ratification by contracting states." *Id.* at 60. However, subsidiarity was adopted as Community policy not long after "Pope John XXIII issued his 1961 encyclical *Mater et Magistra*." Leustean & Madeley, *supra* note 7 at 3.

[190] Letsas, *supra* note 76 at 722.

[191] *Id.* at 721; *see also* Fokas, *supra* note 70 at 58 ("each contracting state is, in the first place, responsible for securing the rights and freedoms protected by the Convention").

[192] Paola G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 50 (2003) (quoting Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253, Arts. 1 & 2)).

[193] Letsas, *supra* note 76 at 721.

[194] *Id.* at 722.

> laissez-faire liberal capitalist society and Marxian socialist alternatives.[195]

"Subsidiarity is therefore a somewhat paradoxical principle. It limits the state, yet empowers and justifies it. It limits intervention, yet requires it. It expresses both a positive and a negative vision of the role of the state with respect to society and the individual."[196]

"There are two broad categories of cases in which the Court has taken national authorities to be better placed and has deferred to their judgment. The first category includes cases where there is no *consensus* among Contracting States on what human rights individuals have."[197] Consensus is inversely related to the margin of appreciation. "[T]he less a court is able to identify a European-wide consensus on the treatment of a particular issue, the wider the margins a court is prepared to grant to the national institutions. Minority values, hardly reflected in national politics, are the main losers in this approach."[198]

"The second category comprises cases where the Court defers to the decision of the national authorities because the latter are better placed to decide on politically sensitive issues within a particular Contracting State."[199] With respect to the extent of the margin of appreciation:

> some aims are more susceptible to an objective analysis than others; a bigger objectivity calls for a lesser discretion on the part of national authorities. Second, the nature of the activities subjected to limitation; when they concern strictly an individual's private life—and not so much the community—the State's margin of appreciation lessens while the ECtHR's power of control increases, and, at the same time, 'particularly serious reasons' are required to consider that a State interference has been legitimate.[200]

The margin of appreciation tends to be particularly wide in religious freedom cases.[201] This should not be surprising. "The

[195] Carozza, *supra* note 192 at 40-41.
[196] *Id.* at 44.
[197] Letsas, *supra* note 76 at 722.
[198] Benvenisti, *supra* note 78 at 851.
[199] Letsas, *supra* note 76 at 723; *see also id.* at 706 (noting the substantive element of the margin doctrine "is to address the relationship between individual freedoms and collective goals").
[200] Martínez-Torrón, *supra* note 56 at 601.
[201] Fokas, *supra* note 70 at 58; *see also* EVANS, *supra* note 58 at 143 ("While in theory there is no difference between the margin of appreciation in relation to particular Articles, State respondents in Article 9 cases tend to be given a wider margin of appreciation."). Specifically, "The 'margin of appreciation' has paradigmatically figured in judgments concerning the limitation clauses; the

discretion the Court grants to national authorities on religious issues is symptomatic of the difficulty in dealing with them."[202] And especially given that "the countermajoritarian role of the European Court of Human Rights . . . is not unconditionally accepted,"[203] it "enables the European Court to take account of local sensibilities when making rulings in particular cases"[204] and "provides an exit for the Court from certain culturally and politically sensitive issues."[205]

Although the doctrine "allows states a certain, variable, leeway to interpret religious rights and freedoms within the broader context of their national cultures and traditions"[206] its application is not without difficulty. To begin, some question whether the doctrine undercuts the universality of the rights protected by the Court to an unacceptable degree.[207] Additionally, many have charged that the Court relies on the doctrine inconsistently, and that the degree to which the Court will defer to national institutions is unpredictable.[208] Functionally, application of the doctrine "especially when coupled with the consensus rationale, essentially reverts difficult policy questions back to national institutions, in complete disregard of their weaknesses."[209]

More problematically, "the doctrine is inappropriate when conflicts between majorities and minorities are examined."[210] In addition to leaving unanswered "some of the more philosophically taxing questions about the accommodation of religious belief,"[211] the doctrine burdens minorities, including religious minorities, in important ways. Eyal Benvenisti explains:

doctrine is being used in particular where the Convention enables a balancing of interests by the Member state, notably under Articles 8-11 . . . which contain in the second paragraph the 'necessary in a democratic society' clause." Zoethout, *supra* note 179 at 418.

[202] Fokas, *supra* note 70 at 58.

[203] Zoethout, *supra* note 179 at 421.

[204] Cumper & Lewis, *supra* note 2 at 15.

[205] Fokas, *supra* note 70 at 58

[206] *Id.*

[207] Benvenisti, *supra* note 78 at 843 ("The ECHR's "universal aspirations are, to a large extent, compromised by the doctrine of margin of appreciation.") & 844 ("Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights.").

[208] Fokas, *supra* note 70 at 55 (noting the "variable 'margin of appreciation' it allows individual states on religious issues, particularly when concerning Islam."); Letsas, *supra* note 76 at 705 ("Most commentators complain about the lack of a uniform or coherent application of the margin of appreciation doctrine in the case law of the European Court of Human Rights."); Benvenisti, *supra* note 78 at 844 ("Inconsistent applications in seemingly similar cases due to different margins allowed by the court might raise concerns about judicial double standards.").

[209] Benvenisti, *supra* note 78 at 853.

[210] *Id.* at 847

[211] Cumper & Lewis, *supra* note 2 at 15.

> a wide margin of appreciation is appropriate with respect to policies that affect the general population equally, such as restrictions on hate speech (which are aimed at protecting domestic minorities), or statutes of limitations for actions in tort. On the other hand, no margin is called for when the political rights of members of minority groups are curtailed through, for example, restrictions on speech or on association, when their educational opportunities are restricted by the State, or when the allocation of resources creates differential effects on the majority and the minority. Acquiescing to the margin of appreciation in the latter cases assists the majorities in burdening politically powerless minorities.[212]

He continues, noting that the consensus doctrine similarly:

> puts quite a heavy burden on the advocates of the promotion of individual and minority rights who must spread their resources among the diverse national institutions in their efforts to promote human rights. Only if they succeed in a sufficient number of jurisdictions will the court be convinced that the status quo has been changed and react accordingly. Such a policy cannot be said to promote human rights, especially not minority rights.[213]

In Carla Zoethout's view, "it is time for the Court to develop a new mode of adjudication—a form of review which makes it possible to act as a countermajoritarian institution and set a European standard, without infringing state sovereignty."[214]

3. *Defining Religion (or Not)*

a. The Problem of Definition

When the Court does address Article 9 head-on, it must face, as an initial matter, a question of definition or classification. And "[t]he definition of religion—how it is organized, the rituals it employs, the beliefs it transmits—is a central determinant of the degree to which religious liberty is protected."[215] "Although many international and regional human rights instruments guarantee rights

[212] Benvenisti, *supra* note 78 at 847.
[213] *Id.* at 853
[214] Zoethout, *supra* note 179 at 413.
[215] Lori G. Beaman, *The Courts and the Definition of Religion: Preserving the Status Quo Through Exclusion*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 203, 210 (Arthur L. Greil & David G. Bromley, eds., 2003).

related to freedom of religion or belief, none attempts to define the term 'religion,'" and it "remains undefined as a matter of international law."[216] There is no "commonly agreed definition of what 'religion' means in EU law and policy."[217] Whether and how religion ought to be defined for legal purposes are "increasingly contested and divisive questions."[218] Yet "because religion is much more complex than other guaranteed rights, the difficulty of understanding what is and is not protected is significantly greater."[219] And this difficulty is perhaps even more acute in the legal field that in others. "While academics have the luxury of debating whether the term 'religion' is hopelessly ambiguous, judges and lawyers often do not."[220]

"The word 'religion' has a fairly long pedigree in European languages. . . . its use dates back at least to Roman times" but its antiquity does not "mean that the word has always had the same meaning throughout history; rather the opposite is the case."[221] "Religio" in Roman times referred primarily to the monastic life (as "Religious" still does within the Roman Catholic Church, as seen in the division between the "religious" clergy who belong to orders, and "secular" diocesan clergy, who do not). Moreover, "to the degree that 'religio' designated a wider quality or domain, this sphere . . . denoted those matters having to do with God or gods" and human devotion to them generally; it was "singular and not plural."[222] Today, however, religion exists as a reified "thing" that exists in the world. "Religion in the West is understood both as a personal judgment about what is true and right . . . and a group

[216] T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189, 189-90 (2003). *See also* Danchin, *supra* note 8 at 675-76 ("none of the major international and regional human rights instruments define the term 'religion.'"); Arthur L. Greil & David G. Bromley, *Introduction*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 3 (Arthur L. Greil & David G. Bromley, eds., 2003) ("it is probably safe to venture the proposition that no consensus has yet been reached with regard to this subject."); EVANS, *supra* note 58 at 51 ("No human rights treaty, including the Convention, has ever defined religion or belief.").

[217] Sergio Carrera and Joanna Parkin, *The Place of Religion in European Union Law and Policy: Competing Approaches and Actors Inside the European Commission*, RELIGARE Working Document No. 1, September 2010, at 3.

[218] Danchin, *supra* note 46 at 456.

[219] Gunn, *supra* note 216 at 190.

[220] *Id.* at 191.

[221] Peter Beyer, *Defining Religion in Cross-National Perspective: Identity and Difference in Official Conceptions*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 163, 166 (Arthur L. Greil & David G. Bromley, eds., 2003).

[222] *Id.*

identity that is deeply rooted."[223] As such, there is a general assumption that religion is capable of definition.

But with respect to Article 9 in particular, "the issue has proved so controversial that it has been difficult to achieve any consensus as to the meaning of the term."[224] Defining religion, especially as a legal term of art, is no simple task. As Eisgruber and Sager explain:

> The problem goes something like this: in order to protect religious liberty we have to define what religion is, and once we are in the business of saying that some beliefs, commitments, and projects are entitled to special treatment as 'religious' while others are not, we are creating a sphere of orthodoxy of exactly the sort that any plausible understanding of religious liberty should deplore.[225]

Moreover, "any attempt to define the scope and content of the right to religious liberty will necessarily involve assumptions about the underlying nature of religion itself."[226] Legal definitions may incorporate attitudes and assumptions that reflect cultural attitudes about religion generally or toward individual religions specifically. For example, with respect to religion generally, "[t]he right to religious freedom is often referred to simply as 'freedom of conscience or belief.' This subtle shift in terminology is in fact the product of two deeply entangled historical and normative transformations that have occurred in modern secular discourse on religious freedom."[227]

Thus, rather than viewing religion as an entity, it is better to speak of it as "a 'category of discourse,' whose precise meaning and implications are continually being negotiated in the course of social interaction."[228] "The practical task of defining religion is one that involves a large number of social actors in a variety of social

[223] Moon, *supra* note 34 at 258.

[224] Evans, *supra* note 58 at 51.

[225] Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 807 (2009).

[226] Danchin, *supra* note 8 at 676 (quoting Gunn, *supra* note 216 at 195).

[227] *Id.* at 675

[228] Greil & Brombley, *supra* note 216 at 4; *see also* Meredith B. McGuire, *Contested Meanings and Definitional Boundaries: Historicizing the Sociology of Religion*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 127, 127 (Arthur L. Greil & David G. Bromley, eds., 2003) ("Definitional boundaries are the outcomes of *contested meanings*." (emphasis in original)). Even biases within "sociology of religion . . . ha[ve] underwritten conceptions of 'religion' as essentially fixed, rather than existentially variable." William H. Swatos, Jr., *Differentiating Experiences: The Virtue of Substantive Definitions*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 39, 43 (Arthur L. Greil & David G. Bromley, eds., 2003).

contexts and that has important social, political and cultural consequences. This is perhaps most obvious if we look at the courts."[229] The ECtHR in particular has addressed the definitional issue in a unique way, by beginning with a broad, inclusive definition, but then differentiating between religious beliefs *qua* beliefs, on the one hand, which are inviolable, and manifestations of belief on the other, which are entitled to far less protection. The underlying problem is that this approach is not neutral between religions.

First, the Court has responded to the problem of defining religion by adopting a "a broad, inclusive approach to the question of what 'counts' as a religion or belief for the purposes for the second sentence of Article 9(1)."[230] For example, "[t]he Church of Scientology was accepted as falling under the protection of Article 9 with no discussion of the issues that have concerned domestic courts."[231] And "[p]acifism has been accepted as a belief even when it is not linked to a particular religion."[232]

But the Court has been far less accommodating in its protection of religion as it is actually lived. It has "moved from a very liberal definition of 'religion or belief' to a very restrictive view of what freedom of religion and belief entail. . . . they have in fact developed a conservative conception of these notions that belies the expansive approach taken at the definitional stage."[233] And "the way in which the Court and Commission have dealt with the substance of the protection of freedom of religion or belief subtly prefers some conceptions of religion to others."[234]

[229] Greil & Bromley, *supra* note 216 at 3.

[230] Evans, *supra* note 103 at 295; *see also* Evans, *supra* note 123 at 389-90 ("The basic approach of the Commission has been to define religion or belief liberally and inclusively. It has rarely been determined that something that is alleged to be a religion or belief does not fall within the protection of the Convention.") & 392 ("the tendency of the Court and Commission at the definition stage of Article 9 cases has been to adopt a philosophy of inclusiveness."). However, "[a]lthough the Court has been relatively liberal in its definition of religion, its insistence that its views, rather than those of the applicants, should decide what is required by the relevant religion has meant that. . . there is a risk that the Court 'will single out for protection religious rites and practices with which the members of the Court are familiar and feel comfortable.'" MCCREA, *supra* note 17 at 126 (quoting EVANS, *supra* note 58 at 125).

[231] EVANS, *supra* note 58 at 55 (citing X & Church of Scientology v. Sweden, App. No. 7805/77, 16 Eur. Comm'n H.R. Dec. & Rep. 68, 70 (1978)).

[232] EVANS, *supra* note 58 at 55 (citing Le Cour Grandmaison & Fritz v. France, App. Nos. 11567/85 & 11568/85, 53 Eur. Comm'n H.R. Dec. & Rep. 150 (1987) and Arrowsmith v. United Kingdom, App. No. 7050/75, 19 Eur. Comm'n H.R. Dec. & Rep. 5, 19 (1978)). Both of these cases understand "belief" to mean "conviction."

[233] EVANS, *supra* note 58 at 66.

[234] Evans, *supra* note 123 at 392.

Specifically, "the emphasis in the interpretation of Article 9 is on the internal: the private thought, conscience, and religion of the individual."[235] Therefore, as William Arnal explains:

> [O]ur definitions of religion, especially insofar as they assume a privatized and cognitive character behind religion (as in religious *belief*), simply reflect (and assume as normative) the West's distinctive historical feature of the secularized state. Religion, precisely, is *not* social, *not* coercive, *is* individual, *is* belief-oriented, and so on, because in our day and age there are certain apparently free-standing cultural institutions, such as the Church, which are excluded from the political state.[236]

Additionally, the Court has held that "'religious freedom is primarily a matter of individual conscience' though one that implies a right to some manifestation."[237] The problem is that "[t]he primacy that the Court has given to the internal role of conscience and the notion that freedom of religion or belief is mainly about being able to hold a particular set of beliefs is relevant to the conception of who or was is entitled to freedom of religion or belief."[238] "The 'norm' in Strasbourg freedom of religion case law appears to be a Protestant, belief-centered conception of religion. This conception favours internal and disembodied forms of religion over external and embodied ones."[239] Although the Court has not attempted to define religion comprehensively, (assuming such a definition is possible),[240] "background assumptions about religion as primarily a matter of conscience or belief appear throughout its freedom of religion case law."[241]

Finally, there are lurking behind the legal issues, questions of diversity, toleration, and cultural identity. Apart from the difficulties in defining religion generally, and the special hardships in defining it for legal purposes, it may be that the Court's uneasiness with Article 9 as a whole "reflects a deep-seated European uneasiness about how far to tolerate religious diversity."[242] Veit Bader has found that among European states,

[235] EVANS, *supra* note 58 at 72.

[236] William E. Arnal, *Definition*, *in* GUIDE TO THE STUDY OF RELIGION 21, 31 (Willi Braun & Russell T. McCutcheon, eds., 2000).

[237] Evans, *supra* note 123 at 393 (quoting Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A), para 33 (1993)).

[238] *Id.* at 394.

[239] Peroni, *supra* note 6 at 233.

[240] Petty, *supra* note 14 at __ (Tenn. L. Rev.).

[241] Peroni, *supra* note 41 at 236.

[242] Janis, *supra* note 1 at 76. In addition, "There is always a danger in attempting to apply a concept as complex and controversial as religious freedom,

domestic courts in France, Belgium, Italy, and Portugal face challenges "in finding defensible definitions of 'religion' under conditions of greater and manifestly visible religious diversity."[243] The Strasbourg court has therefore avoided addressing Article 9 when it found such avoidance to be expedient.

b. Avoiding the Issue

"It is fairly common for legal analyses of freedom of religion or belief to avoid a serious discussion of the definitional problem, even among the most important works."[244] Because Article 9 was almost completely the domain of the Commission for many years, "[t]he task of defining religion or belief in the context of Article 9 has generally been performed by the Commission."[245] Both the Commission and, later, the Court "have taken a generous approach to defining religion or belief."[246] They "have refrained from defining, or even listing, the essential criteria of the word 'religion.'"[247] "And [t]he Commission has, by and large, not entered into that controversy as it has rarely determined that something that is alleged to be a religion or belief is not."[248]

"The reluctance of the European Commission or Court formally to define the word 'religion' is understandable."[249] A workable legal definition would have to be specific enough to provide practical guidance to courts on inclusion and exclusion criteria, while at the same time accounting for the wide diversity of religious belief and practice and distinguishing religious behaviors that could also be classified as cultural, philosophical, or otherwise non-religious. "Such a balance would be almost impossible to strike and explains why definitions of religion have also been avoided in the past by the Human Rights Committee of the International Covenant

that those charged with applying it will simply draw on their own experiences or notions of 'common sense' and thus give deference to systems of belief with which they are familiar or comfortable, but fail to adequately protect that which seems foreign or strange." EVANS, *supra* note 58 at 18.

[243] Veit Bader, *Religion and the Myths of Secularization and Separation*, RELIGARE Working Paper no. 8, March 2011, at 3 & n.1.

[244] Gunn, *supra* note 216 at 190-91.

[245] EVANS, *supra* note 58 at 53

[246] *Id.* at 55

[247] Adhar & Leigh, *supra* note 65 at 152 ("It is a frequent criticism of the jurisprudence on Article 9 of the European Convention that it has failed almost entirely to confront the issue of defining religion."); Cumper, *supra* note 105 at 173. *But see* Freedland & Vickers, *supra* note 66 at 601 (noting the "ECHR suggests that beliefs must have sufficient 'cogency, seriousness, cohesion and importance' to warrant protection.").

[248] EVANS, *supra* note 58 at 54. "Often the Commission tried to simply ignore the issue by dealing with controversial cases on different grounds." *Id.* at 56.

[249] Cumper, *supra* note 105 at 173.

on Civil and Political Rights 1966 (ICCPR) and the UN's Special Rapporteur on the Elimination of Religious Intolerance."[250]

In addition to simply avoiding the definitional question, the Court went to greater lengths in avoiding Article 9 entirely. The ECtHR developed its jurisprudence of the permissible limitations on rights in the context of Articles 8, 10 and 11, rather than Article 9 because, until 1993, Article 9 cases were almost entirely deemed inadmissible by the Commission. "By the time the Court began to judge on the merits of applications based on religious freedom, there was a well-established doctrine on the permissible limitations on the freedom of expression, the freedom of assembly and association, and the right to private and family life."[251]

In recent years, the Court has changed course. The Court "has been engaging seriously with the freedom of religion and belief under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms" for the last fifteen years.[252] "Article 9 of the Convention explicitly protects freedom of religion or belief. Yet there are a wide variety of conceptions as to what this freedom entails."[253] "[T]he Court may be considered to be in the process of developing a 'theory' on the proper place of religion in the public sphere."[254] But the Court still must overcome a variety of structural and doctrinal hurdles to do so, particularly in a way that is both coherent and equitable.

V. EUROPEAN POLITICAL THEOLOGY: RELIGIOUS LIBERTY AS A WESTPHALIAN PARADOX

European societies have assumed that being modern and secular requires the privatization of religion.[255] As Robert Yelle has said, "we inhabit a particular political theology."[256] "[W]hat we call 'secular law' has been shaped by Christian soteriology and supersessionism" involving "[t]he separation of a spiritual 'religion' from both civil law and ceremonial 'religion.'"[257] The result of this separation is that "[t]he practical application of human rights approaches to the freedom of religion is structurally biased towards those forms of religious belief which are essentially voluntarist,

[250] Cumper, *supra* note 105 at 173.

[251] Martínez-Torrón, *supra* note 56 at 594.

[252] Scharffs, *supra* note 69 at 249.

[253] EVANS, *supra* note 58 at 18.

[254] Fokas, *supra* note 70 at 55 (noting the jurisprudence of the ECHR reflects the "extreme state of flux currently characterizing the place of religion in the European sphere, both at the European and national level.").

[255] Casanova, *supra* note 42 at 26.

[256] Yelle, *supra* note 3 at 25.

[257] *Id.*

private and individualist—one might say pietistic—rather than communitarian in organisational orientation."[258]

Yelle continues:

> Indeed, Christianity arguably created a separation between the religion and political domains with its distinctions between the 'Two Kingdoms (Cities, Swords)' and, even earlier, between Christian 'grace' and Jewish 'law.' The original version of the Great Separation' was the founding narrative of Christianity, which, according to Saint Paul, effected a fundamental break with its own Jewish past. Following Christ's redemptive sacrifice on the Cross, the laws that prescribed sacrifice and other rituals were ineffective as a means of salvation and were abrogated. Religion was no longer a matter of law, but of grace; no longer of the flesh, but of spirit.[259]

This understanding of religion is privatized and ultimately Christian "'because . . . it emphasizes the priority of belief as a state of mind rather than as constituting activity in the world.'"[260] Religion thus became "an internal discipline superior because invisible, ubiquitous, and transcendent: in a word, *spiritual*."[261] And while ritual continued to play an important part in the early church, "the 'interiorization of religion' following the Reformation . . . made belief the measure of what religion is understood to be."[262] "Privileging belief over practice . . . rests on a conception of religion that has emerged out of a particular historical trajectory and that, as a result, is largely Protestant."[263]

But this is hardly the only way that one can understand religion. It need not be principally spiritual, and "there is nothing 'natural' or 'universal' in describing religion as fundamentally a matter of belief."[264] Indeed, this understanding of religion is not necessarily applicable outside of its own Western milieu. "Many non-Western traditions . . . cannot conceive of, nor accept, a system of rights that excludes religion. Religion is for these traditions inextricably

[258] Evans, *supra* note 103 at 313.

[259] Yelle, *supra* note 3 at 24 (internal quotation omitted)

[260] Danchin, *supra* note 8 at 676-77 (quoting TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 47 (1993)). *See also* Stone, *supra* note 34 at 42. ("Western liberalism's very definition of religion as being about belief and not custom or law has a distinctly Protestant cast that does not suit religions such as Judaism or Islam.").

[261] Yelle, *supra* note 3 at 26.

[262] Peroni, *supra* note 41 at 249 (internal quotations omitted).

[263] *Id.* at 248-49.

[264] *Id.* at 249.

integrated into every facet of life."[265] For those who see themselves as "'born into' some religious group rather than religiously 'born again'" religion is not a matter of voluntary assent.[266] These are "collectivistic religions that are 'public in character and defin[e] people's group identity.'"[267] But "more communitarian-oriented religious traditions tend to challenge the state's ordering of society in a manner which more individually focused religions do not."[268] Therefore, "the 'choice' of religion is also established as a legal principle: it serves to define what religion is."[269] It is a choice: voluntary assent to certain propositions.

Accordingly, "any non-Christian or non-Western religion such as Islam which deviates from this notion of religion as private belief and subjective experience thus faces a double charge: not only is it a threat to the secular political order but it is also not religion in its true, modern form."[270] So it should be no surprise "that Western Christianity has found it easier to cohabit plural liberal democracies than some other forms of religious traditions."[271] Christianity fits the *forum internum* left to it by the state, and the state defines religion as generalizations based on Christianity.[272] Western secularism:

> presupposes a Christian civilisation that is easily forgotten because, over time, it has silently slid into the background. Christianity allows this self-limitation, and much of the world innocently mistakes this rather cunning self-denial

[265] John Witte, Jr., *Law, Religion and Human Rights*, 28 COLUM. HUM. RTS. L. REV. 1, 12 (1996).

[266] Ferrari, *supra* note 175 at 368 (quoting SLAVA JAKELIC, COLLECTIVISTIC RELIGIONS: RELIGIONS, CHOICE, AND IDENTITY IN LATE MODERNITY 1-3 (2010)). *See also* Russell T. McCutcheon, *The Category "Religion" and the Politics of Tolerance*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 139, 144 (Arthur L. Greil & David G. Bromley, eds., 2003) (quoting MADAN SARUP, IDENTITY, CULTURE, AND THE POSTMODERN WORLD 3 (1996) ("'[F]or members of many ethnic-minority groups, their religion is an aspect of their culture, a valuable support in a hostile environment.'")); Evans, *supra* note 123 at 396 ("For some religious minority groups, their ability to retain a distinctive lifestyle may be essential to the survival of a community that is supportive of their beliefs.").

[267] Ferrari, *supra* note 175 at 368.

[268] Evans, *supra* note 103 at 314.

[269] Ferrari, *supra* note 175 at 368 (quoting JAKELIC, *supra* note 266).

[270] Danchin, *supra* note 8 at 689.

[271] Evans, *supra* note 103 at 314.

[272] Peroni, *supra* note 41 at 236 ("the Court has valorized disembodied, autonomous, and private forms of religiousity identified with mainstream Protestantism, while sidelining embodied, habitual, and public forms.") & 244 ("aspects of applicant's practices that the Court has tended to de-emphasize include those that cannot be neatly separated from daily actions or everyday life. . . . manifestations outside the domains of home, family and places of worship are of secondary importance.").

> for its disappearance. But if this is so, this 'inherently dogmatic' secularism cannot coexist innocently with other religions . . . it can live comfortably with liberal, Protestantized, individualized, and privatized religions but has no resources to cope with religions that mandate greater public or political presence or have a strong communal orientation. This group-insensitivity of secularism makes it virtually impossible for it to accommodate community-specific rights and therefore to protect the rights of religious minorities.[273]

But, like religion, neither secularism nor religion is a universal category: they need to be contextualized, as they are the product of different and particular histories and cultures. Once applied to Europe, this conclusion means that European secularism is the outcome of European history, in which Christianity has played a central role.[274] But "once European secularism is placed in its context, its Christian roots become evident and prevent the claim of the neutrality of the secular public sphere from being taken seriously: this sphere is an exclusionary space where some selected religions feel at home while others are left out in the cold."[275] Paradoxically, European secularism "remains intrinsically and inevitably Christian—to be fair to non-Christian religions."[276] José Casanova suggests:

> Rather than recognizing the "really existing" religious and secular pluralisms and the multiple European modernities, the dominant discourses in Europe prefer to hold on to the idea of a single secular modernity, emerging out of the Enlightenment. Only secular neutrality is supposed to guarantee liberal tolerance and pluralist multicultural recognition in an expanded European Union. Thus, the secularist paradox, that in the name of freedom, individual autonomy, tolerance, and cultural pluralism, religious people—Christian, Jewish, and Muslim—are being asked to keep their religious beliefs, identities, and norms

[273] Rajeev Bhargava, *Rehabilitating Secularism*, *in* RETHINKING SECULARISM 92-113, 101 (Craig Calhoun, et al. eds., 2011).
[274] Ferrari, *supra* note 175 at 360.
[275] *Id.* at 361-62
[276] *Id.* at 361. *See also id.* at 362 (internal quotation omitted) ("the liberal model of toleration results from an internal Christian dynamic of secularization, which reproduces theological principles in secular guise.")

> "private" so that they do not disturb the project of a modern, secular, enlightened Europe.[277]

But as *JFS* revealed, this is not really possible.[278] Secular modernity guarantees religious freedom only by the privatization of religion. The space that the modern state has left to religion is shaped like Christianity, and when other religions do not fit, they are not treated equally. "[T]he claim of religious neutrality, on the basis of which secularism asserted the authority to adjudicate the limits of the various religions, especially vis-à-vis the secular, stands revealed as myth."[279]

In a nominally post-Christian Europe, there is little to be gained by failing to "acknowledge these roots and to recognize that the art of separation—and, with it, the privatizing of religion—is nothing by an imposition of secular liberalism's Christian cultural heritage on non-Christian religions whose basic terms of reference are entirely different."[280] The "[l]ack of sensitivity and respect for the needs of others are becoming really dangerous for management processes of religious and cultural diversity in European states. We seem to be violating principles of equality in questionable efforts to force unequals to . . . become like us."[281]

This can be seen in the text of the Convention and in the Court's dichotomy between belief and practice. "The ECtHR has, despite Article 9's protection of the right to 'manifest' one's religion, seen protection of individual religious freedom as being largely confined to the private sphere."[282] And "[i]n the Strasbourg representational discourse, the relationship between the two terms appears unidirectional: belief is imagined as pre-existing and practice as its subsequent manifestation. . . . this suggests that there is an actual belief lying beneath practice that comes first."[283] But this need not be the case. "[N]either practice nor belief is foundational, as the two are mutually dependent."[284] "The difficulty with the interpretive methodology of the European Court of Human Rights . . . is that any

[277] José Casanova, *Religion, European Secular Identities, and European Integration*, *in* RELIGION IN AN EXPANDING EUROPE, 65-92, 66-67 (T.A. Byrnes & P.J. Katzenstein, eds., 2006).

[278] *See generally* Petty, *Faith*, *supra* note 14. *See also* Ferrari, *supra* note 175 at 359 (noting Western secularism "penalises non-Christian religions in particular.").

[279] Yelle, *supra* note 3 at 35.

[280] Stone, *supra* note 34 at 41-42.

[281] Werner Menski, *Fuzzy Law and the Boundaries of Secularism*, RELIGARE Lecture, June 2010, at 9.

[282] MCCREA, *supra* note 17 at 122.

[283] Peroni, *supra* note 41 at 255.

[284] *Id.* at 256; ADAM B. SELIGMAN, ET AL., RITUAL AND ITS CONSEQUENCES: AN ESSAY ON THE LIMITS OF SINCERITY 106-07 (2008) (discussing ritual and belief as mutually reinforcing).

assertion of universal authority in the form of 'free-standing' reason . . . tacitly subsumes majoritarian cultural norms . . . into the meaning and scope of Article 9."[285] In the end, "the ECHR has been interpreted so as to permit the use of coercive state power to promote the interests of certain religions."[286]

As Lourdes Peroni suggests:

> moving towards a more inclusive European Human Rights Convention Law may require reaching and challenging deep-rooted assumptions and conceptions underpinning the Court's legal reasoning. In particular, the move may involve rethinking those assumptions and conceptions, which all too often pass for natural and universal, but which in fact benefit some and disadvantage others.[287]

VI. CONCLUSION

"Religion and church continue to have a marked significance in European countries at the end of the twentieth and the beginning of the twenty-first century."[288] And while European states test "different models of democracy, law and religion,"[289] "states not only cannot avoid considering religion, but have an interest in doing so in an increasingly multicultural environment. Europe cannot just disregard religion in all its various manifestations in the 21st century."[290]

In particular, "Christianity continues to shape significant aspects of both the state and state law. This is an embarrassment for liberal theories of rights and their assumption of state neutrality."[291] It is also, to a significant extent, inevitable. The understanding of

[285] Danchin, *supra* note 8 at 745. "Of course, the collective culture within which individual religious freedom is asserted is inevitably influenced by cultural norms to which particular faiths have disproportionately contributed. Therefore, the protection of private religious freedom may allow adherents to culturally entrenched religious a greater degree of freedom to adhere to their faith in public situations, not because the Court accords them a more extensive right to religious freedom, but because there is no clash between the collective norms and structures of the society in which they live and the requirements of their faith." Peroni, *supra* note 41 at 104.

[286] Peroni, *supra* note 41 at 105.

[287] Peroni, *supra* note 6 at 234. *See also* Martínez-Torrón, *supra* note 70 at 365 ("Among the improvable aspects of its case law is the protection of individual religious or moral identity, especially when it is expressed in particular actions in ordinary life, beyond traditional expressions of religiousity such as rites or preaching.").

[288] Pollack, et al., *supra* note 23 at 1.

[289] Ungureanu, *supra* note 11 at 307.

[290] Menski, *supra* note 281 at 1.

[291] Danchin, *supra* note 8 at 670-71.

religion that underlies the state's claim to neutrality and perhaps even the Westphalian system itself is predicated on the privatization of religion and the transfer of jurisdiction over temporal matters to the state. Redefining religion as something broader than propositional belief calls into question the state's goal of neutrality and to a certain (now extremely limited) extent the *raison d'être* of the state itself.

But "unless it faces these issues explicitly, challenging its own assumptions and looking at the consequences of its approach, the European Court of Human Rights is unlikely to provide an example to the international community as it continues to struggle with the complex implications of religious freedom."[292] Focusing on belief in considering issues of religion is not "necessarily wrong or useless. It is merely culturally dependent on 1700 years of Christian history, so ingrained as to be invisible."[293] This is where the Court can do better. "Religious freedom is best measured on the margins: it is those groups who don't 'fit' into definitions of religious normalcy who are the best indicator of a society's commitment to religious expression in its widest possible form."[294]

It seems likely that "the tacit background assumptions shaping the public-private divide—religion as primarily a matter of belief or conscience whose proper place in the private sphere—become more visible when it is a Muslim who seeks to manifest a non-Christian belief or practice in the public sphere."[295] But "this is not only an issue about Islam but about other faith groups, including Orthodox Judaism; and indeed it spills over into some of the questions that

[292] Evans, *supra* note 123 at 396-97.

[293] James V. Spickard, *Cultural Context and the Definition of Religion: Seeing With Confucian Eyes*, *in* DEFINING RELIGION: INVESTIGATING THE BOUNDARIES BETWEEN THE SACRED AND SECULAR 189, 191 (Arthur L. Greil & David G. Bromley, eds., 2003).

[294] Beaman, *supra* note 215 at 216.

[295] Danchin, *supra* note 8 at 672. For example, Joseph Dan suggests that "[t]he political consequences of the mis-use of the term 'religion' are most obvious today concerning the image of 'fundamentalist' Islam in the West. If Islam is a 'religion,' it should be confined to individual spiritual life, and not try to become the Law of the Land of modern countries and see everything outside of itself as evil, and to be fought against as a dangerous cultural and political enemy. Yet this is exactly the meaning of Islam since its beginnings; it never recognized a culture outside of itself (except as subordinated, tolerated minorities which are denied full political rights). Islam was always a political entity, and the expectation that it will conform to the Christian definition of 'religion' is the result of the process of the attempt to universalize the concept of religion in its particular meaning in Christianity." Joseph Dan, *Jewish Studies and European Terminology: Religion, Law and Ethics*, *in* JEWISH STUDIES IN A NEW EUROPE: PROCEEDINGS OF THE FIFTH CONGRESS OF JEWISH STUDIES IN COPENHAGEN 1994 UNDER THE AUSPICES OF THE EUROPEAN ASSOCIATION FOR JEWISH STUDIES xxiii-xxxvi, xxviii n.9. (Ulf Haxen, et al. eds., 1998).

have surfaced . . . about the right of religious believers in general to opt out of certain legal provisions."[296]

"[C]itizenship in a secular society should not necessitate the abandoning of religious discipline, any more than religious discipline should deprive one of access to liberties secured by the law of the land"[297] "[H]uman rights law regarding the freedom of religion in Europe today is developing in a fashion which is as likely to hinder as it is to assist the realisation of the goals of tolerance and religious pluralism which are said to be what it is seeking to achieve."[298] To do so, "[r]eligion . . . needs to be categorised within a wider frame than 'religion and belief.'"[299]

[296] Williams, *supra* note 49 at 263.

[297] *Id.* at 268.

[298] Evans, *supra* note 103 at 291.

[299] Maleiha Malik, *The "Other" Citizens: Religion in a Multicultural Europe*, *in* LAW, STATE AND RELIGION IN THE NEW EUROPE: DEBATES AND DILEMMAS 93-114, 95-96 (Lorenzo Zucca & Camil Ungureanu eds., 2012).

CONCLUSION

This dissertation began five years ago with an observation: The highest court in Britain had held, as a matter of law, that religion and ethnicity were separate things. And not only separate, but incompatible. The court claimed that to the extent a religious community defined itself by descent rather than by affirmation of faith, it was invalid.[1]

What appeared to underlie much of the court's reasoning was an unstated assumption that membership in a religious group depends primarily, if not exclusively, on faith—adherence to particular theological propositions. That understanding of how membership of a religion must be understood, and by extension how religion as a whole must be understood, troubled me.

I looked first at the linguistic and ontological history of the word "religion," noting that it appears to have originally connoted actions or, collectively, a way of life. Only later, especially after the Reformation, did it come to mean the institutions and doctrines intended to facilitate those actions and ways of life.[2] Later still, the Enlightenment, with its systematization of an ever-expanding world, reified religion into its modern form, allowing us to speak of multiple "religions."[3]

Furthermore, the history of the idea revealed that the conception of religion-as-belief privileged Christianity. Most ancient peoples had a national cult; Christianity, a religious community connected by common belief rather than common ancestry was a novel form of religious collectivism.[4] Now it is taken as given—a sociological axiom. The U.K. Supreme Court's insistence that "real" religion concerns matters of belief assigned legal consequences to its reproduction of a Christian worldview.[5]

The British courts were not alone in their assumptions about the nature of religion. Somewhat surprisingly, the Supreme Court of Israel had also found faith to be critical in determining who qualified as a "Jew" under Israeli law. Here, though, while belief was immaterial to determining who qualified as a Jew for religious purposes, the Israeli court concluded that rather than a religious definition, it must accord a "secular" meaning to the term in the application of Israeli civil law.[6] But, as we have seen, the

[1] R (on the application of E) v. Governing Body of JFS & Others, [2009] UKSC 15 (U.K.).

[2] *See*, *e.g.*, GAVIN I. LANGMUIR, HISTORY, RELIGION, AND ANTISEMITISM 70 (1990).

[3] Michael L. Satlow, *Defining Judaism: Accounting for Religions in the Study of Religion*, 74 J. AM. ACAD. RELIGION 837, 841 (2006); JAMES TURNER, WITHOUT GOD, WITHOUT CREED: THE ORIGINS OF UNBELIEF IN AMERICA 23-24 (1985).

[4] WILFRED CANTWELL SMITH, THE MEANING AND END OF RELIGION 23, 26 (1963).

[5] DANIEL BOYARIN, BORDER LINES: THE PARTITION OF JUDAEO-CHRISTIANITY 8 (2004).

[6] HCJ 265/87 Beresford v. Minister of the Interior 43(4) PD 793 [1987] (Isr.), *translated in* Jewish Law Association Studies XI: Law, Judicial Policy, and Jewish Identity

history of the idea of religion reveals that there is little about it that is religiously neutral. The Israeli court's approach is understandable, however, in light of the young state's desire to avoid charges of theocracy and the unique role of religion in the creation of the Westphalian system itself.

Religion is a common legal term of art used in a large number of constitutions, statutes, regulations, and judicial pronouncements. If "religion" is not itself religiously neutral, how is neutrality to be maintained?

One possibility is to define it. But this poses tremendous problems. Religion, as a category, is difficult to define precisely because it is a generalization of Christianity that fits very little else with any degree of fullness or accuracy. This leaves essentialist definitions in a double-bind. The criteria employed will either be so restrictive that the definition remains biased, or so elastic as to be useless. Multifactor approaches perhaps fare marginally better, but still depend on comparisons to what is readily apparent as religion.

Both the Supreme Court of the United States and the European Court of Human Rights have avoided the task of defining religion with great care. Both prefer to adjudicate cases under more general provisions if it is possible to do so. This is perhaps the best course of action. Defining religion in a way that is both comprehensive and utilitarian is likely an impossible task, and even understanding religion in a reasonably inclusive way is still a challenge.

Much work, of course, remains to be done. In particular, a normative question arises about the extent to which law imbued with a Christian understanding of religion may be defensible. Most jurisdictions, even those with an officially-recognized religious establishment such as the U.K., purport to offer legal protection to adherents of all religions on an equal basis. So it should not be terribly surprising that the legal systems of Western states understand religion in a Western way, reflecting centuries of Christian influence. Laws and court rulings are not made in a vacuum, but by legislators and judges—people who, for the most part, share in the same common cultural background.

But it would be at least somewhat surprising for a legal system that claims to be neutral among religions to define religion in a way that advantages some over others, antithetically to its stated purpose. That is, unless the stated neutrality is *contingent* on a belief-based conception of religion, and to the extent that some religions go beyond belief, the state is not interested in offering protection. There may be something to this. The modern Westphalian state and the modern conception of religion grew up together, and in many respects remain intertwined.

in the State of Israel 27, 56-62 (Daniel B. Sinclair, ed., 2000); Ralph Slovenko, *Brother Daniel and Jewish Identity*, 9 ST. LOUIS U. L.J. 1, 15 (1964).

More likely, however, is simple ignorance on the part of legislators and judges that many non-Christian religions define themselves and their membership in ways that may have comparatively little to do with belief. Ensuring that the legal understanding of religion does not inadvertently exclude religious practices or commitments that may not seem necessarily religious under a narrower, belief-based approach would aid in giving effect to laws guaranteeing freedom of religion and in protecting non-Christian, often minority, religions. At the same time, a broader legal understanding of religion would likely have little detrimental impact on the majority.

Recognition of the difficulties inherent in some international instruments pertaining to religious freedom is just beginning. And while there is some good historical work that has been done on the importance of religion in the emergence of the Westphalian system, the extent of its continuing importance in how modern states understand religion more generally would add substantially to our understanding of how courts conceive of religion as an object of legal protection. For now, it is perhaps enough to say that courts understand religion as essentially a matter of belief; the primacy of belief, and the idea of religion more generally, reflects a Christian heritage; and this heritage presents great difficulties today in adjudicating matters of religious freedom. Courts should tread carefully, and with a substantial degree of self-awareness when dealing with this subject, and only broach the subject where it cannot be avoided.

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SUMMARY

In accordance with Article 13(2) of the *Leiden University Doctorate PhD Regulations 2015* and the *Memorandum on PhD Dissertations Consisting of Articles*, dated 30 March 2010, this dissertation is comprised of an unpublished introduction, four substantive chapters each of which has been (or will be shortly) published in a law review or journal, and an unpublished conclusion. Thematically, the first and second chapters may be read together as "Part One," and the third and fourth chapters as "Part Two."

Part One begins with an in-depth analysis of the *JFS* case in the United Kingdom. In that case, a claim was raised that JFS, a state-sponsored Jewish school, improperly refused admission to an applicant who practiced liberal Judaism, but who was not a Jew under the Orthodox view of the school, because his mother was not Jewish and he had not converted.

The opinions of many of the judges in that case expressed a view that membership in a religious community is (or should be) based on the individual beliefs of its members. And because the applicant believed himself to be Jewish and practiced liberal Judaism, the judges concluded that the Orthodox definition based on matrilineal descent violated the Race Relations Act. I suggest that by focusing on the applicant's beliefs, the courts introduced a Christian normativity. The courts then penalized the school for deviating from that norm in its application of Orthodox Jewish law to determine which applicants were Jewish.

One might be tempted to think that the courts of Israel, a self-described Jewish state, would be less susceptible to introducing Christian bias into their legal understanding of religion. In Chapter Two, I critically review three cases from the Israeli Supreme Court concerning who qualifies as a Jew under Israeli civil law. Somewhat surprisingly, I found that Israeli courts not only took the same position as the British courts, but that they did so on the premise that treating belief as the sine qua non of religion was religiously neutral. I propose several theories for why this may have come to pass and suggest how these findings fit into the secularization debate.

Given the findings in Part One, Part Two asks how "religion" as a legal term of art could be applied in less biased manner. Chapter Three explores various types of definitions, and the shortcomings of each, in defining religion as a general matter, and in defining it for legal purposes, primarily in the context of U.S. law. I conclude that none of the available options are particularly attractive, and suggest avoiding relying on explicit protections for religious liberty when other legal guarantees, such as freedom of speech, will suffice.

Chapter Four addresses the same issue in the context of Article 9 of the European Convention on Human Rights. I note that even before judicial decisions are reached, the text of Article 9 itself is biased in favor of confessional religions because of its equation of religion with belief and conscience. Some of the court's doctrines have exacerbated this bias, while others have made remedies difficult to obtain. I locate part of the difficulty in the nature of Westphalian system, which reduced the legitimate reach of religion to the *forum internum* and transferred legitimate temporal authority to the state.

HET JURIDISCHE BEGRIP 'RELIGIE'

SAMENVATTING

In overeenstemming met artikel 13, lid 2 van het promotiereglement van de Universiteit Leiden en het *Memorandum on PhD dissertations consisting of articles* (dd 30 maart 2010) kan een proefschrift bestaan uit artikelen. Het onderhavige proefschrift bestaat uit een niet-gepubliceerde inleiding, vier inhoudelijke hoofdstukken die elk gepubliceerd zijn in een juridisch tijdschrift (of dat zullen worden) en een onuitgegeven conclusie.

Thematisch, kunnen de eerste en het tweede hoofdstuk samen gelezen worden als "Part One," en de derde en vierde hoofdstuk als "Part Two."

Deel I begint met een grondige analyse van de zaak *JFS* uit het Verenigd Koninkrijk. In dat geval werd JFS aangeklaagd, een door de staat gesteunde joodse school, omdat de school ten onrechte geweigerd had een leerling aan te nemen die tot het liberale jodendom kan worden gerekend, maar die *geen jood* was volgens de orthodoxe opvattingen van de school. Volgens de school was hij geen jood omdat zijn moeder niet joods was en hij zich ook niet had bekeerd.

Een kritische analyse van de opvattingen van de rechters in deze zaak maakt duidelijk dat de meerderheid van de rechters ervan uitgingen dat lidmaatschap van een religieuze gemeenschap gebaseerd is (en moet zijn) op de individuele geloofsopvattingen van de leden. En omdat de aanvrager zelf de overtuiging was toegedaan dat hij als joods zou moeten worden gekwalificeerd en dat hij een vorm van liberaal Jodendom praktiseerde, concludeerden de rechters dat de orthodoxe definitie van jodendom, waarbij de afstamming van de moeder centraal staat in strijd is met de Race Relations Act. De conclusie van deze dissertatie is dat door de focus geheel te richten op de opvattingen van de aanvrager een christelijke normativiteit wordt geïntroduceerd door de rechters. Vervolgens werd de school bestraft omdat deze afweek van deze norm door het toepassen van de orthodox-joodse criteria om uit te maken wie joods is en wie niet.

Men zou geneigd zijn te denken dat de rechters in Israël, dat zichzelf typeert als een Joodse staat, minder geneigd zouden zijn om het christelijk vooroordeel in hun juridische opvattingen van wat religie is als uitgangspunt te nemen. In hoofdstuk twee behandel ik drie uitspraken van het Israëlische Hooggerechtshof die ingaan op de vraag wie als "joods" kwalificeert onder het Israëlische burgerlijk recht. Tegengesteld aan wat men zou verwachten, blijkt dat de Israëlische rechters geen andere benadering kiezen dan de Britse rechters, maar dat deden zij gebaseerd op de premisse van een religieus-neutrale benadering. Ik behandel verschillende theorieën waarom dit gebeurd zou kunnen zijn en ik suggereer ook hoe deze resultaten passen in het secularisatie debat.

Gezien de bevindingen in het eerste deel, vraagt het tweede deel zich af hoe "religie" als een juridische vakterm zou kunnen worden toegepast in een minder bevooroordeelde zin. Hoofdstuk drie onderzoekt verschillende soorten definities, en de tekortkomingen van elk, in het definiëren van religie als een algemeen verschijnsel. Ook wordt hier religie als een juridische term behandeld, voornamelijk zoals deze term gehanteerd wordt in de context van het Amerikaanse recht. Ik concludeer dat geen van de beschikbare opties bijzonder aantrekkelijk is en ik stel voor om, zoveel als maar mogelijk

is, een beroep op godsdienstvrijheid te vermijden wanneer andere wettelijke garanties, zoals de vrijheid van meningsuiting, ook mogelijk zijn.

Hoofdstuk vier richt zich op dezelfde kwestie, maar dan in het kader van artikel 9 van het Europees Verdrag voor de Rechten van de Mens. Ik stel vast dat zelfs vóór rechterlijke beslissingen worden bereikt, de tekst van artikel 9 zelf bevooroordeeld is, namelijk ten gunste van de confessionele religies. Dat blijkt uit de identificatie van godsdienst met geloof en geweten. Sommige van de doctrines zoals die door het Hof worden onderschreven hebben dit vooroordeel versterkt, terwijl andere het moeilijk hebben gemaakt om oplossingen te bedenken. Ik zoek een deel van de problemen in de aard van het Westfaalse systeem, dat het legitieme bereik van religie beperkte tot het *forum internum* en dat de legitieme tijdelijke autoriteit bij de staat legde.

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