The legal conception of "religion"

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INTRODUCTION

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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.")