The legal conception of "religion"

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

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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

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[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-

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[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

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[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

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[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

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[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, Ἰονδαϊσμος 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.)).