

# ‘It is difficult for a white judge to understand’:<sup>1</sup> orientalism, racialisation, and Christianity in English child welfare cases

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*This paper considers a set of English child welfare cases in order to explore judicial representations of non-Christianness. Drawing upon insights contained in feminist, critical race, and postcolonial theory, we make two main arguments. First, we argue that judges deploy three distinct yet overlapping approaches to understanding non-Christianness: (1) as belief and ritual practice; (2) as racial genetic marker; and (3) as culture and personal identity. Secondly, we argue that, within these judicial texts, a way of thinking can be identified that is, at times, orientalist, racialised, and Christian. We further argue that this way of thinking plays into contemporary debates about ‘western values’ and ‘civilisational missions’.*

## INTRODUCTION

This paper considers a set of English child welfare cases in order to explore judicial representations of non-Christianness. We focus upon decisions involving consideration of children’s religious and cultural identity over the last 20 years. These legal texts not only provide a window into how English legal discourse grapples with minority religious claims, but they also offer a lens to read English law as resting upon a nominally secular yet, we argue, invisibilised Christian foundation. So, our critique here is not one of the concept of secularism per se but, rather, is focused on an analysis of Christian normativity underlying judicial deployments of ‘secularity’.<sup>2</sup> Cases where judges calculate a child’s cultural welfare offer rich material for such a reading as the judges decide what is best for that child presently and in the future. Where parents, guardians, experts, and/or local authorities dispute a child’s cultural identity, judges intervene to demarcate the boundaries, direction, and pace of this trajectory.

In this paper, we focus upon a set of English legal decisions where judges have given some consideration to the meaning of being Jewish, Muslim, and Sikh, and, in one case, Jain, primarily within a welfare framework. These cases tend to involve litigation surrounding adoption, residence, and specific issue orders. We have not selected these judgments to the exclusion of others: the cases we discuss here appear

<sup>1</sup> *Re S (Change of Names: Cultural Factors)* [2001] 3 FCR 648, Wilson J.

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<sup>2</sup> For critiques of secularism as a concept, see T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003) and H. De Vries, *Introduction* in H. De Vries and L. Sullivan (eds), *Political Theologies* (Fordham University Press, 2006), J.R. Jakobsen and A. Pellegrini (eds), *Secularisms* (Duke University Press, 2008), and H. De Vries, *Religion, Beyond a Concept* (Fordham University Press, 2008).

to be the only ones where the significance of being non-Christian has been discussed explicitly and at length in the context of child welfare.<sup>3</sup>

Some of these decisions, or related ones, are analysed in a different way elsewhere. In the socio-legal literature on religion, for example, scholars tend to focus on arguments to do with human rights and religious freedoms, particularly in relation to respecting the rights of ethnic minority groups to bring up their children according to the beliefs and practices of that culture or religion.<sup>4</sup> These themes are also explored in academic work that considers the relevance of concepts of multi-culturalism, tolerance, diversity, children's rights, and belonging, amongst others.<sup>5</sup> The (more empirical) literature on 'transracial adoption' focuses on whether 'ethnic minority' children adopted primarily by 'white' English families suffer a (psychological) loss of identity, culture and sense of belonging by not growing up in families and communities of the same ethnic origin as their birth parents.<sup>6</sup>

A further literature, in the law and healthcare field, implicates issues of religion and ethnicity through a consideration of decisions defined as being about medical ethics.<sup>7</sup> These scholars turn their attention to how parental cultural affiliations impact on their children's wider healthcare needs.<sup>8</sup> Fox and Thomson, for example, differentiate between the religious and cultural identity issues of parents and their children, arguing that both female and male circumcision is a harmful practice with little redeeming value.<sup>9</sup> Other writers in the medical law area tend to take a similar position in terms of focusing on how non-Christian beliefs and practices (often termed 'rituals') potentially

<sup>3</sup> Note that we have not been able to uncover any recent cases where a dispute involved a conflict between parents of different Christian denominations, nor of a dispute between atheist and religious parents – but see *J v C* (1969) 2 WLR 540 for a discussion of some of the older case law and *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163 involving a brethren sect.

<sup>4</sup> A. Bradney, *Religion, Rights and Laws* (Leicester University Press, 1993); R. Ahdar, 'Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments' (2003) 23 *Oxford Journal of Legal Studies* 611; R. Adhar, 'Religion as a factor in custody and access disputes' (1996) 10 *International Journal of Law, Policy, and the Family* 177–204; R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005); S. Poulter, *Ethnicity, Law and Human Rights* (Oxford University Press, 1999).

<sup>5</sup> See J. Eekelaar, 'Children between cultures' (2004) 18 *International Journal of Law, Policy and the Family* 178; M. Freeman, 'Whose life is it anyway?' (2001) 9 *Medical Law Review* 259; P. Hayes, 'Giving due consideration to ethnicity in adoption placements – a principled approach' (2003) 15(3) *CFLQ* 255; R. Jones and W. Gnanapala, *Ethnic Minorities in English Law* (Trentham Books, 2000); Y. Ronen, 'Redefining the child's right to identity' (2004) *International Journal of Law, Policy and the Family* 147–177; S. Van Praagh, 'Faith, Belonging, and the Protection of Our Children' (1999) XVII *Windsor Yearbook of Access to Justice* 154–203.

<sup>6</sup> I. Gaber and J. Aldridge (eds), *In the Best Interests of the Child: Culture, Identity and Transracial Adoption* (Free Association Press, 1994); E. Griffith and I. Silverman, 'Transracial adoption and the continuing debate over the racial identity of families' in H. Harris, H. Blue and E. Griffith (eds), *Racial and Ethnic Identity: Psychological Development and Creative Expression* (Routledge, 1994); L. Hollingsworth, 'Adoptive dissimilarity from the adoptive family: clinical practice and research implications' (1998) 15(4) *Child and Adolescent Social Work Journal* 3003–3019; M. Husain and S. Husain, 'Mix'n'Match' in R. Phillips and E. McWilliam (eds), *After Adoption: Working with Adoptive Families* (BAAF, 1996); D. Kirton, 'Race', *Ethnicity and Adoption* (BAAF, 1996).

<sup>7</sup> For example, M. Fox and J. McHale, 'In whose best interests?' (1997) 60 *Modern Law Review* 700–709.

<sup>8</sup> H. Gilbert, 'Time to reconsider the lawfulness of ritual male circumcision' (2007) *European Human Rights Law Review* 279–294.

<sup>9</sup> M. Fox and M. Thomson, 'Short changed? The law and ethics of male circumcision' (2005) 13 *International Journal of Children's Rights* 161–181; M. Fox and M. Thomson, 'A covenant with the status quo? Male circumcision and the new BMA guidance to doctors' (2005) 31 *Journal of Medical Ethics* 463–469; see also M. Thomson, *Endowed: Regulating the Male Sexed Body* (Routledge, 2008), especially ch 2. See also K. Green and H. Lim, 'What is this thing about female circumcision?: Legal

harm children. Bridge, for example, calls male circumcision 'a mutilatory assault on an infant', and cites Brazier as 'insightfully pointing out' that 'foreskins can be removed at parental will [yet] I cannot have my little boy given a discreet cross tattooed on his arm to signify my Christian faith'.<sup>10</sup>

Unlike much of the socio-legal literature, however, our interest here is not in framing the questions as ones of 'minority rights' or 'religious dilemmas'<sup>11</sup> or even about 'childhood' or children's rights per se, nor do we wish to consider a practice like circumcision purely in terms of consent, harm, and injury. Rather, we argue these cases can provide a lens to illustrate the circulation of a set of pervasive discourses: we do not seek to advance a normative project about what the courts *should* do when confronted with such disputes.<sup>12</sup>

We draw theoretical, analytical, and methodological inspiration from a variety of sources. Our work is indebted to Edward Said's work on orientalism. Said used this concept, and its evolution as a European discipline, to develop a reading of western thought on the east, most particularly, in Said's work, the middle-east. He argued that orientalism was, 'a system of knowledge about the Orient' offering 'positional authority' to those espousing it.<sup>13</sup> By this he meant that western, Christian thought had developed a systemised knowledge-base, representative typography, and set of practices with material effects about and pertaining to 'the orient' that located western values at a civilisational apex. Out of this orientalist constellation came the 'truth' of the east, for the Christian west.<sup>14</sup> According to Said, orientalism is thus, 'a political vision of reality whose structure promote[s] the difference between the familiar (Europe, the west, "us") and the stranger (the Orient, the east, "them")'.<sup>15</sup>

We argue that the child welfare cases discussed in this paper can be read as orientalist in terms of their understanding of non-Christian, non-western culture. We also subscribe to Said's methodological insistence on the importance of studying representations, including their discursive power and material effects.<sup>16</sup> Further, we draw methodologically from a rich history of feminist scholarship that has studied legal discourse to explore how judges understand, produce, and deploy gender,<sup>17</sup> as well as critical race approaches that read legal texts to uncover processes of racialisation

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education and human rights' (1998) 7 *Social & Legal Studies* 365–388. While Green and Lim's article is about female circumcision, a topic we do not address in any way here, their focus on the 'western-centred universalism', at *ibid* p 366, inherent in much of the anti-female circumcision discourse, is similar to how we approach understanding anti-male circumcision discourse, as we discuss further below.

<sup>10</sup> The quote from Brazier is from a conference paper, 'Children's Interests: Community Norms' (1997), quoted in C. Bridge, 'Religion, culture, and conviction – the medical treatment of young children' (1999) 11(1) CFLQ 1.

<sup>11</sup> C. Bridge, *ibid*.

<sup>12</sup> Nor do we seek to advance a normative position about circumcision itself. But see J. Eekelaar, 'Children between cultures' (2004) 18 *International Journal of Law, Policy and the Family* 178; P. Hayes, 'Giving due consideration to ethnicity in adoption placements – a principled approach' (2003) 15(3) CFLQ 255; and Y. Ronen, 'Redefining the child's right to identity' (2004) *International Journal of Law, Policy and the Family* 147–177.

<sup>13</sup> E.W. Said, *Orientalism* (Vintage, 1979), at pp 6–7, re-published with new Afterword in 1994.

<sup>14</sup> See also R. Lewis, *Gendering Orientalism* (Routledge, 1996).

<sup>15</sup> E.W. Said, *Orientalism* (Vintage, 1979), at p 43.

<sup>16</sup> *Ibid*.

<sup>17</sup> Eg, C. Smart, 'The woman of legal discourse' (1992) 1 *Social & Legal Studies* 29; R. Graycar and J. Morgan, *The Hidden Gender of Law* (Federation Press, 2nd end, 2002).

(defined below).<sup>18</sup> We are also indebted to scholarship in literary and cultural studies, for example, the work of Bryan Cheyette, which has taken up these concerns in different ways.<sup>19</sup> To this mix, we add recent work on civilisational discourse, secularism, and the idea of 'the west'.<sup>20</sup>

Drawing upon the insights contained in these literatures, we read the cases to make two main arguments. First, we argue that judges deploy three distinct yet, occasionally, overlapping approaches to understanding non-Christianness: (1) as belief and ritual practice; (2) as racial genetic marker; and (3) as culture and personal identity. The first approach prioritises a child's intellectual capacity to understand the meaning of belief and ritual; the second prioritises a 'racial' or ethnic lineage; and the third applies a more context-oriented perspective in order to determine a child's cultural identity.

Second, we argue that, within these judicial texts, a way of thinking can be identified that is, at times, orientalist, racialised, and Christian. We have elucidated our understanding of orientalism above. We use the words 'racialisation' and 'racialised', not as terms of art, but to signify a particular form of understanding and way-finding – usually through phenotypical signifiers or characteristics – when encountering persons perceived as alien to the 'home' environment;<sup>21</sup> an approach that overlaps with yet is distinct from orientalisating processes. We argue that this orientalist, racialised, Christian thinking leads to particular forms of decision-making with significant implications for the discursive subjects – both the children and their parents. We further argue that both the orientalism and racialisation in these cases play into contemporary debates about 'western values' and civilisational missions.<sup>22</sup>

Our deployment of the term 'Christian' is not intended to homogenise Christianity or ignore the very significant history of Protestantism and Catholicism in England. Nor is it our intent to marginalise the fact that Christianity is riven by historical and

<sup>18</sup> See, for example, R. Delgado, J. Stefanic, A. Harris (eds), *Critical Race Theory* (Federation Press, 2001); K. Crenshaw, N. Gotanda, G. Peller and K. Thomas (eds), *Critical Race Theory: The Key Writings That Formed the Movement* (New York University Press, 1996); A. Wing, R. Delgado, D. Bell (eds), *Critical Race Feminism: A Reader* (New York University Press, 2003). For critical race readings of Jews and Jewishness in English law, see D. Herman, 'Jews and other Uncertainties: Race, faith and English law' (1999) 19 *Legal Studies* 339–366 (with D. Cooper); D. Herman, '“An Unfortunate Coincidence”: Jews and Jewishness in 20<sup>th</sup> century English Judicial Discourse' (2006) 33 *Journal of Law and Society* 277–301; D. Herman, '“I do not attach great significance to it”: Taking note of “the Holocaust” in English Law' (2008) 17 *Social & Legal Studies* 427–452.

<sup>19</sup> B. Cheyette, *Construction of 'The Jew' in English Literature and Society* (Cambridge, 1993). More recently, see also N. Valman, *The Jewess in Nineteenth-Century British Literary Culture* (Cambridge, 2007).

<sup>20</sup> See T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003) and H. De Vries' *Introduction* in H. De Vries and L. Sullivan (eds), *Political Theologies* (Fordham University Press, 2006); J.R. Jakobsen and A. Pellegrini (eds), *Secularisms* (Duke University Press, 2008) and H. De Vries, *Religion, Beyond a Concept* (Fordham University Press, 2008). See also: W. Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, 2006); J. Butler, 'Sexual politics, torture, and secular time' (2008) 59 *The British Journal of Sociology* 1–23; A. Bonnett, *The Idea of the West: Culture, Politics and History* (Palgrave, 2004).

<sup>21</sup> On the concept of racialisation, see M. Omni and H. Winant, *Racial Formations in the United States: From the 1960s to the 1990s* (Routledge, 1994); D. Goldberg, *The Racial State* (Blackwell, 2001). For a child welfare analysis using the concept of 'racial ideologies', see M. Kline, 'The "colour" of law: Ideological representations of First Nations in legal discourse' (1994) 3 *Social & Legal Studies* 451–476. For further elaboration of 'racialisation' see also R. Miles and M. Brown, *Racism* (Routledge, 2003) and R. Miles, *Racism and Migrant Labour* (Routledge, 1982) discussed in more detail below.

<sup>22</sup> See also K. Green and H. Lim, 'What is this thing about female circumcision?: Legal education and human rights' (1998) 7 *Social & Legal Studies* 365–388. We are conscious that we downplay agency – of the litigants, other actors, or other discourses – in favour of a focus on judicial discourse. However, it is the agency of the judiciary that we wish to highlight in this paper.

contemporary dissent and fissures, that English Christianity takes a particular form in its establishment, and that English religious history is replete with violence and discrimination against non-conforming Christians as well as others. Nonetheless, it is our contention, and we would ground that contention in a wide-ranging and inter-disciplinary scholarship,<sup>23</sup> that Christianity, despite the different forms it takes, can nonetheless be analysed as a set of organising principles or constellation of elements. These would include not only clearly theological principles – for example, a belief in the divinity of Jesus and his eventual return – but also ways of knowing and being that are articulated as non-religious or secular, and associated with reason, civility, and progress.<sup>24</sup>

As a number of scholars have argued, despite the enunciation of these values as ‘secular’ and ‘universal’ (and therefore according to the traditional secularisation thesis, free of religion), they are, rather, deeply embedded in Christianity, more particularly Protestantism.<sup>25</sup> Moreover, although the secularisation thesis relating to Europe and North America has sometimes been willing to acknowledge its Christian roots, its proponents often fail to recognise the continued fusion of secular values with Christian principles in these locations.<sup>26</sup> Thus, the term ‘Christian’ can be understood in a de-theologised form, as a set of universalised, secular values and way of thinking that has become embedded in western culture.<sup>27</sup>

Perhaps most importantly for our purposes here, it must be possible to name the asymmetric power Christianity has in the world today and has had ever since its early form fused with imperial state power in the Roman and Byzantine empires. This is a power that has had material effects through, amongst other things: a long European history of anti-Jewish and anti-Islamic thinking and practice; in past colonial projects of domination; and in current ones that justify the post 9/11 ‘war on terror’ on the underlying premise that civilisation (and democracy) – associated with Christian values of North America and Europe – should be advanced. In stating these historical linkages, we are not adopting an un-nuanced theory of power, but recognising that Christianity, like patriarchy, or like capitalism, has an imperial and subjugating dimension when it is tied to nation-building and expansion, despite the different forms it takes in particular contexts. Recent work, for example, comparing Islamophobia in Catholic France and Anglican England are examples of scholarship that draws these

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<sup>23</sup> Much of this scholarship is referenced in and engaged with by the contributions to J.R. Jakobsen and A. Pellegrini (eds), *Secularisms* (Duke University Press, 2008).

<sup>24</sup> Ibid.

<sup>25</sup> Ibid. See also H. De Vries, *Religion, Beyond a Concept* (Fordham University Press, 2008), at p 11.

<sup>26</sup> Obviously, secularism takes non-Christian forms elsewhere.

<sup>27</sup> It is worth noting that whilst this Christian cultural hegemony has been more widely acknowledged in the context of law and society in the USA (J.R. Jakobsen and A. Pellegrini (eds), *Secularisms* (Duke University Press, 2008)) and N. Rosenblum, *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies* (Princeton, 2000), it is relatively unremarked upon in the context of English law, although see A. Bradney, *Religion, Rights and Laws* (Leicester University Press, 1993), and A. Bradney, *Faith in A Sceptical Age* (Routledge-Cavendish, 2009); also, D. Herman, ‘“An Unfortunate Coincidence”: Jews and Jewishness in 20<sup>th</sup> century English Judicial Discourse’ (2006) 33 *Journal of Law and Society* 277–301.



broader connections.<sup>28</sup> It is possible, then, to recognise the heterogeneity of Christianity, while at the same time highlighting its dominating, imperial, cross-cultural, and transnational dimensions.

## BRIEF BACKGROUND TO THE CASES

Although we will refer to a number of legal judgments, our main focus is upon eight cases where more extensive discussion of non-Christianness took place: *Re G (A Minor)*;<sup>29</sup> *Re JK (Transracial Placement)*;<sup>30</sup> *Re B (A Minor) (Adoption Application)*;<sup>31</sup> *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)*;<sup>32</sup> *Re P (A Minor) (Residence Order: Child's Welfare)*;<sup>33</sup> *Re S (Change of Names: Cultural Factors)*;<sup>34</sup> *Re C (Adoption: Religious Observance)*<sup>35</sup> and *Re S (Specific Issue Order: Religion Circumcision)*.<sup>36</sup> We set them out briefly below in the order in which we discuss them in the text.

In *Re P*, a child, known as 'N' in the judgments, with down's syndrome and other disabilities, was born, in 1990, into a large, orthodox Jewish family. Seventeen months later, for various reasons, the parents felt unable to cope with having N at home and asked the local authority to temporarily place her with an orthodox Jewish family. A home conforming to the parents' wishes was not available, and, with great reluctance, they agreed to place N with Christian carers. The child remained with the carers for 4 years, having regular contact with the birth parents. In 1994, against the birth parents' objections, the foster family applied for a residence order, which was granted. The foster family was thus given some rights with respect to religious and educational matters. In 1998, the birth parents' application to have this order varied was refused, and in 1999 this refusal was confirmed by the Court of Appeal. Both judgments contained extensive discussion of what weight to attach to N's alleged 'Jewishness'.

At this same time, another case was making its way through the system. *Re J* concerned a 7-year-old child with a 'Turkish Muslim' father and an 'English Christian' mother. The parents were separated, and the mother had been granted a residence order. The father wished to have the boy circumcised (amongst other requests) and the mother objected. In May 1999, Wall J found for the mother, and in November 1999, the father's appeal was rejected. The extent of the boy's 'Muslimness' was a key factor in both judgments, as was the medical case against circumcision.

Wall J also adjudicated in *Re B*, involving a couple seeking to adopt a 4-year-old child who had been born in Gambia. During the proceedings, expert evidence was presented to the court stating that the breaking of the child's bond with her prospective adopters would cause her a level of harm (psychological damage) that would outweigh the benefits of her being returned to her birth family in Gambia. Despite this medical

<sup>28</sup> See W. Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, 2006); J. Butler, 'Sexual politics, torture, and secular time' (2008) 59 *The British Journal of Sociology* 1–23. Also S. Motha, 'Veiled women and the affect of religion in democracy' (2007) 34 *Journal of Law and Society* 139–162 and 'Liberal cults, suicide bombers, and other theological dilemmas' (2008) 5(2) *Journal of Law, Culture and the Humanities* 228.

<sup>29</sup> [1990] FCR 881.

<sup>30</sup> [1990] 1 FCR 891.

<sup>31</sup> [1995] 2 FCR 749.

<sup>32</sup> [1999] 2 FLR 678 and [2000] 1 FLR 571.

<sup>33</sup> [2000] Fam 15.

<sup>34</sup> [2001] 3 FCR 648.

<sup>35</sup> [2002] 1 FLR 1119.

<sup>36</sup> [2004] EWHC 1282.

evidence, Wall J barely discussed the attachment of the child to the foster parents in his judgment. Instead his eventual decision to return the child back to Gambia was based on a 'nativity' argument, namely the need for her to grow up with her birth family in the culture and traditions 'into which she was born'.

In another 'transracial' adoption case, *Re JK*, a child was placed in foster care with a 'white' English family as the self-identified Sikh birth mother felt unable to care for her within the Sikh community in which she was embedded. Although the foster placement had been envisaged as short term, the local authority had tried, in accordance with their ethnic matching policy, to find Sikh adopters but had not succeeded in doing so. As the local authority remained unable to find Sikh adopters, the foster carers submitted an adoption application with the support of the child's birth mother. Despite this support, the local authority refused the application and, according to the judgment, attempted to weaken the child's bond with the foster parents in preparation for transferring the child to a bridging family whilst they assessed three new couples: two were Asian Hindu and the third Asian Roman Catholic. On the basis of the expert evidence that removing the child from the carers' home would cause her psychological damage, Stephen Brown J found in favour of the child being adopted by the foster family and remaining with them in the meantime.

In *Re G*, a 7-year-old boy, identified by the name of 'Tarquin' in the judgment, was the subject of a bitter dispute between a Christian grandmother and a Jewish aunt and uncle. The detailed facts surrounding the case are quite complicated and, for the most part, are not relevant to our discussion. For our purposes, we will return later to consider a small portion of the judgment where Tarquin and his family's 'Jewish appearance' are the subject of judicial discussion.

A Muslim mother and Sikh father were in dispute in *Re S (Change of Names: Cultural Factors)*. The parents had divorced, and the mother wished to change the child's Sikh names, including by deed poll, so that he would be accepted within the Muslim community of which she was a part. She also wished the boy to be circumcised, for the same reason. The father opposed both applications. Here, the judge, Wilson J, took a different approach to both *Re P* and *Re J*. In terms of the name change, Wilson concluded that it was in the child's best interests to have his names informally changed from Sikh to Muslim ones, but that it was not in his interests for this to be done officially by deed poll. In relation to circumcision, Wilson J, with virtually no discussion or debate, authorised it.

In *Re C*, in another judgment of Wilson J's, a child with 'Jewish, Irish Roman Catholic and Turkish-Cypriot Muslim elements' was placed for adoption. Both birth parents, according to the judgment, had 'learning disabilities'. A prospective adoptive couple was found by the local authority – this couple was Jewish. It is somewhat unclear from the judgment whether the birth parents fully consented to this particular couple adopting the child, but in fact the case came to court because the child's official guardian issued proceedings to judicially review the local authority's decision to place the child with a Jewish couple. The guardian's objection was that placement with a Jewish couple was not appropriate. Wilson J disagreed, commenting in his judgment extensively on the nature and qualities of Jewishness.

The final case we explore is *Re S (Specific Issue Order: Religion: Circumcision)*. Here, a separated Muslim mother and Jain father were in dispute over their children's future religious upbringing. The mother, who had a residence order, wished both children to be given a Muslim education, and sought to have their son circumcised, a practice explicitly prohibited in Jainism. In this case, the judge did not authorise the circumcision, but in terms quite different to those used in *Re J*.

## APPROACHING NON-CHRISTIANITY

### (a) Belief, ritual, and cognitive processing

One way that judges approach minority cultures containing religious dimensions is to insist that true faith entails theological understanding accompanied by observant practice. Belief is manifested through practice and the latter provides the evidence for the former. According to this judicial narrative, theological understanding is about knowing the *meaning* – as in significance – of a particular form of spiritual belief. To be Jewish, it is not enough to ‘know God’; one must understand what knowing God means to Jews as distinct from anyone else. To be Muslim, it is not enough to have an affective appreciation of Muslimness; one must have an epistemic appreciation of it, one must be able to explain its terms in rational discourse. Consistent with the ethos of the welfare paradigm, most judges implicitly and explicitly depict childhood as a state of cognitive immaturity and thus discount any subjective feeling or agency even older children might have. Instead, the judges assume that children are not capable of being truly religious; they do not possess the requisite degree of rational autonomy to knowingly profess religion in this sense.<sup>37</sup>

In *Re P*, the case about the young child with down’s syndrome placed with Christian foster parents, both Wall J at first instance, and Butler-Sloss LJ on appeal, appeared to have a clear sense of what ‘being Jewish’ entailed, and the relationship between any such Jewishness and the welfare of the child. Wall J expressed the ‘critical question’ thus: ‘does N’s welfare require the displacement of her right to be brought up by her parents in their religion and way of life?’<sup>38</sup> In other words, a child has a prima facie right to her parents’ religion, but welfare calculations can outweigh this right. In coming to his decision that, in fact, her welfare did outweigh any presumed religious rights, Wall J placed great emphasis on the effect of the learning disability that would leave her always with a mental age of between 7 and 10. Relying on expert evidence, he concluded that:

‘N will never have any real appreciation of her Jewish heritage, and that her understanding of her religion will be limited to a rudimentary perception of God as Creator and as a Beneficent Being and that in addition she will have a capacity to participate in (and no doubt enjoy) certain rituals without any full understanding of their significance.’<sup>39</sup>

Thus, N’s learning disability meant that ‘being Jewish’ had no *and could never have* meaning to her; it would have no meaning because ‘being Jewish’ necessitates a ‘real’ appreciation and an understanding of theological frameworks as well as knowing the ‘full’ theological significance of specific ‘rituals’.<sup>40</sup> Jewishness, within this understanding, is, presumably, a knowledge acquired over time; if a child cannot understand the *why* of religion, they are not fully *of* that religion. Jewishness is a ‘heritage’ only insofar as it is a legacy of some sort. If the legacy is not properly treasured, invested in as religious education or training, if a child is unable to understand the theology (and as N is presumed by the experts to have an intellectual

<sup>37</sup> For a different view, one we cannot explore further here, see R. Coles, *The Spiritual Life of Children* (Mariner, 1991).

<sup>38</sup> *Re P* [2000] Fam 15, at 483. All quotes from Wall J’s decision are taken from Butler Sloss LJ’s appeal court judgment.

<sup>39</sup> *Ibid.*

<sup>40</sup> Medical ethics cases about the treatment of infants also take this approach, see, eg *NHS v MB* [2006] EWHC 507 (Fam), *NHS v A* [2007] EWHC 1696.



age of between 7 and 10 the judge must assume that children under 10 are not able to achieve this understanding), then Jewishness becomes a fossilised relic. In so far as N is concerned, Jewishness is akin to a mysterious historical artefact the significance of which is now unknown. Jewishness may offer N aesthetic or sensory pleasures, but it is not cognitively processed by her.

On appeal, Butler-Sloss LJ put it thus:

‘No one would wish to deprive a Jewish child of her right to her Jewish heritage. If she had remained with a Jewish family it would be almost unthinkable, other than in an emergency, to remove her from it. I have no doubt, like the judge [Wall J], that the Orthodox Jewish religion provides a deeply satisfying way of life for its members and that this child, like other Down’s syndrome children, would have flowered and prospered in her Jewish family and surrounding if she had continued to live with them. But in the unusual circumstances of this case her parents were not able to accommodate her within the community . . . she was deprived of her opportunity to grow up within the Jewish community.’<sup>41</sup>

And, later in the judgment:

‘They [the parents] have asserted in their evidence and through their counsel on this appeal their fervent belief that N’s home is with them and within the Orthodox Jewish community. She was born a Jew and remains a Jew wherever she may live and however she may be brought up.’<sup>42</sup>

In these passages, Butler-Sloss LJ makes it clear that being Jewish may be a child’s ‘heritage right’ but, if so, it is a right that requires a mediator, the parents, to implement in order to have effect. Implementation apparently requires: (1) full-time immersion in ‘the community’ (clearly the birth parents non-residential contact is insufficient); and (2) according to Wall J, a level of intellectual engagement with the theology and ritual that amounts to far more than mere ‘enjoyment’.

In *Re P* one cannot help concluding that Butler-Sloss LJ is effectively saying that since N has not been brought up within the Jewish community, and does not have the intellectual capacity to understand the nature of Judaism, this child, who once may have been Jewish, or, at least born with a heritage right to be Jewish, is Jewish no longer. Her birth parents effectively deprived her of her heritage right by agreeing to her initial placement. Although, according to the reported facts of an early decision in the litigation,<sup>43</sup> the parents were desperate to ensure that N was placed with a Jewish family, the local authority was unable to find a suitable one. She thus entered a Christian home with the parents’ very reluctant consent and with their understanding that the placement would be temporary. According to Hale J’s earlier (and more nuanced) judgment in this saga, when N was first placed with the foster carers the birth parents visited often, bringing with them kosher food for N to eat (this seemed to end with the initial residence order in 1994).<sup>44</sup>

Nevertheless, as a result of this chain of events, N lost her right to be Jewish, while her parents’ ‘fervent’ attempts to ‘get her back’ are pathologised as selfish and out of

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<sup>41</sup> *Re P* [2000] Fam 15, at 486.

<sup>42</sup> *Ibid*, at 491–492.

<sup>43</sup> *Re P* [1994] 2 FCR 1093.

<sup>44</sup> *Ibid*.

control.<sup>45</sup> A child's heritage or religious rights must, then, not be fundamental if they can be so simply and permanently alienable by the parents. This seems a 'child welfare' and human rights issue that the court conveniently ignores; a parent's inability to care for a child can result in the permanent loss of that child's heritage right. N's down's syndrome and other disabilities add a further complication: if she had been a so-called 'normal' child, would the court have used the same discourse? Is there a disability rights issue here that the courts are also ignoring? If the child had been a circumcised boy, would the courts have gone about arriving at their decision any differently?

While these questions are complicated ones, for our purposes here it is crucial to recognise, as the courts neglect to do, that N has not been received into some secular state of 'non'-religion: she has, arguably, been placed on the road to conversion through having been removed from the Jewish community and placed in a Christian home. While the foster family is reported as being 'non practising Catholics', we know from Wall J's judgment that they had applied to the court to have N baptised. In his 1998 decision, Wall J rejected this application; however, the appeal decision makes no reference to it. Clearly the fosters carers are not entirely 'non-practising', and, in any event, a child raised by self-identified Christians, deprived almost entirely of contact with her Jewish birth parents, could, arguably, lose whatever residual Jewishness she may have had over time.

In the same year as they considered Jewishness in *Re P*, several of these same judges considered the significance of Muslimness in *Re J*. At first instance, Wall J, in reaching his decision that the father's wish to have his son circumcised should be denied, came to a number of preliminary conclusions. These included: that J was a Muslim in Islamic law but that this was not in any way binding in English law; that while the mother was 'nominally Christian', her household was 'essentially secular' (the official solicitor had presented evidence that the mother had been baptised and 'thinks of herself as a Christian' but that the child had a 'mixed heritage' and an 'essentially secular lifestyle'); and that neither parent had Muslim friends or a Muslim 'circle'.<sup>46</sup> Using strong rhetoric, and drawing on expert medical evidence as well as the literature of an anti-circumcision organisation called 'Norm',<sup>47</sup> Wall J also noted that the medical case against circumcision was very strong:

'The medical benefits arising from circumcision . . . are highly *contentious* . . . There is a *powerful body of medical opinion* which puts strongly in issue any suggestion that male circumcision prevents or reduces the risk of urinary tract infection, penile cancer, or sexually transmitted disease. Equally *contentious* is the suggestion that it reduces the incidence of cervical cancer in women . . . The procedure for a child of J's age carries small but identifiable *physical and psychological risks*. It is an *invasive* procedure . . . There is evidence that . . . there is a consequential *loss of sexual sensory pleasure* during sexual intercourse . . . [This] is *an issue for society*, not the health professionals.'<sup>48</sup>

<sup>45</sup> For further analysis of this discourse in the context of the father's history as a 'survivor of the Holocaust', see D. Herman, ' "I do not attach great significance to it": Taking note of "the Holocaust" in English Law' (2008) 17 *Social & Legal Studies* 427–452.

<sup>46</sup> *Re J* [1999] 2 FLR 678, at p 682.

<sup>47</sup> An organisation whose website contains links to sites unmasking an alleged 'trade in foreskins', see: [http://www.norm-uk.org/where\\_do\\_foreskins\\_go.html](http://www.norm-uk.org/where_do_foreskins_go.html).

<sup>48</sup> *Re J* [1999] 2 FLR 678, at p 693 [emphasis added].

In terms of the legal framework governing his decision-making, Wall J noted that there was a legal presumption that a child's religious upbringing should be in the religion of the parent with the residence order (the mother here), and that the relevance of religion was ultimately subservient to the welfare principle. He also, somewhat reluctantly, concluded that the courts could not interfere with circumcision where both parents were agreed on it.

In bringing 'the law' to bear upon 'the facts' as he saw them, Wall J relied heavily on the information that neither the residential carer (the mother) nor the child's immediate environment were Muslim and that one of the 'risks' of circumcision was that J could 'be picked on or teased by his peers' (an old argument familiar from anti-gay custody cases)<sup>49</sup> and that this constituted one of the 'psychological effects' of the procedure.

'Although born a Muslim, it is clear to me that J is going to have an essentially secular upbringing in England. He is not going to mix in Muslim circles, and his main contact with Muslims and the Muslim ethos will be his contact with his father. J is therefore not going to grow up in an environment in which circumcision is part of family life; or in which circumcision will be in conformity with the religion practised by his primary carer; or in which his peers have all been circumcised and for him not to be so would render him either unusual or an outsider. To the contrary, circumcision in the circles in which J is likely to move will be the exception rather than the rule. Circumcision is an effectively irreversible surgical intervention which has no medical basis in J's case. It is likely to be painful and carries with it . . . risks . . . As I have already made clear, he is not going to be brought up as a Muslim child ...'<sup>50</sup>

Although the father had presented evidence that he defined himself as a 'secular Muslim', and that his son's circumcision was important not for religious reasons but for 'identity' ones, the judge ignored these arguments. Instead, Wall J acknowledged that although J was 'born a Muslim', meaning something presumably similar to N's 'heritage right' to be a Jew in *Re P*, he was not going to be 'brought up as a Muslim child'. By virtue of his parents' separation and his primary carer being his Christian mother, J too had presumably lost his birth-right to be a Muslim child.

Like the courts' approach in *Re P*, the space outside the minority community is marked as 'secular'. Not only does J's Christian mother literally transform into a 'secular' one in the judgment, but, according to Wall J, 'England' will not provide J with contact with Muslims; J will get that only through his father, who, being Muslim, is presumably not 'of' England but, rather, provides the child's 'Turkish side'.<sup>51</sup> There is an assumption that the boys that J will mix with throughout his childhood will be neither Muslim nor Jewish as they will be uncircumcised: 'The evidence does not disclose that there are any other Muslim children at J's school'.<sup>52</sup> This explains why to allow J to be circumcised would be to 'render him either unusual or an outsider' amongst his presumptively Christian peers.<sup>53</sup>

J's father's Muslimness, and therefore circumcision, becomes solely associated with his Turkish origins, an Islamic world outside England's Christian (aka 'secular') borders.

<sup>49</sup> And one thoroughly discredited in that context by Helen Reece, 'Subverting the Stigmatization Argument' (1996) 23 *Journal of Law and Society* 484–505.

<sup>50</sup> *Re J* [1999] 2 FLR 678, at p 699.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, at p 682.

<sup>53</sup> *Ibid.*, at p 699.

Wall J states, 'in Turkish society, a Muslim male child's peers will all be circumcised'.<sup>54</sup> His father, who, as it happens, also lives in England, will have the opportunity to 'provide information'<sup>55</sup> about Muslimness in much the same way that the child N's birth parents (should they be allowed any contact with her, which eventually they were not) could tell N stories about Jewishness. For J, Muslimness becomes collapsed into nationality in the phrase 'the Turkish side of his inheritance', a phrase the judge repeats several times.<sup>56</sup> The inevitable development of the children's Christianess is never explicitly articulated.

On appeal before LJs Thorpe, Schiemann, and Butler-Sloss P, Wall J's first decision was described by the appeal court as 'characteristically thorough', 'important', 'significant', 'concise', and 'impregnable'.<sup>57</sup> Most of Thorpe LJ's leading judgment was a reproduction of passages from it and thus the court happily rejected the appeal. Schiemann LJ chose to pose the question on appeal as: "whether to authorise the infliction of pain, the permanent loss of foreskin and the exposure to the small risk of serious physical and psychological damage".<sup>58</sup> The question could have been posed differently, for example: whether to authorise that this child should not carry a significant mark of Muslimness?

The key passage in Thorpe LJ's judgment (with which both Schiemann LJ and Butler-Sloss P agreed) reads:

'Some faiths recognise their religion as a birthright derived from either the child's mother or the child's father. Some recognise religion by some ceremony of induction or initiation. But the newborn does not share the perception of his parents or of the religious community to which the parents belong. A child's perception of his or her religion generally depends on involvement in worship and teaching within the family. From this develops the emotional, intellectual, psychological and spiritual sense of belonging to a religious faith . . . the realities of child development [are that] fear, pain, despair or a sense of betrayal may all be transient in the temporal sense but still inflict emotional and psychological trauma that will burden a child for life.'<sup>59</sup>

A number of assumptions underlie this passage. First, as with Jewishness in *Re P*, Muslimness is about *religion*, and religion – in the final instance – is about *perception* not inalienable *right*: it requires theological knowledge and ritual participation in order to 'be'. The father's arguments about culture and identity, noted but not considered by Wall J at first instance, are not referred to on appeal (they may not have been argued).

Secondly, religion, thus defined, is a private, family concern. If it is not taught within the family, it effectively does not exist as living matter to which the courts should attend: the 'public' is implicitly defined as nominally non-religious, secular; the hegemonic Christianness of the public remains unspoken.<sup>60</sup> If, as Jakobsen and Pellegrini (and others) argue, 'religious and secular formations are profoundly

<sup>54</sup> Ibid, at p 697.

<sup>55</sup> Ibid, at p 699.

<sup>56</sup> Ibid.

<sup>57</sup> *Re J* [2000] 1 FLR 571, at p 573.

<sup>58</sup> Ibid, at p 576.

<sup>59</sup> Ibid, at p 575.

<sup>60</sup> See also D. Cooper's argument in 'Talmudic Territory?: Space, law and modernist discourse' (1996) 23 *Journal of Law and Society* 529–539.

intertwined',<sup>61</sup> then this apparent relegation of religion to the privatised family is a rhetorical move to which we should attend. The approach in *Re J* is thus entirely consistent with *Re P*, discussed above, and exemplifies a similar invisibilising of dominant Christianity in the public sphere.

Related to this, in *Re J*, Thorpe LJ refers to the 'realities of child development', which he recites as a form of common sense (and in the absence of child development 'experts').<sup>62</sup> A child, he states, 'will' be burdened for life by the trauma of undergoing circumcision.<sup>63</sup> The court could have looked at the issue differently: the trauma of having *not* been circumcised could 'burden' a Muslim boy for life. Or, perhaps: a Christian child will be 'burdened' for life by being circumcised. However, J is never represented as Christian, his 'mother's side', what the judges presumably think of as the 'English side of his inheritance', is unmarked, or marked as 'secular'. He thus becomes 'a' child, rather than a Christian child.

The appeal judges also strongly endorse Wall J's view that all cases of disputed male circumcision should be resolved by the courts. Circumcision, the judges agree, is one of the 'exceptional' cases that require judicial scrutiny when parents are in conflict. According to Butler-Sloss P, it is akin to sterilising a child, or changing its surname.<sup>64</sup> While the courts recognise that refusing to authorise the sterilisation of a child may protect their rights to future reproductive choice, they fail to recognise that refusing to authorise circumcision could impair a child's ability to exercise future choices with respect to ethnicity and/or religion. J, for example, should he ever wish to join a devout Muslim community, may feel that he has to consider having an arguably more invasive, painful procedure as an adult. The retention of foreskin is an act of commission – it can orient a child towards the majority Christian culture. Thus, a judicial decision not to authorise a boy's circumcision could, in itself, arguably be considered a normative religious edict with far-reaching future consequences. As Edge has suggested:

'How are we to characterise the recipient of circumcision? Are they a hyper-autonomous individual, a holder of rights against the world, or are they an integral, organic, part of broader communities, both religious and familial? This is not a manifestation of the argument as to whether circumcising children for community reasons treats them as means not ends. We can treat the child as the end, but construct circumcision quite differently if we see it as something whereby "his culture, religion and family is enhanced" [quoting Bridge, 1999], as opposed to something carried out upon him for the benefit of others.'<sup>65</sup>

Taking Edge's remarks further, we would argue that what the judges, and many academic commentators, fail to grapple with is that the rejection of male circumcision, couched as it is in the language of medical and psychological health, is as much a normative ethno-religious choice as is the act of circumcision itself. While recent scholarship on male circumcision wishes to protect an unconsenting child from the intentional infliction of pain, and this is a worthwhile aim, these writers choose to ignore the surrounding context of power in which these decisions get played out –

<sup>61</sup> J.R. Jakobsen and A. Pellegrini (eds), *Secularisms* (Duke University Press, 2008), at p 11.

<sup>62</sup> *Re J* [2000] 1 FLR 571, at p 575.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, at p 577.

<sup>65</sup> P. Edge, 'Male circumcision after the Human Rights Act 1998' (2000) 5 *Journal of Civil Liberties* 320, at p 336. For C. Bridge see: 'Religion, culture, and conviction – the medical treatment of young children' (1999) 11(1) CFLQ 1.



namely, a nation state with an established Christian church and active participation in a long European history of anti-Semitism within which the denunciation of circumcision has played a major role.<sup>66</sup>

These approaches also reinforce the understanding of Jewishness and Muslimness as a narrow form of religious faith – predominantly as belief evidenced by practice – as they implicitly or explicitly assume the child in question ‘has no religion’,<sup>67</sup> only the parents do.<sup>68</sup> A decision not to circumcise such as that in *Re J* follows inevitably from a particular way of characterising what being Muslim means: if a child can not understand what it means to be Muslim then certainly they should not be circumcised. To acknowledge meanings of Muslimness or Jewishness wider than the ability to cognitively process theological principles would be to place circumcision in its wider cultural context and to do this complicates any simple anti-circumcision argument.<sup>69</sup>

A focus on the child’s lack of consent not only masks the impositions taking place on the child’s body by virtue of a failure to circumcise; such arguments also *produce* western modernity by relegating circumcision to a pre-modernity practice of unreason and pain. Particularly in a post-9/11 world of ‘clash of civilisations’ discourse, this focus on circumcision, like the similar obsession with ‘the veil’ or ‘forced marriage’,<sup>70</sup> as barbaric practices that become associated with particular cultures, is problematic.<sup>71</sup> In the case of circumcision, a secularised, modern ‘healthcare’ argument can thus be read as racialising, orientalist and Christian (as in bound up in a project of Christian imperium)<sup>72</sup> as can the related argument that circumcision is, at root, a barbaric ritual having no place in a civilised society, made by European enlightenment rationalists

<sup>66</sup> See, for example, S. Gilman, *The Jew’s Body* (Routledge, 1991) and J. Katz, *From Prejudice to Destruction: Antisemitism, 1700–1933* (Harvard, 1980).

<sup>67</sup> H. Gilbert, ‘Time to reconsider the lawfulness of ritual male circumcision’ (2007) *European Human Rights Law Review* 279–294, at p 289.

<sup>68</sup> M. Thomson, *Endowed: Regulating the Male Sexed Body* (Routledge, 2008), at p 22. See also Green and Lim’s discussion of ‘the child’ in feminist anti-female circumcision discourse: ‘What is this thing about female circumcision?: Legal education and human rights’ (1998) 7 *Social & Legal Studies* 365, at pp 376–378. Consequences such as uncircumcised males not being accepted as properly Jewish or Muslim by many orthodox Jewish or Muslim communities are also ignored by these writers. This could affect their burial choices, amongst other things.

<sup>69</sup> The title of one of Fox and Thomson’s pieces, ‘A covenant with the status quo’ (see fn 9 above), exemplifies this problem, evoking, as it does, a biblical Israelite attempting to ritually sacrifice his son. We note that Fox’s earlier work, M. Fox and J. McHale, ‘In whose best interests?’ (1997) 60 *Modern Law Review* 700–709, is more nuanced with respect to discussions of culture.

<sup>70</sup> See S. Motha, ‘Veiled women and the affect of religion in democracy’ (2007) 34 *Journal of Law and Society* 139–162 and ‘Liberal cults, suicide bombers, and other theological dilemmas’ (2008) 5 *Journal of Law, Culture and the Humanities* 228–246; S. Razack, ‘Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages’ (2004) 12 *Feminist Legal Studies* 129–174; A. Vakulenko, ‘Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends’ (2007) 7(4) *Human Rights Law Review* 717–739.

<sup>71</sup> See also T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003), at pp 59 and 106–115.

<sup>72</sup> There is also a different argument to make – which we are not able to pursue here. Following S. Gilman, *The Jew’s Body* (Routledge, 1991), one could argue that anti-circumcision scholars’ focus on the ‘lack’ of foreskin from circumcision, and its consequences for masculinity, replicate a much earlier discourse about Jewish (lack of) masculinity.

over 200 years ago.<sup>73</sup> We are not suggesting this is the only way that circumcision has been read in the west; however, our argument is that contemporary denunciations of it evoke this older discourse and that this is problematic in this current era.

We are also not disputing that the courts have a duty to arrive at a child welfare calculation in these kinds of cases. Nor do we wish to argue that *Re P* or *Re J* were wrongly decided. What we wish to highlight is *how* judges go about finding their way; what gets valued, and not, what gets normalised, and not, what gets sacralised, and not; in other words, the choices that get made, the work these choices do, and the pervasive discourses that inform these acts of choice. In this section, we have argued that judges in these cases deploy a 'cognitive processing' approach to non-mainstream Christian cultures that prioritises a secular-seeming rationality, in terms of the child's capacity to truly understand beliefs and practices narrowly defined as 'religious'.<sup>74</sup> We have also highlighted how this very partial picture of Jewishness and Muslimness both facilitates anti-male circumcision arguments and is informed by an implicit Christian normativity that can, effectively, result in a judicially authorised conversion.<sup>75</sup> This is a different argument to the one made by Green and Lim in their important work on female circumcision, but it may be worth returning to their prescient warning:

'. . . as the number of non-religious circumcisions rapidly declines in the west, all the ingredients are present for male circumcision to shift from the realm of the "normal" and the "culture-free" to being constituted as a fixed and barbaric practice of the west's local others.'<sup>76</sup>

### (b) In the blood

Other child welfare and adoption cases take a different approach to that of belief/practice. In these judgments, Jewishness, Muslimness, and other minority identities, are biological markers that can not be overcome by any amount of theological understanding. They become conceptualised predominantly as genetic material, handed down in a blood line (assumed by the judges to be a patriarchal one). This process of racialisation, conceiving of Muslimness and Jewishness as inherited from a birth parent, is also articulated to the language of 'ethnicity', when judges suggest traditions and practices are shared in community with others of the same 'race'.<sup>77</sup> An individual's cognitive ability, and therefore theology, whether knowledge or belief, becomes subject to this racialisation process.

<sup>73</sup> See J. Katz's study: *From Prejudice to Destruction: Antisemitism, 1700–1933* (Harvard, 1980). We are not suggesting this is the only way that circumcision has been read in the west (see M. Fox and M. Thomson, 'Short changed? The law and ethics of male circumcision' (2005) 13 *International Journal of Children's Rights* 161–181; however, our argument is that contemporary denunciations of it evoke this older discourse and that this is problematic in this current era.

<sup>74</sup> This secular rationality is also applied to Christians who stray too far into the realm of the 'miraculous', see eg *NHS v A* [2007] EWHC 1696, or away from 'forgiveness', see *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163.

<sup>75</sup> Taking a more historical approach, we can see that this is not surprising as Christianity has always only been able to conceptualise both Judaism and Islam as an orthodox other as it has required clear binaries for its own Christianisation project, as it has always required converts, see D. Boyarin, 'The Christian Invention of Judaism: The Theodosian Empire and the Rabbinic Refusal of Religion' in H. De Vries, *Religion, Beyond a Concept* (Fordham University Press, 2008), at p 168.

<sup>76</sup> K. Green and H. Lim, 'What is this thing about female circumcision?: Legal education and human rights' (1998) 7 *Social & Legal Studies* 365, at p 382.

<sup>77</sup> R. Miles and M. Brown, *Racism* (Routledge, 2003) define racialisation as 'a representational process whereby social significance is attached to certain biological (usually phenotypical) human features, on the basis of which the people possessing those characteristics are designated as a distinct collectivity' (at p 100). R. Miles, *Racism and Migrant Labour* (Routledge, 1982) uses the concept of racialisation as a

We turn first to the 1995 *Re B* case involving Mr and Mrs W's application to adopt 'a Gambian child' staying with them for 'a long holiday'. In this case, Wall J faced the question of whether breaking the bond between the prospective adopters and the child – and the harm that this would cause – outweighed the benefits to her of being returned to her birth parents. As this case was somewhat unusual compared to the majority of transracial adoption disputes (as it involved the question of returning the child to her birth parents rather than another prospective adoptive couple), Wall J appeared to prioritise the 'natural parent presumption'. Thus, rather than assessing the harm that might be done to the child from being removed from the prospective adopters, the judge sought to establish if there was any 'basis in law or morality whereby the court could properly deprive the parents of their parental responsibility'.<sup>78</sup> By deciding in favour of the child returning to Gambia, it seems clear that for Wall J, potential psychological damage to the child did not outweigh the natural parent presumption. In making this argument, however, he believed it to be 'in the interests of the child' and also clarified that the natural parent factor was not to be understood in terms of parental rights to their birth child in the proprietary sense, but instead should be viewed as *the child's right*. For the judge it is clear this prima facie right trumps any other (health) rights that she may have, such as not being deprived of her psychological parents.

We do not seek to analyse this case from a children's rights perspective;<sup>79</sup> our argument here is that the deployment of a 'rights language' in relation to the natural parent presumption masks the judicial privileging of bloodline and the blood relationship between parent and birth child.<sup>80</sup> This is further illustrated by Wall J's concluding remarks:

'This is a sensitive area and I am conscious that I am dealing with a Muslim couple living in an ethos which is not my own. But the father is right, in my view, when he now says that his wife's views must be paramount, and the mother undoubtedly wants the child home.'<sup>81</sup>

Despite Wall J's rhetoric that the natural parent factor is not to be understood in terms of parental rights to their birth child in the proprietary sense, but instead should be viewed as the child's right,<sup>82</sup> it is clear from the above quote that the 'mothers' wish to have *her* child home 'must be paramount'. After all, as Wall J states early in the

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synonym for the concept of 'racial categorisation' defined as 'a process of delineation of group boundaries and of allocation of persons within those boundaries by primary reference to (supposedly) inherent and/or biological (usually phenotypical) characteristics' (at p 157). See also M. Omni and H. Winant, *Racial Formations in the United States: From the 1960s to the 1990s* (Routledge, 1994); D. Goldberg, *The Racial State* (Blackwell, 2001).

<sup>78</sup> *Re B* [1995] 2 FCR 749, at p 756.

<sup>79</sup> But see Y. Ronen, 'Redefining the child's right to identity' (2004) *International Journal of Law, Policy and the Family* 147–177.

<sup>80</sup> This privileging of blood link is also clearly apparent in the case of *Re M (Child's Upbringing)* [1996] 2 FLR 441, although this case does not have an explicit 'religion' element. As in *Re B* the judges in *Re M* approached this case as the child having a right to be reunited with his Zulu birth parents and extended family in 'his' native country over what might be in his best interests vis-à-vis psychological harm. Ward LJ also confirmed the first instance judge's 'master plan' that the child's development 'must be, in the last resort and profoundly, Zulu development and not Afrikaans or English development', at p 453. See Y. Ronen, 'Redefining the child's right to identity' (2004) *International Journal of Law, Policy and the Family* 147–177 for a detailed commentary on this case from a children's right perspective.

<sup>81</sup> *Re B* [1995] 2 FCR 749.

<sup>82</sup> *Ibid*: 'to have the ties of nature maintained, wherever possible, with the parents who gave it life'.

judgment, the prospective adopters are 'strangers in blood' to the child.<sup>83</sup> Thus, although it is not entirely clear from the judgment whether it is primarily the right of the child or that of the parents 'wish' to have their relationship restored, what is evident is the importance of maintaining their 'blood link'. The prospective adopters are clearly distinguished by not having this 'blood link' with the child and for the judge it seems that this *lack* cannot be replaced or compensated for by the psychological attachment between foster carer and child.

Interestingly, Wall J also states, 'In my view a child has in principle a right to be brought up by his or her parents *in the ways of life and in the religion practised by the parents*'.<sup>84</sup> Consistent with *Re P*, he views this as the child's 'birthright'. So whilst there is recognition that Muslimness pertains to a theological model of belief and practice ('ways of life and religion'), it becomes racialised in being posited as a consequence (and right) of birth and thus intertwined with the natural parent presumption. There is also a simultaneous ethnicisation of religious practices into the melting pot of 'cultural heritage and traditions',<sup>85</sup> effectively marginalising an understanding of religion as an individual and cognitively developed religious belief and/or practice (as in our first set of cases). Wall J refers to Mr B as a 'practising Muslim' and the child's birth family as 'well respected in their community' – this is given prime importance in what he calls the 'heritage argument'.<sup>86</sup> In this configuration, religion is posited as a communal entity of 'culture' shared with others (of the same 'race') and its very existence becomes affirmed through public recognition by and of that group.

Moreover, the importance of 'blood' does not stop with the genetic link to birth parents or even wider family and community; it also extends to nationality where the nation is one's 'native country':

'In my judgment the child is a black Gambian child. Her place is in the Gambia. That is her heritage and her culture, that is where she belongs and that is where she should be.'<sup>87</sup>

For the child in this case, Gambia is her nation because it is her '*native*' country, the country 'into which she was born'.<sup>88</sup> In short, for the judge, 'blood' becomes a racialising brush with which to paint religion, culture, community *and* nation; these social relations are inherent to the child rather than experienced or developed in life.<sup>89</sup> Thus, for Wall J, the importance of the child being linked by blood to a family and ethnic community – as having a particularised 'ethos' as he puts it – is part of the reason for her 'resuming her natural and cultural heritage'; a factor that is also

<sup>83</sup> Ibid, at p 753.

<sup>84</sup> Ibid, at p 758 [emphasis added].

<sup>85</sup> Ibid, at p 753.

<sup>86</sup> Ibid, at p 773.

<sup>87</sup> Ibid, at p 778.

<sup>88</sup> Ibid, at p 753.

<sup>89</sup> Perhaps the judge partly takes this view because of evidence presented to him, particularly that of a social worker who is described as 'having a detailed knowledge of the West African extended family system and a full understanding of the cultural and social mores of the case' (ibid, at p 774). She states: 'Particularly in Muslim families the concept of adoption is unthinkable. A child is always part of his genetic family, wherever he lives, whoever cares for him, the link cannot be severed' (ibid, at p 775). An important aspect of these cases is the role of 'experts' – their reports and testimony. We can not do justice to that question in this paper; however, see co-author's earlier work on the relationship between 'expert' and legal discourse, D. Herman, ' "Sociologically speaking": Law, sexuality and social change' (1991) 2 *Journal of Human Justice* 57 and *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (University of Toronto, 1994), ch 7.

intertwined with the child's citizenship and nationality ('the child is a black Gambian child'), as we note above.<sup>90</sup> Thus, in *Re B*, the child's Muslimness is inextricably tied to her 'black Gambian' racial make-up.

The racialisation of non-Christianity also features in other adoption cases. *Re JK*, for example, involved 'white' foster carers applying to adopt a child whose birth mother identified as Sikh.<sup>91</sup> The local authority refused their application in accordance with their racial matching policy and then sought to remove the child from the foster carers' home so as to 'weaken the bonds' and place her in a bridging home whilst assessing three other Asian adoptive couples.<sup>92</sup> These Asian couples were considered more suitable for the task of helping the child to develop a sense of her own Sikh identity even though none of these couples were in fact Sikh, one was Asian Hindu, another Asian Roman Catholic and a third couple of mixed Asian descent. Being Asian, for the local authority at least, was considered more of a qualifying factor for understanding and nurturing Sikh identity, presumably because it was deemed to be 'racially closer' (the grounds for making this assumption are not made clear). The judge merely states:

'It is quite clear from the evidence that I have heard that the social workers have been and are very concerned about the future which may lie ahead in the child's adolescent years when she will inevitably become more aware of her own racial background.'<sup>93</sup>

While Sir Stephen Brown P sympathised with the local authority's position of being a 'prisoner of policy',<sup>94</sup> he nevertheless decided in favour of the child remaining with the foster carers, approving their adoption application on the basis of the 'psychological scar' the child would suffer if removed from their home. In coming to his decision, Sir Stephen Brown P also considered the foster carers' capacities to deal with 'preserving this child from any racial problems':<sup>95</sup>

'Whilst they are not of an advanced intellectual standard which can assimilate easily the finer details of different races and religions, they have been making a very praiseworthy attempt to help the little girl in this respect: they take her weekly to a Sikh temple in the area. One of the features of the area is that there are these facilities there which has [Sic] now become well accustomed to various

<sup>90</sup> The significance of the child's non-Britishness is also highlighted in Wall J's concern for English public policy: that it would be 'wrong to make an adoption order in this case' as 'it was plain that the primary objective of an adoption order would be to secure British nationality for the child', (*Re B* [1995] 2 FCR 751.) Yet all overseas adoptions involve immigration issues and this does not necessarily trump the courts role of deciding what is in the child's best interests. See, for example, *Pawandeep Singh v Entry Clearance Officer* [2004] EWCA Civ 1075 and *Re K (Adoption: Foreign Child)* [1997] 2 FCR 389. In the latter case an English Christian family had their initially approved adoption order set aside. They had brought the child from Bosnia to England initially for treatment following injuries sustained during the war but then decided, having cared for her, integrated her into the family, and baptised her, that they would adopt her despite there being no confirmation that her family were dead. Butler-Sloss, Swinton Thomas, and Aldous LJs all agreed that the initial adoption order had been granted in error, that the special needs of the child had obviated the necessity to comply with adoption rules in relation to the 'natural family and the child herself' and furthermore 'there were public policy considerations relating to the adoption of children from overseas', namely immigration issues.

<sup>91</sup> *Re JK (Transracial Placement)* [1990] 1 FCR 891.

<sup>92</sup> *Ibid.*, at p 894.

<sup>93</sup> *Ibid.*

<sup>94</sup> Suggesting he did not agree with it.

<sup>95</sup> *Ibid.*, at p 897.



racial groups, and they say . . . that they will see to it that her contact with her own background is followed up and that they will seek assistance in order to be able to deal with this matter.<sup>96</sup>

As in *Re B* above, the child's religious identity is inextricably linked to her genetic/racial inheritance. Once again, the judge does not prioritise a theological view of religion as the courts did in *Re P* and *Re J*, one that must be cognitively processed by the individual. Instead, religious practices (such as attending the temple) become ethnicised as traditions or 'rituals' to share in community with others of the *same racial identity*. At the same time, the judge's remark about 'the finer details of different races and religions' and the necessary 'intellectual standard' required to appreciate these brings to the surface an orientalist ordering of religious and ethnic others in the sense that to 'know' these non-Christian others one must have a particular intellectual orientation.

Another adoption case, *Re G*, can be read to highlight a similar, racialised understanding.<sup>97</sup> Although evidence is presented to the court noting that the child's parents did not participate in any Judaic belief or practice, and, indeed, his mother may not have come from a Jewish family at all (we are not informed), nevertheless, Purchas LJ confidently states:

'... I cannot close my eyes to the fact that in spite of the protestations of the grandmother this basically was a Jewish family. It is perfectly true that the dead father did not go to the Synagogue, or anything of the sort, but the grandfather, the grandmother's husband, was a Jew and his brother, who is also now dead, was, as I understand it, also a practising Jew.'<sup>98</sup>

The judge finds that the (now dead) family patriarchs (ignored for the purposes of determining Jewishness in Jewish law of course) were Jewish; therefore, the child is Jewish. Purchas LJ, therefore, resolves the 'ethnic problem' of the case (a phrase he repeats four times) through applying a racial lineage. This is even despite the judge's apparent approval of expert evidence suggesting the child would find it hard to fit into the 'darker' Jewish family, who 'bear the outward signs of their origins', as he was 'fair of complexion'.<sup>99</sup> So, although Purchas LJ may be uneasy with the fact that child may not be sufficiently Semitic-looking (and this disturbs his orientalist ordering), he nonetheless finds that the child's patriarchal racial lineage is a Jewish one; this, together with his welfare interests overall, entail him remaining with the 'darker' Jews rather than the Christian grandmother (whose 'complexion' remains unmarked and therefore unremarked upon).

In tracing this discourse of racial lineage, it is worth returning again to *Re P* (the very first case we discussed), and Ward LJ's judgment, which took a somewhat different turn than Butler-Sloss LJ's in one respect: he explicitly references 'blood'.<sup>100</sup> Ward LJ refers to the case as a 'blood-tie' case, agrees that N has a 'Jewish birthright', but, in contrast to Wall J's judgment in *Re B* (the 'Gambian' case), ultimately concludes that 'the psychological tie outweighs the blood tie'.<sup>101</sup>

<sup>96</sup> Ibid, at p 898.

<sup>97</sup> *Re G* [1990] FCR 881.

<sup>98</sup> Ibid, at p 11. Page references are to the Lexis print-out.

<sup>99</sup> Ibid, at p 3.

<sup>100</sup> *Re P* [2000] Fam 15, at p 494.

<sup>101</sup> Ibid, at p 497.

'... here the primary contention is that by the tie of blood the further knot of religion is firmly attached to N. At the heart of the appellants' submission is their conviction that the knot should also bind the court. Therein lies the error: religion is but one factor – though I do not doubt that it may be a weighty factor – to be placed in the scales which, when the balance is struck, will determine what N's welfare demands. Thus it is submitted that N's birthright is to be Jewish and to live her life in the practice, enjoyment and ultimate fulfilment of her Jewish faith. I accept that as her birthright. She is and will forever remain a Jew in this life and hereafter whatever this court may determine.'<sup>102</sup>

Ward LJ thus decouples race and religion. Unlike Butler-Sloss LJ, Ward LJ believes N is and will always be a Jew by race (even, apparently, after she is dead); race can not be undone by the court – it is in the blood. However, race and religion are separate – one can, presumably according to Ward LJ, be a Jew by race, and a Christian by religion and the latter is something the courts can authorise in the interests of the child.

We see this move, again, in another case, *Re S*.<sup>103</sup> Here, Wilson J, also decouples race/ethnicity and religion. He decides that the boy, a child of a Muslim mother and a Sikh father, should have his Sikh names changed to Muslim ones, but not by deed poll. He should be brought up as a Muslim, as that is the residential carer's (the mother's) community, and that also requires his circumcision. Wilson confidently states that:

'A child cannot be brought up in two faiths simultaneously so, admirable though Sikhism is, he cannot be brought up as a Sikh. That however in no way precludes his becoming aware of his Sikh identity.'<sup>104</sup>

This 'half-Sikh identity', Wilson J concludes, is a 'genetic identity' which the mother was attempting to 're-write'.<sup>105</sup> So, like Ward LJ's judgment in *Re P*, the child in *Re S* is seemingly racially or ethnically Sikh through carrying his father's 'Sikh genes' (as N was a Jew in *Re P*), but he can and *should* become a Muslim by faith, like his mother.

However, unlike the judges in our first set of belief/practice cases, Wilson J also believes it is the court's duty to facilitate the child's 'half-Sikh identity', and so he concludes that an official name-change would 'contribute to a comprehensive elimination of his half Sikh identity'.<sup>106</sup> Thus, maintaining, as best as possible in the circumstances, both elements of the child's identity (as the judge understands them), is crucial to the child's welfare in the long term. This is not the conclusion reached in *Re J* (the first circumcision case), where the courts' obsession with the medical case against circumcision overwhelmed their ability to balance these 'identity' issues. In both

<sup>102</sup> *Ibid*, at p 494.

<sup>103</sup> *Re S* [2001] 3 FCR 648.

<sup>104</sup> *Ibid*, at p 660.

<sup>105</sup> *Ibid* child welfare cases on Jewish, Muslim, and Sikh identity can not be read entirely outside the context of race relations jurisprudence, most particularly *Mandla v Dowell Lee* [1982] 3 All ER 1108 and its progeny. The courts in our cases never refer to or cite these others, however, child welfare law must be in some part influenced by, for example, the fact that 'Jewish' and 'Sikh' are recognised 'ethnic groups' under the Race Relations Act, and 'Muslim' is not. We are not able to pursue these linkages here, however, see D. Herman, '“I do not attach great significance to it”: Taking note of “the Holocaust” in English Law' (2008) 17 *Social & Legal Studies* 427–452; *Jews and Jewishness in English Law* (Oxford, 2011 forthcoming) for a detailed discussion of Jews and Jewishness in English race relations law. See also N. Bamforth, M. Malik, C. O'Connell and G. Bindman, *Discrimination Law: Theory and Practice* (Sweet & Maxwell, 2008).

<sup>106</sup> *Re JK (Transracial Placement)* [1990] 1 FCR 891.

*Re J* and *Re P*, the courts did, in effect, authorise the 'comprehensive elimination' of the children's Muslim and Jewish identities.

However, Wilson J's judgment is, at the same time, indebted to an orientalist discourse. He confidently comments upon the violence of non-Christian others. 'It is difficult', Wilson J writes, 'for a white judge to understand, let alone articulate' the shame the Muslim family must have experienced (from the daughter marrying out to a Sikh man) and what sorts of acts could result from such humiliation. While we can identify this 'shame' discourse as emanating from the mother's legal submissions, Wilson J went on to offer further comment:

'One of the great strengths of Islam is the loyalty which it draws from its members. But every strength has its downside; and on the evidence of this case there is in some quarters a concomitant intolerance, the strength of which, even in East London only ten miles from where I speak, is astonishing. Analogous problems are reflected in today's news of ugly clashes between Muslims and Hindus in Bradford.'<sup>107</sup>

Where the judge speaks from, the court, is, implicitly, a white space of (again unspoken) Christian (secular) tolerance and rationality – 10 miles away, in east London, is a non-white space of racial/religious extremism, a space that is difficult for a 'white' judge to even understand.<sup>108</sup> The judge's whiteness is visibilised here (unusually), and this succeeds in racialising the 'Islam' of his remarks, as Wilson J distances himself from what must be darker 'east London'; further, a white judge cannot be Muslim, presumably. A false antimony is thus established between whiteness and Muslimness, while, Christianity, the more obvious religious suspect to contrast with 'Muslim' or 'Hindu', remains, again, unspoken.

Once again, we see civilisational discourse rearing its head – the English courtroom versus the 'intolerant, ugly clashes' of inner city tribals, 'only ten miles' from where the judge 'speaks'. As Asad has argued: 'to make an enlightened space, the liberal must continually attack the darkness of the outside world that threatens to overwhelm that space'.<sup>109</sup> The judge's confident knowledge of Islam's 'great strengths' recalls Said's elucidation of orientalism as a self-conscious knowing and speaking about the orient/east. Wilson J's pronouncements about Islam are indebted to an orientalist legacy that allows us to identify 'an Islamic society, an Arab mind, an Oriental psyche'.<sup>110</sup>

In this section of the paper, we have highlighted how the judicial discourse in these cases privileges a logic in which ethnicity, religion and sometimes nationality are determined by blood-ties passed on to a child from its (birth) parents. Thus, religion or rather, Jewishness, Muslimness or Sikhness, becomes emptied of theological content (in contrast to the first belief/practice approach) and ethnicised into a lineage of shared

<sup>107</sup> Ibid, at p 651. See also *Re B* [1995] 3 All ER 333, at p 341 where Simon Brown J refers to 'deep hostility' between 'opposing' groups of Jews and Arabs. See also S. Jivraj, (forthcoming PhD) for further exploration of this latter case.

<sup>108</sup> Note that London's east end was historically subject to such depictions, see J. Walkowitz's many important works, for example, perhaps most intriguingly, in terms of intersections of race, class, and religion, 'The Indian Woman, the Flower Girl, and the Jew: Photojournalism in Edwardian London' (1998–1999) 42 *Victorian Studies* 3–46.

<sup>109</sup> T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003), at p 59.

<sup>110</sup> E.W. Said, *Orientalism* (Vintage, 1979), at p 301.

tradition and practices. At the same time, and in common with the cases in the first section of the paper, this racialised discourse is firmly embedded in an orientalist, 'civilisational' way-finding.<sup>111</sup>

### (c) The significance of culture and personal identity

Another judgment of Wilson J's exemplifies a somewhat different approach to understanding religion and ethnicity, one that appears on first reading to rely neither on genetic inheritance nor theological understanding and practice. In *Re C*, Wilson J authorises the adoption by a Jewish couple of a 2-year-old girl who, according to the judge, has a mixed genetic heritage that includes Jewish, Christian, Muslim, Scottish, and Turkish-Cypriot elements.<sup>112</sup> Both birth parents had learning disabilities, and it is unclear from Wilson's judgment whether they ultimately approved of this adoption or not. However, the official guardian objected to it strenuously, and she was the one who applied to the court to prevent it.

According to the judge:

'The crux of the guardian's primary argument is that, contrary to the guidance, the local authority, including for this purpose the panel, have labelled C as Jewish and have ignored the other elements of her background. C's mixed heritage requires, so she argues, placement in an essentially secular family, in other words in a religiously neutral environment, from which exposure to the different elements of her background can evenly be developed.'<sup>113</sup>

Given this argument, Wilson J felt compelled to investigate the adopters' Jewishness and, in a section headed 'The Level of Mr and Mrs A's Jewishness', the judge listed over 20 items relevant to this investigation.<sup>114</sup> Concluding this lengthy section, he stated: 'I accept that Mr and Mrs A have quite a strong Jewish identity, but with a low level of specifically religious observance ...'.<sup>115</sup> Wilson J went on to find that the guardian's argument, that the A's home was, in effect, too Jewish, and that C had been inappropriately labelled as Jewish by the local authority when her birth home was a 'secular' one, was 'inflexible and doctrinaire'; that the guardian's search was for 'the lowest common denominator'.<sup>116</sup>

In considering further the relevance of the birth home and the wishes of the birth parents, Wilson J found that the former was characterised by 'poverty, physical but in particular intellectual and emotional', and that it contained a 'religious void' which the guardian 'paradoxically' was seeking to replicate.<sup>117</sup> In relation to the weight that should be accorded the birth parents' views, Wilson J offered the following:

<sup>111</sup> See also Lord Denning's echoes of this discourse in *Mandla v Dowell Lee* [1982] 3 All ER 1108: 'Jews are not to be distinguished by their national origins. The wandering Jew has no nation. He is a wanderer over the face of the earth. The one definable characteristic of the Jews is a racial characteristic' (at 1113). See further, D. Herman, 'An Unfortunate Coincidence': Jews and Jewishness in 20<sup>th</sup> century English Judicial Discourse' (2006) 33 *Journal of Law and Society* 277–301.

<sup>112</sup> *Re C* [2002] 1 FLR 1119, at para [3].

<sup>113</sup> *Ibid*, at para [36].

<sup>114</sup> These ranged from where the A's had been married (in a United Synagogue), to who comprised their circle of friends, to their practices on Friday nights, and at Christmas.

<sup>115</sup> *Ibid*, at para [32].

<sup>116</sup> *Ibid*, at para [37].

<sup>117</sup> *Ibid*, at para [38].

'Parental wishes must be analysed in context. How considered are the wishes? Upon what are they founded? How deep do they run? In answering these questions there is no escape from some reference to the tragic barrenness of the parents' lives and the superficiality of their thoughts. Although they have occupied their present accommodation for almost 2 years, there is no carpet in the living room and it is entirely empty apart from a television set and one plastic garden chair . . . The room is testament less to lack of money than to lack of purpose . . . even the making of an appointment with their solicitors seems to overwhelm them . . . The mother describes herself as Church of England but it is unclear whether she has ever attended a church service, still less whether Anglican teaching holds any meaning for her. When on 18 June she indicated opposition to the placement on the basis that C was Church of England, it is hard to discern any meaning behind that label; and the father's contribution at that time was to say that C had a "London religion".'<sup>118</sup>

The judge thus builds up the case for the A's, first by noting yet playing down their degree of religious observance, second by playing up their middle class multicultural milieu, and, finally, by finding that the birth parents live 'tragic, barren, and superficial' lives, and thus their views on their own religion and culture, much less that of the prospective adopters, were irrelevant.<sup>119</sup> The intriguing complexity of the father's response – that C had a 'London religion' – is instead offered as evidence of his lack of intellect.

So, in *Re C*, we see a hybrid approach to Jewishness, part theology/ritual practice, part 'cultural' or perhaps ethnic. Wilson J takes the former approach to the learning disabled birth parents; he interprets their words as demonstrating a lack of cognitive ability to understand religion. Like N, the learning disabled child in *Re P*, they cannot 'know' religion, and thus they cannot have any: their lives are 'tragically barren' and their thoughts 'superficial'. Their own subjective experience and understanding – their 'London religion' – is ridiculed. Wilson portrays the birth parents as leading uncivilised lives – they have no carpet, no furniture, they cannot make business appointments, their existence is without purpose.

At the same time, the Jewishness of the proposed adoptive parents is treated in a more nuanced way than one usually finds in these judgments. Although the facts clearly indicate some level of orthodox Jewish practice (ie keeping kosher; a religiously Jewish marriage), the prospective adopters could also, to a large extent, be described as 'secular Jews', a concept that appears almost unthinkable in many of these judgments. Wilson J describes their beliefs as being 'liberal Jewish', but there is no further explication of what that might mean. The A's live in a non-Jewish area and do not observe Shabbat. The A's are willing to observe Christmas, and they undertake not to bat mitzvah the child – perhaps tests of their adaptability to Christian England. Wilson J thus evinces an understanding of the complexity of Jewishness – as religion, as ethnicity, as culture – largely absent in the other decisions we have discussed. But he does this in the context of rebutting the guardian's claim that the couple are too Jewish.

*Re S* (2004) takes a somewhat similar approach. While here, Barton J, relying on expert evidence, found that circumcision was 'relatively safe',<sup>120</sup> and unlike the judges in *Re J*, she spent no time elaborating its potential abusive effect on children, she

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<sup>118</sup> *Ibid*, at para [42].

<sup>119</sup> The mother had said that if she had had a son, she would have had him circumcised (*ibid*, at para [44]).

<sup>120</sup> *Re S* [2004] EWHC 1282, at para [72].



nevertheless refused to authorise it. Arguing that it was in the interests of the children to 'have the best of both worlds', and that circumcision now might impinge on the boy's later choices to be Jain, Barton J found that it would be best to wait until the boy was 'Gillick competent' and could make his own choice.<sup>121</sup> The fact that circumcision at this later age would not violate Muslim law also influenced her decision.

Barton J appears fully committed to the possibility of mixed identity and the court's duty to facilitate this, and also seems to have a more expansive understanding of children's cognitive abilities to appreciate ethno-religious worlds:

'...K's understanding of his dual heritage is well established. Therefore, obviously, both Muslim and Hindu elements of his identity will require validation if he is to grow up with a proper knowledge of his true self.'<sup>122</sup>

However, the belief/practice approach creeps into her judgment too; she dismisses the religiosity of the parents as they do not evidence sufficiently serious ritual practice. She remarks that the father, 'assert[s] his religion when his adherence is patchy'.<sup>123</sup>

While both *Re C* and *Re S* (2004) are problematic decisions in some respects, both the judges in these cases do manage to think somewhat more complexly about the character of non-Christianity, and it is striking how few judges do. They rely neither on belief/practice, nor on racial genetic ancestry. Wilson J and Barton J are both committed to the possibility of mixed identity, which they believe it is the court's duty to facilitate. Wilson J's judgment in *Re C* goes some way in this direction; however, it is limited by his insistence that while ethnicity can be mixed because it is 'genetic', a child cannot be brought up believing in two different religions and so religion can not be legally 'mixed' in this way.

## CONCLUDING REMARKS

We have focused on a number of English child welfare-related cases in order to explore several inter-locking and also divergent themes. In doing so, we made two main sets of arguments. The first proceeded by tracing the different yet overlapping approaches judges take to coming to terms with children's non-Christian cultural backgrounds: we identified these as belief/practice; racial/genetic ancestry; and cultural context-oriented. We do not argue that these three approaches are analytically or normatively distinct, but rather that considering the cases through this sorting mechanism illuminates particular dimensions of the judgments to which we wish to draw attention.

So, for example, an understanding of 'Jewish', 'Muslim', or 'Sikh' as 'religion' narrowly defined through the prioritisation of belief/practice and cognitive processing can result in the de facto conversion of non-Christian children to Christianity, which itself remains invisible; if spoken of at all, it is called 'secularism'. Those cases that prioritised blood and genetic ancestry exhibit a racialised logic that the first set of cases largely does not. Here, 'Jewish', 'Muslim', or 'Sikh' are de-theologised, and, instead, ethnicised, resulting in a complex relationship between the 'religious' and the 'racial'. While, through the language of ethnicity, the children's authentic heritage is judicially identified as being 'in the blood', it is possible, according to some of the judges, to de-couple race and religion. Thus, a Jew by virtue of her 'blood' (per Ward LJ in *Re P*), or a Sikh by virtue of his 'genetic[s]' (per Wilson J in *Re S*), can become

<sup>121</sup> Ibid, at para [83].

<sup>122</sup> Ibid, at para [71].

<sup>123</sup> Ibid, at para [59].

Christian, or Muslim, by religion, but they will never lose their racial make-up, they will always and forever remain Jewish or Sikh by race. In *Re B*, 'Muslim' and 'Gambian' appear similarly racialised and deemed to live forever 'in the blood'.

The final set of cases, those emphasising the child's wider cultural context and personal identity, exhibit an attempt to overcome the rigidities of the other approaches. Both Wilson J and Barton J, in *Re C* and *Re S (Specific Issue Order)* respectively, demonstrate a more sophisticated understanding of non-Christian worlds, one that adopts a broader concept of 'culture'.<sup>124</sup> However, even here, and particularly in *Re C*, we encounter a different problem – and this brings us to our second set of arguments.

While each child welfare discourse has its own (at times overlapping) logic, almost all the judgments exhibit aspects of orientalist thinking. In saying this, it is not our intention to label the judges 'racist'; rather, our interest has been to consider how orientalism is productive of particular understandings and therefore, in the case of law, material outcomes for people, how it is 'willed human work'.<sup>125</sup> Judges are not ciphers, simple mouth-pieces for the arguments of others. Judges make choices about how to present 'the facts', about the terms and expressions they deploy, and, within certain constraints of course, about which side they favour at the end of the day – but it is not the final decision that has concerned us here. We wish to draw attention to how most of the judges in these cases share a common outlook – namely a normative Christianity. Christianity becomes defined as secularism, it is rarely, in itself, the subject of story-telling or enquiry.<sup>126</sup>

Finally, we draw parallels between some of the language in these decisions and contemporary 'clash of civilisations' discourse. Whether it is through how anti-circumcision arguments are mobilised to advance the path of western reason against barbaric ritual, or through how a judge might sit back and reflect on the warring tribes of non-Christian, racialised others, we argue that there is a kinship between legal narrative in child welfare cases and a civilisational discourse at this particular moment, one to which we should attend.

We are conscious that the judgments we consider have not been analysed in this way elsewhere, and that there may be resistance to how we read the cases and the conclusions we draw from them. In *Orientalism*, Said wrote that his project was not about finding something hidden, but rather was one of bringing to light representations already there for all to see, and of tracing the real, material effects of these representations.<sup>127</sup> On a much smaller scale, this is our endeavour here. However, in contrast to *Orientalism* and much subsequent work in postcolonial studies, our focus is on how orientalisation and racialisation work on bodies in the imperial centre rather than the colonial periphery, namely diasporic non-Christians in England. We are not suggesting that our reading constitutes the 'truth' of these legal cases, but, rather, that an unconventional, at times provocative, reading can shed light on what is there for all to see. In much the same way that earlier feminist scholars insisted, in the face of

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<sup>124</sup> We see this approach in some of the cases in another legal area relating to children – the education law field dealing with children with 'special needs', for example, see *R v Secretary of State for Education ex parte E* [1996] ELR 312 and *A v SENT, LB Barnet* [2004] ELR 293. See also D. Herman, *Jews and Jewishness in English Law* (Oxford, forthcoming 2011) for further discussion of this area of law.

<sup>125</sup> E.W. Said, *Orientalism* (Vintage, 1979), at p 15.

<sup>126</sup> A related enquiry, but one we can not accomplish here, is to pursue representations of Christianity in English case law. This is work that has yet to be done, however, for some discussion see D. Herman's earlier work with D. Cooper: 'Jews and other Uncertainties: Race, faith and English law' (1999) 19 *Legal Studies* 339–366. In that piece, we discuss the representation of Anglicanism in *Re Allen* [1953] 2 All ER 898.

<sup>127</sup> E.W. Said, *Orientalism* (Vintage, 1979), at pp 23 and 273.

much resistance, that law was 'gendered', and this has now become a new common sense, we argue that orientalism, racialisation, and Christianity are also significant elements of legal discourse, recoverable through changing our lens.