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# Unlawful Religion? Modern Secular Power and the Legal Reasoning in the *JFS* Case

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PETER DANCHIN AND LOUIS BLOND

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## Unlawful Religion? Modern Secular Power and the Legal Reasoning in the *JFS* Case

PETER DANCHIN<sup>†</sup> AND LOUIS BLOND<sup>††</sup>

Strictly speaking, Judaism is not a religion at all but simply the union of a number of individuals who, since they belonged to a particular stock, established themselves into a community under purely political laws, hence not into a church.... We cannot, therefore, begin the universal history of the Church ... anywhere but from the origin of Christianity, which, as a total abandonment of the Judaism in which it originated, grounded an entirely new principle, effected a total revolution in doctrines of faith.... The subsequent discarding of the corporeal sign which served wholly to separate this people from others is itself warrant for the judgment that the new faith, not bound to the statutes of the old, nor, indeed, to any statute at all, was to contain a religion valid for the world and not for one single people.

— Immanuel Kant, *Religion within the Boundaries of Mere Reason* (1793)<sup>1</sup>

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1. IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS 130, 132 (Allen Wood and George di Giovanni eds., 1998) (hereinafter "KANT, RELIGION").

## INTRODUCTION

Two ideas shape the structure and logic of contemporary religious freedom discourse: first, that the state should be neutral towards religion;<sup>2</sup> and second, that religious freedom is a universal human right which guarantees both the individual and collective right to freedom of religion, conscience, and belief.<sup>3</sup> These two concepts animate equally constitutional and international law on religious liberty and can be traced in the jurisprudence of a large number of national and international courts. In any jurisdiction in which they are invoked, neutrality and the right thus become essentially-contested questions for the parties and adjudicators alike and, by extension, raise deeper anxieties about our contemporary conditions of secularity and freedom.

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2. In First Amendment jurisprudence, *see, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968) (“Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no–religion, and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”). In European Court of Human Rights jurisprudence, *see, e.g.*, the recent judgment of the Grand Chamber in *Lautsi v. Italy*, 54 Eur. Ct. H.R. 3, ¶ 60 (2011) (noting that Article 9 of the ECHR “guarantees freedom of thought, conscience and religion, including the freedom not to belong to a religion, and ... imposes on Contracting States a ‘duty of neutrality and impartiality’” and further, *citing Leyla Şahin v. Turkey* [GC], no. 44774/98, § 107, ECHR 2005–XI, that “States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs [including] ... relations between believers and non–believers and relations between the adherents of various religions, faiths and beliefs.”).

3. Universal Declaration of Human Rights art 18, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9 (opened for signature by the Council of Europe on Nov. 4, 1959, entered into force Sept. 3, 1953). *See also* OFFICE OF INT’L RELIGIOUS FREEDOM, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, RELIGIOUS FREEDOM: AN INTERNATIONAL RESPONSIBILITY, FACT SHEET, April 16, 2001 (“Religious freedom has always been at the core of American life and public policy. It is the first of the freedoms enumerated in the Bill of Rights — a reflection of the founders’ belief that freedom of religion and conscience is the cornerstone of liberty. Freedom of religion and conscience, however, is not an American invention. Indeed, as recognized in the Universal Declaration of Human Rights, religious liberty and other universal rights are not ‘granted’ by any state or society.”).

*Prima facie*, the reasoning in *R (on the application of E) v. The Governing Body of JFS* (the “Jews Free School” or “JFS” case)<sup>4</sup> does not concern religious freedom. Rather, the judgments are framed according to the principles and logic of antidiscrimination and equality law which seek to guarantee the fair treatment of all parties. As this Article argues, however, the dialectic between secular neutrality and subjective freedom is evident in the legal reasoning which seeks to achieve neutrality of treatment through an unarticulated conceptualization of religion latent in the distinction between racial and religious *grounds* of discrimination. The case thus provides a powerful illustration of how in practice secular power in the liberal state assumes a non-neutral position and actively intervenes in religious institutional practice to delimit the sphere of religious influence.<sup>5</sup> In particular, two themes emerge from the judgments discussed below.

First, the right to religious liberty can be seen to encode a conception of the essential nature of religion understood in creedal terms as interiorized *conscience* or *belief* viewed as freely chosen, i.e. as a “set of beliefs in a set of propositions (about transcendence, causality, cosmology) to which an individual gives assent”.<sup>6</sup> This conception of religion “emphasizes the priority of belief as a state of mind rather than as constituting activity in the world.”<sup>7</sup>

Second and closely related, both the subject of the right and the scope of freedom it protects are indeterminate categories which inescapably entangle conceptions of the religious and the secular.<sup>8</sup> It is the autonomous subject who is the (universal) bearer of the right to religious liberty while the freedom protected by the right is divided into two spheres: an internal, sovereign realm of absolute freedom of

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4. [2009] UKSC 15, [2010] 2 A.C. 728 (S.C.) (appeal taken from Eng.) [hereinafter *JFS*].

5. Hussein Ali Agrama, *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or Religious State?* 52 COMP. STUD. SOC’Y & HIST. 495, 499 (2010). Much recent critical scholarship on the nature of secularism thus emphasizes that it “involves less a separation of religion and politics than the fashioning of religion as an object of continual management and intervention, and the shaping of religious life and sensibility to fit the presuppositions and ongoing requirements of liberal governance.” *Id.*

6. Saba Mahmood, *Can Secularism Be Other-wise?*, in VARIETIES OF SECULARISM IN A SECULAR AGE 283 (Michael Warner, Jonathan VanAntwerpen and Craig J. Calhoun eds., 2010).

7. TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 47 (1993).

8. *Cf.* Agrama, *supra* note 5, at 502.

conscience or belief and an external realm of manifestation of conscience or belief which is subject to state limitation and regulation.

The *JFS* case demonstrates that these categories are vigorously contested by contemporary religious traditions in their meaning, scope, genealogy and everyday practice. As a matter of history and theory, rival intellectual traditions and normative conflicts are *internal* to the question of the right to religious liberty itself. This suggests that religious freedom is not a single, stable principle situated outside of culture, spatial geographies, or power relations but is rather a fractious, polyvalent concept unfolding through particular histories in differing national and international normative orders.<sup>9</sup>

This Article illustrates these propositions by analyzing the reasoning in the majority, concurring, and dissenting judgments respectively. What emerges from the tripartite sequence of opinions is a complex, but familiar picture: the statutory scheme comprised by the Race Relations Act 1976 (“RRA 1976,”)<sup>10</sup> later consolidated and revised in the Equality Act 2010,<sup>11</sup> in conjunction with judicial interpretation of these provisions, is premised on distinct conceptions of both religion and the right to religious freedom.

The argument proceeds in two parts. Part I begins by analyzing the majority’s finding of *direct* ethnic discrimination by JFS in excluding M on the basis of two critical distinctions: first, between racial (Section A) and religious discrimination (Section B) and second, between the “grounds” for such discrimination on the one hand and the “reasons” or “motives” for it on the other (Section C). The Article argues that these two distinctions encode a distinctly modern and Christian conception of religion and religious subjectivity which is deeply incompatible both conceptually and historically with Judaism as a religion (Section D).

Part II then considers the conflicts of value that arise internal to the right by examining the disagreements first, between the majority on the one hand and concurring and dissenting judgments on the other regarding the relationship between *direct* racial discrimination

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9. Peter Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT’L L. 663, 746 (2011); Saba Mahmood & Peter G. Danchin, *Politics of Religious Freedom: Contested Genealogies*, 113 SOUTH ATL. Q. 1 (2014).

10. Race Relations Act, 1976, c. 74 (U.K.), *amended by* Race Relations Act, 2000, c. 34 (U.K.), *repealed by* Equality Act, 2010, c. 15 (U.K.).

11. Equality Act, 2010, c. 15 (U.K.).

and the right to religious freedom as encoded in the distinction between racial and religious grounds for exclusion (Section A); and second, having found JFS's ground for exclusion to be *religious*, between the concurring and dissenting judgments themselves regarding whether JFS *indirectly* discriminated against M on racial or ethnic grounds and the ensuing attempts to reconcile the competing claims of right using the concepts of "legitimate aim" and "proportionality" (Section B).

The Article argues that these twin divergences in reasoning illustrate the three dominant themes in modern discourse regarding the conceptual structure, subject and authority of the right to religious freedom (Section C). The Article concludes by considering the implications of these themes for legal reasoning and contestation more broadly concerning the right to religious freedom.

#### I. STATE NEUTRALITY TOWARDS RELIGION

As described in Heather Miller Rubens' case study,<sup>12</sup> the facts of the case are relatively straightforward. The Jews' Free School ("JFS") was founded in 1732 and is today one of the best, state-funded schools in London. JFS gives preference to Jews in its admissions decisions and recognizes the authority of the Office of the Chief Rabbi, as head of the United Synagogue, to determine who is Jewish for these purposes. This is permitted under English law but only on the basis that the determination is made on grounds of "religious" belief, membership or practice. Under the RRA 1976, there is no exemption for discrimination on grounds of "race" which is defined to include "ethnic or national origins."

A 12-year old boy "M" applied for admission to the school. M's mother, who was Italian Catholic by birth, had converted to Judaism under the supervision of a non-Orthodox (Masorti) rabbinate. M was living with his father at the time and they were both members of a Masorti synagogue. M was denied admission because he was not recognized as being Jewish according to Orthodox interpretation of *halakhah* according to which M would be considered Jewish only if his mother was Jewish (the matrilineal test) or if M underwent a conversion under the supervision of an Orthodox rabbi. Given that the Office of the Chief Rabbi did not recognize the conversion of M's mother on the basis that it did not recognize the *halakhic* authority of the Masorti Rabbinic courts, and given that M himself did not wish to

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12. Heather Miller Rubens, "Something has Gone Wrong": *The JFS Case and Defining Jewish Identity in the Courtroom*, 29 MD. J. INT'L L. 366 (2014).

undergo an Orthodox conversion, M was denied admission to JFS (his family's practice of Judaism notwithstanding).

M's father sued JFS arguing that the school's use of the matrilineal test in its admission policy violated the RRA 1976. A court at first instance upheld the school's right to deny M admission. This was reversed on appeal and the case then came before the new U.K. Supreme Court. All nine judges wrote separate opinions reflecting striking differences in judicial reasoning and the complexity of the issues under consideration. Despite their differences, most expressed "sympathy" with the governors of the school and expressed great anxiety about the Court's decision stating that they thought "something has gone wrong."

A majority of five judges (Lords Phillips, Mance, Kerr, Clarke and Lady Hale) held that the admissions policy of JFS constituted direct racial discrimination under the RRA 1976 on the grounds that the criteria used by JFS to select pupils treated applicants differently on account of their "ethnic origins." Two judges (Lords Hope and Walker) concurred in this result but found instead that the admissions policy of JFS constituted permissible religious discrimination which had the unlawful effect of indirect racial or ethnic discrimination. The remaining two judges (Lords Rodger and Brown) dissented finding that JFS's admissions policy was neither directly nor indirectly discriminatory under the RRA 1976.

Historically, there are several ways to view neutrality and equality of treatment in religious matters. As Christopher McCrudden has observed, British legal policy towards majority and minority religious groups has moved through at least three main phases: first, a phase in the early nineteenth century of political compromises accommodating conflicting interests;<sup>13</sup> second, a mid-1960s "multicultural" phase which relied primarily on antidiscrimination law and accommodation of "new" ethnic groups,<sup>14</sup> and third, a

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13. Christopher McCrudden, *Multiculturalism, Freedom of Religion, Equality, and the British Constitution: the JFS Case Considered*, 9 INT'L J. CONST. L. (I-CON) 200 (2011). This approach had two features: first, judicial abstinence on the theory that matters of religious controversy are better left to the legislature; and second, pragmatic empiricism in the legislature where compromises are sought in direct negotiations between religious communities and the government often resulting in technical and nuanced statutory schemes as opposed to controversial disputes of high constitutional principle. *Id.*

14. *Id.* These accommodations and exemptions from general laws were thought to concern primarily "racial" or "ethnic" issues and thus not to have great relevance



contemporary phase of “constitutional idealism” which focuses more on “principle” and the notion of fundamental rights as enacted in legislation such as the Human Rights Act 1998,<sup>15</sup> which incorporated the European Convention on Human Rights into British domestic law.

This shift towards quasi-constitutional liberal principles has supplanted the legislative contingency of the pre-multicultural phase and the integrationism and antidiscrimination focus of the multicultural phase. Consequently, it has been left to the judiciary to determine how to apply conflicts involving religion, culture and ethnicity. Practices previously regarded as “ethnic” and raising correlative duties of non-discrimination are today often viewed as “religious” to be adjudicated as a matter of individual rights.<sup>16</sup> It was in context of this normative shift towards liberal rights discourse in British constitutionalism that the *JFS* case was both argued and ultimately decided by the U.K. Supreme Court.

Given this background, what does it mean for a nation state to be neutral towards Judaism as a “religion”? If neutrality previously meant affirmative engagement by the state with existing Jewish communities on matters pertaining to Jewish belief and practice, and later protection of such minority communities from acts of unlawful racial or ethnic discrimination, then today neutrality appears to be understood as the protection of the human right to freedom of religion and belief. In this series of moves, neutrality towards religion as an institution, practice, or tradition has shifted almost imperceptibly to the question of the *right to freedom of* religion, which suggests that the state adjudicates between competing *rights* and not neutrality towards competing *religions*. This, as we shall see, is a shift fraught with consequences.

Such a shift in emphasis regarding the category demarcated as “religious” is not immediately apparent in *JFS* given that the judgments focus on the meaning of “racial grounds” in section 1(1)(a) of the RRA 1976 as further elaborated in section 3 to include

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to the “pre-multicultural type of accommodations involving Judeo-Christian practices and beliefs” which continued unaffected. *Id.*

15. Human Rights Act, 1998, c.42 (U.K.). The Act incorporated the European Convention on Human Rights into UK domestic law. Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5. *But see infra* note 97.

16. *Cf. Mandla v. Dowell Lee*, [1983] 2 AC 548 (wearing of the turban held to be an ethnic practice) with *R (Watkins-Singh) v. The Governing Body of Aberdare Girls' High School* [2008] EWHC 1865 (Admin) (wearing of the Kara held to be both a religious and ethnic practice).

“ethnic or national origins.” But what is implicit in both the Act and the Court’s interpretation of these provisions is that the RRA’s prohibition on racial and ethnic discrimination is concordant with both (1) the permission granted to schools having a religious character to engage in religious discrimination under section 50 of the Equality Act 2006,<sup>17</sup> and (2) the right to freedom of thought, conscience and religion protected under Article 9, Schedule 1 of the Human Rights Act 1998.<sup>18</sup> To the extent that any conflict or inconsistency is contemplated, the School Standards and Framework Act 1998 makes it clear that school governing bodies must act in accordance with codes of practice issued by the Secretary of State. The relevant paragraphs in the School Admissions Code for 2007 dealing with faith-based oversubscription criteria provide that such

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17. Equality Act, 2006, c.3 (U.K.). Part 2 of the Act prohibits discrimination on the grounds of religion or belief in the provision of goods and services and § 49 makes it unlawful for a school maintained by a local education authority to discriminate by *inter alia* refusing to accept an application to admit a person as a pupil. § 50, however, contains a list of exceptions to section 49 including an exception in favor of a school designated by the Secretary of State as having a “religious character” under section 69(3) of the School Standards and Framework Act 1998. As noted by Lord Hope in *JFS*, § 50 “does no more than immunize the school from liability for religious discrimination under the 2006 [Equality] Act”. *JFS*, [2009] UKSC 15 ¶ 175. It should be noted that following the *JFS* case, British antidiscrimination law was consolidated and reformed in the Equality Act, 2010, c.15 (U.K.). Part 6 of the 2010 Act addresses discrimination in education and prohibits discrimination in the admissions process on protected grounds including religion. § 85(1). The schedules to the Act then provide a series of exceptions allowing long-standing educational practices, such as single-sex and religious schools which by their nature directly discriminate on the basis of characteristics protected by the Act, to continue. Sch. 11 ¶¶ 4–6. Thus, schools with a religious character may still discriminate in their admissions process by giving preference based on religion. Sch. 11, ¶ 5.

18. Human Rights Act 1998, c. 42. The purpose of the Act is to “to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights”. Schedule 1 sets out the Convention rights and this includes Article 9 which provides as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

“faith-based criteria must be framed so as not to conflict with other legislation such as equality and race relations legislation.”<sup>19</sup>

The logic of this statutory framework is that whatever permissible religious discrimination and the right to freedom of religion and belief collectively encompass, this does not include any act or practice which constitutes racial or ethnic discrimination under the RRA 1976. The notion that race and ethnicity are, in principle, irrelevant to the just treatment of persons on religious grounds and that religion is a distinct and neatly separable sphere from such matters are grounds on which the case is contested.

#### A. *Racial Discrimination*

The RRA 1976 prohibits discrimination on grounds of race but only in specific fields of employment, the provision of goods and services, education and public functions. This leaves other areas of private and social life such as personal relationships, the family, and religion (to the extent these do not overlap with the former categories)<sup>20</sup> unregulated by the Act. In this respect, “private” acts of racial discrimination are permitted under English law and the scope of the RRA 1976 is premised on a particular background understanding of the public-private divide. Thus, for example, an individual excluded from membership in a religious institution outside of the spheres of commerce, education, and employment is unable to sue that body for discrimination on the grounds of race or ethnicity under the RRA 1976.

What is the justification then for the statutory prohibition of racial and ethnic discrimination and its limited scope? Legal restrictions on discrimination limit the freedom of persons to pursue their own social preferences on the premise of protecting the freedom of others. Not all discrimination is morally blameworthy (for example, one *should* discriminate between bullies and non-bullies<sup>21</sup>)

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19. DEP’T. EDUC., SCH. ADMISSIONS. CODE ¶ 2.41(2007); *cf. JFS* [2009] UKSC 15 ¶ 176 (discussing the admissions code). *Cf. Rubens, supra* note 12 at 385.

20. Complex questions arise at the intersection of antidiscrimination law and religious freedom in areas such as employment in religious bodies: *see, e.g.,* JULIAN RIVERS, *THE LAW OF ORGANIZED RELIGIONS: BETWEEN ESTABLISHMENT AND SECULARISM* 122–37 (2010) (discussing exceptions based on (a) genuine occupational requirements where the employer has an *ethos* based on religion or belief and (b) employment or office-holding for the purposes of an organized religion).

21. John Gardner, *On the Grounds of her Sex(uality)*, 18 OXFORD J. L. STUD. 167, 167 (1998).

and thus some account is needed to explain when discrimination is morally wrongful. As John Gardner has argued, this is primarily a question of justice involving extended, context-relative issues of two orthodox legitimacy doctrines: on the one hand *harm* such as denial of opportunity, stigma and historical disadvantage,<sup>22</sup> and on the other *redistribution* of effective social power in the form of correction of existing patterns of advantage and disadvantage.<sup>23</sup> Following Raz, Gardner suggests that what unifies these doctrines is a “non-individualistic theory of autonomy, according to which the state has its own project of providing the conditions of valuable flourishing for its citizens.”<sup>24</sup>

In analyzing the distinction between legitimate and wrongful discrimination, Gardner refers to both the *role* of the discriminator as well as the *grounds* of discrimination. The question of role is an aspect of the public-private divide and the law’s assumption that certain actors such as employers, retailers, educators, and public officials stand in a different relative position to individuals acting in their private capacity. The question of grounds relates to a theory of justice which does not turn on an account of rationality *per se* (there may well be rational reasons in specific contexts to discriminate on grounds of race<sup>25</sup>) but rather the liberal idea of personal autonomy and the duty “to treat people in certain ways defined by reference to the way that others are treated.”<sup>26</sup>

On this view, the ideal of a life lived autonomously is what best explains the two commonly recognized grounds for improper discrimination: immutable characteristics and fundamental choices.<sup>27</sup> The core point is that discrimination on the basis of immutable

22. Paul Brest, *In Defense of the Antidiscrimination Principle*, 1 HARV. L. REV. 1, 8 (1970).

23. John Gardner, *Liberals and Unlawful Discrimination*, 9 OXFORD J. L. STUD. 1, 5–11 (1989).

24. *Id.* at 22 (discussing JOSEPH RAZ, *THE MORALITY OF FREEDOM* 410 (1986)). Gardner explores the idea in Raz that “we are pursuing a culture in which the value of personal autonomy is understood to be the core value” and in which autonomy itself is not an idea “which requires unfettered personal choice, but is instead the repository of shared cultural values.” *Id.* at 20–21.

25. For example: “[i]f your other customers will desert the pub when black people come in ... then, like it or not, ... [this is a reason] for discriminating against black people.” *Id.* 168. It is thus a basic premise of antidiscrimination law that it is sometimes wrong to act on a proposition that one is rationally correct to believe.

26. John Gardner, *Discrimination as Injustice*, 16 OXFORD J. L. STUD. 353, 355 (1996).

27. *Id.* at 170.

characteristics violates this ideal because our most valuable choices – those we should have irrespective of whatever else we may choose – are constrained not by our own, but by the choices of others.<sup>28</sup> This forecloses the possibility of a fully autonomous life. The duties of non-discrimination are thus autonomy-based duties: the duty imposed on discriminator X is by virtue of Y’s autonomy. Given that race is an immutable characteristic over which Y has no choice, any action based on that ground that treats Y less favorably than someone of another race is a violation of Y’s autonomy—the right to live her life based on her own valuable choices not the (morally improper) choices of X. At least in certain public roles then, X should not act in such a way so as to violate Y’s autonomy and the wrongfulness of X’s actions are linked to an improper ground figuring in the operative premises of X’s thinking towards Y.<sup>29</sup>

Consequently, the grounds of the Jews’ Free School treatment towards M in relation to M’s autonomy are subject to strict scrutiny. JFS is viewed by the Court as a discriminator standing in a relative position of justice towards M and thus subject to legal duties to treat M no less favorably than any other applicant on the ground of race, including “ethnic origins”. The question is expressed by Lady Hale as follows: “do the *criteria* used by JFS to select pupils for the school treat people differently because of their ‘ethnic origins’?”<sup>30</sup> The religious context, reasons and motive for applying the matrilineal test by JFS and the OCR are viewed by some of the Lords as irrelevant to this question of *criteria* or *grounds*.<sup>31</sup> Again, as stated by Lady Hale: “[w]e do not need to look into the mind of the Chief Rabbi to know why he acted as he did. If the criterion he adopted was ... in reality ethnicity-based, it matters not whether he was adopting it because of a sincerely held religious belief.”<sup>32</sup> The Court simply asks: (a) What are the *grounds* upon which M was refused entry and (b) are those grounds *racial*?<sup>33</sup>

This way of framing the case relies on an unarticulated distinction between internal belief on the one hand and external manifestation of that belief on the other in the form of action towards others. In order to determine the justice of a discriminatory action

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28. *Id.* at 171.

29. *Id.* at 182.

30. *JFS*, [2009] UKSC 15, ¶ 54 (Lady Hale).

31. One can thus discriminate on racial grounds without meaning to do so or realizing that one is. *Id.* ¶¶ 56–57 (Lady Hale).

32. *Id.* ¶ 65 (Lady Hale).

33. *Id.* ¶ 12 (Lord Phillips). *Cf.* Rubens, *supra* note 12, at 389-90.

towards M (refusing admission), the Court must interrogate the *grounds* of that act, which in turn necessarily requires an assessment of the nature of the belief itself: i.e. the critical question for the Court is whether the criterion used by JFS and OCR to reject M (the matrilineal test) is “racial” or “religious”. Implicit in this dichotomy for the majority is the assumption that a legitimate religious ground for action towards others may not include racial or ethnic criteria (i.e. the absolute prohibition on direct racial discrimination) or, for the concurring judges, to the extent such criteria are part of a religious ground for action, they must conform to the disciplinary limitations of race discrimination legislation (i.e. indirect racial discrimination must be justified). In this exercise of its interpretive authority, the Court does not determine matters of religious doctrine *per se* but rather what about doctrine is essentially a religious matter.<sup>34</sup>

### B. *Religious Discrimination*

It follows then that the puzzle in *JFS* is why exactly religious discrimination is permitted under British law while racial and ethnic discrimination is categorically prohibited? Further, why is the category of permissible religious discrimination not understood to conflict or overlap with the category of racial and ethnic discrimination? The implicit holding of the majority’s interpretation of sections 1(1)(a) and 3 of the RRA 1976 is that racial and ethnic criteria used to determine religious identity are not properly part of the category understood as “religious.” The categories of race and ethnicity are, to this extent, connected to and even contingent on a prior conception of what constitutes religion and a proper religious subjectivity.

This Article argues that religion is implicitly viewed by both the British legislature and courts as a matter of individual conscience or belief—a state of mind rather than an action or activity in the world—to which an individual autonomously assents. Individual choice, as

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34. Central to the logic of secular-juridical genealogies of religious freedom is the concept of *adiaphora* which originates in the old Stoic idea of actions that morality neither mandates nor forbids and which within Christianity was understood to refer to matters regarded as inessential to faith but nevertheless permissible for Christians or allowed in the Church. The relevant point is that once acts were regarded not from a sacramental-religious but political-juridical standpoint as soteriologically indifferent, they could then be brought under the regulation of civil law. See Ian Hunter, *Religious Freedom in Early Modern Germany: Theology, Philosophy and Legal Casuistry*, 113 SOUTH ATL. Q. 37, 56 (2014). On drawing the distinction between the “civil” and “religious” dimensions of an act, see *infra* Part II.C.1.

opposed to immutable characteristics such as race and ethnicity, is what constitutes the essential nature of religious identity and affiliation and decisions made by actors in public roles on this ground does not *per se* infringe the personal autonomy or valuable life choices of others. Choice and autonomy are sanctioned in law because this distributes responsibility and liability across a wide framework and permits neutrality to function in relation to agents as well as institutions. For example, a Muslim student not admitted to a Christian school on the basis of her religion, or refused permission to wear religious clothing such as the Islamic headscarf, can always choose to become a Christian or attend another Muslim or non-religious school.<sup>35</sup> Unlike race and ethnicity over which she has no or socially limited individual choice, religion can be understood as a matter of belief understood as internal to the subjectivity of the autonomous individual and hence also subject to a principle of neutrality.<sup>36</sup>

This abstracted conception of religion is reiterated and relied upon throughout the reasoning of the majority and concurring judgments. For example, the majority cites with approval Lord Justice Sedley's statement in *Eweida v. British Airways* that unlike the grounds of age, disability, gender, race, sex, and sexual orientation, discrimination on grounds of religion or belief is different: "One cannot help observing that all of these apart from

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35. The British case law has followed the European Court of Human Rights jurisprudence in considering whether an alternative is available to a claimant alleging interference with freedom of religion and often finding that any inconvenience incurred by the claimant was a result of her own choice. Thus, in *R(Begum) v. Governors of Denbigh High School*, Lord Bingham noted that the European Court has "not been at all ready to find interference with the right to manifest religious belief or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religion without undue hardship or inconvenience." [2006] UKHL 15, [2007] 1 AC 100, ¶ 23. See McCrudden, *supra* note 13, at 19–20.

36. Note, e.g., that under racial antidiscrimination law the British courts have held that there is no requirement to establish the absence of an alternative. Thus *cf. R. (Watkins-Singh) v. The Governing Body of Aberdare Girls' High School*, [2008] EWHC 1865, ¶ 69 (finding the refusal to allow the claimant to wear the Kara to be a "particular disadvantage" in a race/religious discrimination claim without considering whether she might attend another school) with *R. (X) v. Headteachers and Governors of Y School*, [2007] EWHC 298 (Admin), [2008] 1 All ER 249, [2007] HRLR 20, ¶ 40 (finding the availability of an alternative school meant that the refusal to allow the claimant to wear the *niqab* did not interfere with her freedom of religion). McCrudden, *supra* note 13, at 20.

religion or belief are objective characteristics of individuals: *religion and belief alone are matters of choice.*<sup>37</sup>

Similarly, the two concurring judgments view the competing claims at issue in the case through the lens of autonomous choice, whether the choice of M to follow a particular form of Judaism or the choice of JFS to prescribe its own chosen norms of religious identity and membership. It is implicit in the concurrence's ultimate finding of indirect discrimination that JFS and the OCR have failed to consider and take seriously the valuable choice of M and his mother in electing a Masorti conversion and, conversely, electing not to undergo an orthodox conversion.

For the majority, religion is thus a matter of choice while race and ethnicity are immutable, unchosen characteristics. Whether the matrilineal test is assented to as a matter of *subjective belief* or *religious value* is irrelevant to the *objective fact* that M and his mother's ethnic origins were the factual ground that determined the admissions decision made by JFS.<sup>38</sup> As stated by Lady Hale:

M was rejected, not because of who he is, but because of who his mother is .... it was because his mother was not descended in the matrilineal line from the original Jewish people that he was rejected. This was because of his lack of descent from a particular ethnic group.<sup>39</sup>

On the logic of this approach, religion is reduced to the object of a state of mind or "motive" in the mental decision-making of a discriminator which may be freely believed in but not, without reasonable justification, permitted to determine actions towards others. JFS and the OCR are thus free to believe in the matrilineal test and apply it in determining religious identity and membership in the

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37. [2010] EWCA Civ 80, ¶ 40.

38. *JFS*, [2009] UKSC 15, ¶¶ 13, 16, 20, 62. For Lord Phillips, "grounds" are factual effects of a prior discriminatory judgment. Once *discrimination has been made fact*, the motives of discrimination are irrelevant. *Id.* ¶ 22.

39. *Id.* ¶ 66 (Lady Hale). Lady Hale further notes that in enacting the RRA 1976, Parliament adopted a model of formal equality which allows only carefully defined distinctions and otherwise expects "symmetry":

There can be no doubt that that, if an employer were to take exactly the same criterion as that used by the Office of the Chief Rabbi and refuse to employ a person because the Chief Rabbi would regard him as halachically Jewish, the employer would be treating that person less favorably on grounds of his ethnic origins.

*Id.* ¶ 68 (Lady Hale).



privacy of a synagogue, civic organization or the home,<sup>40</sup> but they are not free to apply the test as a criterion for determining admissions to a school subject to the discipline of racial antidiscrimination law. There are legal precedents for applying a distinction between belief and action, particularly in discrimination cases; however, there is the question as to whether the law is pursuing a legal end (neutrality) which has a secondary, delimiting effect on Jewish belief and practice or whether it is rather pursuing a political or ideological end which directly seek to control Jewish practice while limiting the extent of Jewish belief.

C. *The Matrilineal Test as a “Ground” for Racial Discrimination*

Given the logic of this argument, what does it mean exactly for the matrilineal test to constitute a “ground”—as opposed to a “motive” or “reason”—for the decision by JFS to exclude M? One of the striking aspects of the *JFS* case is the extraordinary level of disagreement and ambiguity—even between those judges comprising the majority—on the question of the relationship between racial and religious grounds on the one hand and between grounds as a category more broadly and motives or reasons on the other. The ways in which these concepts and relations are imagined and interpreted provides the key to understanding the reasoning in the case.

As a preliminary matter, it should be noted that the reasoning of the majority in fact reverses the normative understanding of the relationship between immutability and autonomy advanced by JFS and OCR in legal argument. The OCR acknowledged that “M was ‘ethnically’ Jewish, in the sense that he self-identified as Jewish, he was significantly involved with the Jewish community in various ways, and he was accepted as Jewish by at least parts of the community.”<sup>41</sup> Ethnicity for the OCR was thus not biological, but sociological, involving deep historical practices of social choice and collective autonomy. On the other hand, the OCR did not acknowledge that M was “religiously” Jewish because this was not a matter of individual or social choice but rather was to be determined by an Orthodox interpretation of *halakhah* which, as revealed religious law, is in some vital sense immutable and unchosen.

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40. Even in the private sphere, however, certain statutory or common law limitations may exist in areas such as employment and civil rights.

41. McCrudden, *supra* note 13, at 13. On the reasoning of the House of Lords in *Mandla v. Dowell-Lee*, if M was refused admission to a non-faith based state school because he was Jewish, this would be racial discrimination because “he was being discriminated against on the grounds of his Jewish ethnicity.” *Id.*

The majority judgments do accept that the matrilineal descent test is applied by JFS and OCR in order to comply with Orthodox Jewish religious law.<sup>42</sup> But in a forthright statement by Lord Phillips, the inquiry into the reasoning behind the matrilineal test and related conversion criteria and how these are understood within Jewish religious law are viewed as “subjective” motives which are then rejected as irrelevant to the factual question of direct racial discrimination.<sup>43</sup> This rejection is premised on a strong distinction between internal motive and external action, between *why* and *how*: the reason *why* the test is practised is deemed subservient to *how* it is practised as a matter of objectively ascertainable fact. This telescopic reduction of an entire discursive tradition and its centuries-old reasoning and normative system into a mere subjective “motive,” in contradistinction to a discriminatory “fact” or “ground,” calls for serious consideration.

There are two factors at issue in Lord Phillips’ interpretation of the notion of “grounds”. First, we have seen that the RRA 1976 prohibits discrimination on “racial” grounds; this allows for lawful discrimination (absent other legal restrictions) on non-racial grounds. Accordingly, the law requires a distinction to be drawn between racial and non-racial grounds in cases of direct discrimination. In the *JFS* case, this distinction is drawn between racial and religious grounds, which implies that there exists a kind of ground that is religious and lawful. In addition, it implies that to be lawful a religious ground is *not* a racial (including ethnic) ground.

The second factor is that Lord Phillips notes that the very term “grounds” is ambiguous and may refer to both a “motive” and “factual criteria”. The Concise Oxford Dictionary defines grounds as “factors forming a basis for action or the justification for a belief,” which is likewise ambiguous. This turns on the term “factor” which is defined as “a circumstance, fact or influence that contributes to a result”. Lord Phillips cuts through this ambiguity by declaring that grounds under the RRA 1976 means “factual criteria” rather than motive or justification for a belief.<sup>44</sup>

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42. *JFS* [2009] UKSC 15, ¶ 35.

43. *Id.* See also ¶¶ 127, 132 (Lord Clarke).

44. “Whether there has been discrimination on the ground of sex or race depends upon whether sex or race was the criterion applied as the basis for discrimination. The motive for discriminating according to that criterion is not relevant.” *JFS* at ¶ 20.

In so doing, he draws on *R v. Birmingham City Council, Ex parte Equal Opportunities Commission* where Lord Goff of Chieveley interpreted the Sex Discrimination Act 1975<sup>45</sup> as follows:

The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned ... is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex .... [W]hatever may have been the intention or motive of the council, nevertheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975.<sup>46</sup>

The implication of Lord Phillip's reasoning is that a racial or ethnic ground is based on factual criteria whereas a religious ground is based on motivational or belief-based criteria. The division between race and religion thus corresponds to the fact/value distinction: racial and ethnic criteria are objective, value-neutral facts whereas religious criteria are subjective, non-factual values or beliefs to which a person may choose to assent.

On the logic of this distinction, Judaism is indicted for containing a factual, descent criterion, even if interpreted according to religious law, as part of its internal understanding of religious identity and membership. Given that religion and ethnicity in the

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45. Sex Discrimination Act, 1975, c.65.

46. [1989] AC 1155 ¶ 13. The distinction was also relevant in *James v Eastleigh Borough Council* [1990] 2 AC 751, where the issue of motive versus factual criterion for discrimination split the House of Lords which by majority overturned the Court of Appeal and found that the reasons for the Council's irregular policy on free swimming lessons for pensioners was on the grounds of sex. Lord Phillips in *JFS* cites Lord Bridge in *James* for the majority:

The Court of Appeal's attempt to escape from these conclusions lies in construing the phrase 'on the ground of her sex' in section 1(1)(a) as referring subjectively to the alleged discriminator's 'reason' for doing the act complained of. As already noted, the judgment had earlier identified the council's reason as 'to give benefits to those whose resources would be likely to have been reduced by retirement' and 'to aid the needy, whether male or female.' But to construe the phrase, 'on the ground of her sex' as referring to the alleged discriminator's reason in this sense is directly contrary to a long line of authority confirmed by your Lordships' House in [*Birmingham City Council*].

*JFS*, [2009] UKSC 15, ¶ 15 (Lord Phillips).

form of matrilineal descent are deeply intertwined in Judaism's self-understanding, the effect of the majority's distinction between objective fact and subjective belief is to intervene directly into and thus regulate this religious self-understanding as it pertains to the sphere of an educational institution made subject to the civil jurisdiction of state law by the RRA 1976.

Even as part of the majority, Lord Clarke seeks to avoid this either/or division between race and religion and the implication that if discrimination is racial or ethnic then it is not religious and *vice versa*. For Lord Clarke, the unfair treatment of M was on both religious *and* ethnic grounds.<sup>47</sup> But while the ethnic origins of Jews such as M may indeed have been a matter of complete indifference to the OCR and JFS, "the reason they are not members of the Orthodox Jewish religion is that their forbears in the matrilineal line were not recognised as Jewish by Orthodox Jews and in this sense their less favourable treatment is determined by their descent."<sup>48</sup> Given that the religious ground was based upon an ethnic ground, this was held to be direct discrimination under the RRA 1976.<sup>49</sup>

What is critical to see, however, is that this purportedly bright-line distinction is in fact essentially-contested, unstable, and normatively non-neutral. The main ambiguity relates to the notion of "factual criteria" itself. Does this refer to the *treatment of M* and the assertion that M's descent from a particular ethnic group, whether ascertained on religious grounds or not, constitutes the factual criterion for the decision by JFS to reject M? Or does it refer instead to the *matrilineal test* itself which again, for either religious or non-religious reasons, is premised on descent-based factual criteria? As we shall see in the reasoning in the concurring and dissenting judgments, this ambiguity has important consequences for the domain of religious freedom.

Lord Phillips seeks to avoid this controversy by insisting that it is the treatment of M on a ground prohibited by the RRA 1976 that is the critical fact. On this basis, any normative source, subjective motive, or rational justification for such treatment, whether religious or not, is irrelevant to the question of direct racial discrimination. This line of reasoning, however, is unpersuasive for two reasons. First, if denial of personal autonomy and valuable choices on the basis of immutable characteristics is what best explains the rationale

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47. *JFS*, [2009] UKSC 15, ¶¶ 129–30.

48. *Id.* ¶ 128.

49. *Id.* ¶ 129.

for racial antidiscrimination law, the rejection of M by JFS does not easily fit into this logic. As noted above, both JFS and the OCR acknowledged in legal argument that M was ethnically Jewish; their grounds for refusing him admission were instead that he was not *halakhically* Jewish. Given that both M and his mother remained free to undergo Orthodox conversion or attend another Jewish or non-religious school, it is difficult to see how his autonomy was violated on the basis of immutable characteristics.

In response, one could argue that the effect of the matrilineal test is to treat one group of Jews less favorably than another solely on the basis of their descent, which is a fundamentally immutable, factual characteristic. But here again the position is more complex. The notion of descent under Orthodox Jewish religious in fact encompasses elements of autonomy and choice on the basis that matrilineal descent is established in the case of a mother who herself becomes Jewish not by descent but by recognized conversion.<sup>50</sup> Jewish membership and identity are in this way neither linked nor restricted to any closed or clearly-defined racial or ethnic group. This unsettles and diverges from the understanding of immutability at the heart of racial antidiscrimination law and demonstrates how any clear demarcation between fact and value in establishing either the grounds of decision made by JFS or the relevant characteristics of M is impossible.

A second ambiguity lies in Lord Phillip's rejection of the relevance of motive and reasons in determining the criterion for a racially discriminatory action. This does not diminish the fact that it was Orthodox Jewish religious law that was the basis of the advice offered by the OCR and thus the exclusionary decision made by JFS. The necessary implication of the majority's interpretation of sections 1(1)(a) and 3 of the RRA 1976 is that Jewish religious law, in the

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50. This point is made in an example offered by Lord Hope:

A is the child of parents, and the grandchild of grandparents, all of whom led wholly secular lives similar to those of their largely secular neighbours. They never observed Jewish religious law or joined in the social or cultural life of the Jewish communities where they lived, but there is unimpeachable documentary evidence that more than a century ago the mother of A's maternal grandmother was converted in an Orthodox synagogue. To the OCR A is Jewish, despite his complete lack of Jewish ethnicity.

*Id.* ¶ 203.

Similarly, Lord Brown notes that "those presently admitted [to JFS] come from a 'wide disparity of religious and cultural family backgrounds ... even ... from atheist or Catholic or Moslem families'". *Id.* ¶ 253.

form of the matrilineal descent test, is itself unlawful and no benign motive or rational justification can alter this conclusion. The possibility that the category of religion itself includes some notion of descent is thus foreclosed *a priori*. As argued above, this claim is premised on a prior understanding of what constitutes religion which does not easily accommodate Judaism in any of its forms—whether Orthodox, Masorti, progressive or reform, all of which are based on the matrilineal test—or corresponding notions of membership and obligation under Jewish religious law.

At a deeper level, what is most problematic and anxiety-inducing for the concurring and dissenting judges is the apparent willingness of the majority to allow state law to intervene directly into a matter of Jewish religious doctrine and what in reality is an intra-religious dispute between Jewish groups. It is this kind of direct state intervention and regulation of religious doctrine and practice that the right to religious freedom is usually assumed to prohibit.

For this reason, Lord Hope begins his concurring judgment by stating that “[i]t has long been understood that it is not the business of the courts to intervene in matters of religion” and that any court “must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognized divide between church and state.”<sup>51</sup> Given that “it is entirely a matter for the Chief Rabbi to adjudicate on the principles of Orthodox Judaism,”<sup>52</sup> and that “Jewishness based on matrilineal descent from Jewish ancestors has been the Orthodox religious rule for many thousands of years,”<sup>53</sup> Lord Hope adopts an entirely different approach to how to draw the distinction between the categories of racial and religious grounds.

Unlike Lord Phillips, Lord Hope argues that both motive and reasons for action “may be highly relevant to the determination of the crucial question: was this discrimination on racial grounds.”<sup>54</sup> Further disagreeing with Lord Clarke, he argues that the motivation and state of mind of the alleged discriminator is crucial to determining “why *he acted* as he did,” although once this is established, discriminatory treatment cannot be excused by looking “beyond it to why *he decided* to act in that way.”<sup>55</sup> This subtle shift in terminology from a *reason*

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51. *Id.* ¶ 157.

52. *Id.* ¶ 160.

53. *Id.* ¶ 201.

54. *Id.* ¶ 195. However, “once that conclusion has been reached, the fact that there may have been a benign reason for the discrimination is beside the point.” *Id.*

55. *Id.* ¶ 197 (emphasis added).

for action to a reason to *decide to act* exposes the critical point of divergence between the reasoning of the majority and concurrence.

Consider the following passage from Lord Hope which we quote in full:

The OCR has left us in no doubt as to why it was acting as it did. If the Chief Rabbi were to be asked the question that was framed by Lord Nicholls [i.e. why did the alleged discriminator act as he did?], he would say his reason was that this was *required of him* by fundamental Orthodox Jewish religious law ... To say that his ground was a racial one is to confuse the effect of the treatment with the ground itself. It does have the effect of putting M into an ethnic Jewish group which is different from that which the Chief Rabbi recognizes as Jewish. So he has been discriminated against. But it is a complete misconception, in my opinion, to categorize the ground as a racial one. There is nothing in the way the OCR handled the case or its reasoning that justifies that conclusion. It might have been justified if there were reasons for doubting the Chief Rabbi's frankness or his good faith. But no-one has suggested that he did not mean what he said. As Lord Rodger points out, to reduce the religious element to the status of a mere motive is to misrepresent what he was doing.<sup>56</sup>

For Lord Hope, there is a distinction between the reasoning that follows from an obligation to comply with Orthodox religious law on the one hand and from a personal decision or "motive" to apply that law on the other.<sup>57</sup> The former is in some essential, although as yet unspecified, sense *objective* whereas the latter is subjective. Even if it

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56. *Id.* ¶ 201 (emphasis added). See also Lord Roger who states that "[t]he reality is that the Office of the Chief Rabbi, when deciding whether or not to confirm that someone is of Jewish status, gives its ruling on religious grounds." *Id.* ¶ 227.

57. A similar point is made by Lord Rodger in dissent: [M's] mother could have been as Italian in origins as Sophia Loren and as Roman Catholic as the Pope for all that the governors cared: the only thing that mattered was that she had not converted to Judaism under Orthodox auspices. It was her resulting non-Jewish religious status in the Chief Rabbi's eyes, not the fact that her ethnic origins were Italian and Roman Catholic, which meant that M was not considered for admission. *Id.* ¶ 227 (Lord Rodger, dissenting).

is accepted, *contra* the majority, that the “state of mind of the alleged discriminator” is relevant to determining the grounds of decision, this state of mind cannot be reduced to a “mere motive” or personal belief but must take account of the unique nature of obligation imposed by *halakhah*.

In observing a noticeable change in British law in that previous judicial reticence has been replaced with “a more self-confident willingness to adjudicate contested issues touching on the religious sphere,” Christopher McCrudden has noted the serious epistemological difficulties that courts encounter when seeking to interpret and understand rival normative systems. In particular, McCrudden points to HLA Hart’s famous distinction in *The Concept of Law* between the external and internal points of view and the need to understand normative systems, and official acts taken within those systems, from an internal perspective. McCrudden notes that Neil MacCormick further distinguished between two components of Hart’s internal point of view: between a *cognitive* viewpoint understood in terms of the standards being used by an agent to guide conduct, and a *volitional* viewpoint understood in terms of an agent’s own reasons for observance of a pattern of conduct as a standard for herself or others.

Lord Hope appears to adopt the internal cognitive point of view in adjudicating the first level question of the distinction between racial and religious grounds and he only moves to a volitional point of view at the second level of motive which is then held to be an insufficient factor to excuse racially discriminatory conduct established at the first level. By contrast, Lord Phillips appears to adopt an external point of view towards Judaism as a religion and a solely volitional point of view in considering the discriminatory action of JFS and the OCR which, as “mere motive,” is held to be irrelevant to the question of determining racial grounds. Lord Phillips, for example, states that “[m]embership of a religion or faith indicates some degree of conscious affiliation with the religion or faith on the part of the member.”<sup>58</sup> But before the Court, the OCR explicitly denied the need for any such conscious affiliation in Judaism arguing that “one could be Jewish according to religious law and explicitly reject any conscious affiliation with the Jewish religion or faith.”<sup>59</sup>

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58. *Id.* ¶ 44.

59. McCrudden, *supra* note 13, at 26.



What is the consequence of Lord Hope's distinction between objective cognition and subjective volition as a matter of law and legal reasoning? The distinction does not mean that the justice of ensuing discriminatory action by JFS towards M is not subject to the jurisdiction of civil law. Rather, this is to be dealt with at the secondary level of indirect racial discrimination where the question now is not the ground of decision but whether the effect of an action is to put M at a particular disadvantage as compared with other Jews recognized under the matrilineal descent test. This shifts the focus of antidiscrimination law away from the merits of Jewish religious law and the matrilineal test—matters of religious doctrine considered central to Judaism and within the *forum internum* of the right to religious liberty<sup>60</sup>—and towards the relative merits of any harm caused by the treatment of M.

While Lord Hope and Lord Walker ultimately find that JFS has indirectly discriminated against M, their approach to the initial question of grounds for direct discrimination opens the space for rational deliberation allowing JFS and the OCR to advance reasons and seek to justify both the nature of their *halakhic* obligation and the application of the matrilineal descent test in the school's admissions policy. As discussed above, this justificatory discourse is foreclosed under the approach of the majority which will not allow consideration of motive or reasons (religious or otherwise) to establish or, once established, justify a racial or ethnic ground of decision.

In conclusion, what divides the majority and concurrence on the question of religious versus racial grounds is competing conceptions of the category understood as "religious." For the majority, religion is a matter of subjective belief and assent to creedal propositions that is internal to the mind and volitional consciousness of each person. For the concurrence, however, religion includes such subjective beliefs but may also encompass objective reasons or obligations derived from an "external" discursive tradition encompassing its own sources, justifications and hermeneutics and thus its own conceptions of religious identity, membership and practice. While the majority conception remains within a non-naturalist, rationalistic framework of normativity, to reduce such a tradition to a subjective belief or motive, which the law then deems irrelevant and outside the

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60. A similar sentiment is expressed by Lord Brown in dissent. "The root question for the Court is simply this: can a Jewish faith school ever give preference to those who are members of the Jewish religion under Jewish law. I would answer: yes, it can. To hold the contrary would be to stigmatize Judaism as a directly discriminating religion." *JFS*, [2009] UKSC 15, ¶ 249 (Lord Brown, dissenting).

boundaries of justification in determining the grounds of racial discrimination, is to make two errors: first, by superimposing upon Judaism a distinctly Christian and therefore non-neutral conception of religion and second, by interpreting religious freedom solely in terms of liberal rights and a liberal conception of individual freedom.

*D. Judaism as a Religion*

Let us return to our previous question: what would it mean for the state to be neutral towards Judaism as a religion? Following the discussion above, it is clear that much depends on where and how the law applies its neutrality principle and in what respects. We have seen in Section A how as a matter of British law and policy, neutrality has in the past been applied to minority religions through *ad hoc* legislative engagement and pragmatic accommodation of particular religious bodies, beliefs, and practices.<sup>61</sup> In the multicultural phases of British legal history, neutrality was sought instead by way of antidiscrimination and equality law in order to protect distinct racial and ethnic groups.

But in what may be considered the current phase of constitutional idealism, these earlier forms of neutrality are being renegotiated. The *JFS* case reveals a complex, hybrid form of neutrality which seeks equality by way of a combination of antidiscrimination and human rights law. Hence, how is neutrality to be achieved with regard to religion in general and Judaism in particular? On what basis does a majority of the U.K. Supreme Court assume that religion, properly understood, is not or should not be defined by or entangled with issues of race, ethnicity or descent but is instead interior to human consciousness constituting a subjective or private realm over and against an objective field of facts.<sup>62</sup>

Any attempt to define religion gives rise to notorious epistemological and ontological difficulties of delimitation and inclusionary/exclusionary categories as well as raising related questions about the purpose that such a definition serves. In *JFS*, a majority of the judges appear to understand religion as an

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61. See *supra* note 13 and accompanying text.

62. *JFS*, [2009] UKSC 15, ¶¶ 23, 35, 45, 78. This interiority can be correlated with the complex story of European secularisation and historical evolution of secular state authority and a broadly Christian understanding of religion in terms of faith. This point was made by J. H. H. Weiler. *Discrimination and Identity in London: The Jewish Free School Case*, JEWISH REVIEW OF BOOKS Spring 2010, available at <https://jewishreviewofbooks.com/articles/97/discrimination-and-identity-in-london-the-jewish-free-school-case>.

epistemologically distinct form of non-ethnic belief that parallels both Christian commitment and an Enlightenment view of religious identity as a matter of internal private conscience. But as the submissions of JFS make clear, Judaism contests both the neutrality and universality of this conception. Nevertheless, any attempt to arrive at an understanding of Judaism as a religion is deeply problematic for reasons specific to the nature and history of Judaism itself.

First, “Judaism” and cognate terms are contested concepts. The words “Jew,” “Jewish,” or “Judaism” can be used to refer to religion, nationality, ethnicity, or culture, which overrun what a legal definition requires and there are disparaging comments from the judges indicating discomfort with the slippery task of definition and judgment. Scholars differ on when Judaism *as a religion* begins. Daniel Boyarin argues that Judaism only achieves distinct definitional status in opposition to Christianity in late antiquity; whereas Leora Batnitzky places the origin of Judaism as a religion in the modern European context with thinkers such as Moses Mendelssohn playing a decisive role in defining “Judaism”.<sup>63</sup> Michael L. Satlow argues that most scholars and encyclopedias evade the problem of defining Judaism as a religion or revert to essentialist notions reliant on Jewish self-understanding.<sup>64</sup> For this reason, when scholars of Judaism approach these topics, they limit their liability by defining what form of Judaism they are addressing in their work, be it “rabbinic,” “traditional,” “modern,” or “theological” Judaism.<sup>65</sup> Nevertheless, there is some agreement that the rise of the modern nation-state transformed relations between secular governance and religious practices and removed religious bodies to well-regulated private spheres.

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63. See DANIEL BOYARIN, BORDER LINES: THE PARTITION OF JUDAEO-CHRISTIANITY 11 (2004); LEORA BATNITZKY, HOW JUDAISM BECAME A RELIGION: AN INTRODUCTION TO MODERN JEWISH THOUGHT 13–31 (2011).

64. Michael L. Satlow, *Defining Judaism: Accounting for “Religions” in the Study of Religion*, 74 J. AM. ACAD. RELIGION, 837 (2006); Leora Batnitzky, *Modern Jewish Thought*, in THE CAMBRIDGE GUIDE TO JEWISH HISTORY, RELIGION, AND CULTURE 424 (2010).

65. See, e.g., JACOB NEUSNER, JUDAISM: THE EVIDENCE OF THE MISHNAH 1 (1981); DAVID HARTMAN, A LIVING COVENANT: THE INNOVATIVE SPIRIT IN TRADITIONAL JUDAISM 1–18 (1997); THE CAMBRIDGE GUIDE TO JEWISH HISTORY, RELIGION, AND CULTURE 1–5 (Judith R. Baskin & Kenneth Seeskin eds., 2010); ELIEZER BERKOVITS, GOD, MAN AND HISTORY: A JEWISH INTERPRETATION 3–10 (1959); REVIEWING THE COVENANT: EUGEN B. BOROWITZ AND THE POSTMODERN RENEWAL OF JEWISH THEOLOGY 35–45 (Peter Ochs ed., 2000).

The secularization of European states was an ambiguous experience for European Jewry, for as Jews gained freedom and emancipation in many countries, Judaism as a religion was being privatized through the creation of newly formed secular powers. Consequently, secularization complicates attempts to define Judaism, because it opens up the possibility of a non-religious understanding of Judaism, where membership is not based on practice or belief, but rather on cultural or ethnic association. Were one to define Judaism solely in terms of “norms of conviction and conduct,” one would risk excluding many Jews who actively reject traditional religious norms.<sup>66</sup> Scholars have become sensitive to the methodological problems generated by internal or first-order definitions, where a religion or community defines itself on its own self-understanding. Satlow, following Jonathan Z. Smith, valorizes second-order definitions that work on a descriptive and analytic model, which claims to diminish the normative aspects of first-order definitions.<sup>67</sup> However, questions surrounding definition, belief, and practice remain contentious and center on the various authorities invoked when seeking to authenticate belief and practice.

Accordingly, it should come as no surprise that the law also finds it difficult to agree on the nature of Jewish religion. The Court is attempting to understand a dispute between an Orthodox religious institute, JFS, and a Masorti pupil who claims to be of the Jewish religion. What Judaism “is” is central to the case, as is a working understanding of Jewish law, or *halakhah*, which informs the school’s religious obligations. Despite the fact that the Court is ill-equipped to deal with the workings of *halakhah*, it is obliged to rule on its usage in the case. A religious, or first-order, understanding of Jewish belief and practice differs markedly from an academic approach to the question of Judaism as a religion. Judaism is now striated by denominational differences; however, to comprehend Orthodox Judaism’s understanding of the law one is required to examine its foundational principles which originate in God’s revelation to Israel on Mount Sinai in both written (the Pentateuch) and oral (the Mishnah) form. The Oral Torah explains how the Written Torah and its laws are to be understood and applied. Although there are disputes over the precise content of Oral Torah, it is explicit in an Orthodox understanding of the Jewish tradition that

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66. JACOB NEUSNER, *JUDAISM: THE BASICS* ix–x (2006).

67. Satlow, *supra* note 64, at 843–53.

both the Written and Oral Torah are revealed by God directly to Moses and then transmitted through the tradition.<sup>68</sup>

Jacob Neusner offers a general definition of *halakhah* which encompasses not only a distinction between the written and oral traditions, but also between the legal elements (*halakhah*) and the narrative elements (*aggadah*) of Judaism:

The normative law, or Halakhah, of the Oral Torah define the principal medium by which the Rabbinic sages who in antiquity founded Judaism as we know it set forth their message. Norms of conduct, more than norms of conviction, served to convey the sages' statement. But the exposition of matters of religious belief, or Aggadah, undertakes a critical task as well, and how the Halakhah and the Aggadah together set forth the theology of Judaism whole and in proportion and balance. One without the other leaves the work incomplete.<sup>69</sup>

The Written and Oral Torah include belief as well as law and advance the thesis of Torah as a living covenant. In Orthodoxy, there is a positive relationship between the divine origins of written and oral law and the *aggadic* narratives that expound beliefs; all elements are necessary for understanding how the law is applied in context and as a whole. In contrast, Masorti and Conservative Judaism, while accepting the authoritative texts and broad strokes of the tradition, differ in principle on the nature and hence the authority of Written and Oral Torah. As Dr. Louis Jacobs, the founder of Conservatism (Masorti) Judaism in Great Britain explains:

Conservative Judaism affirms the validity of the traditional observances, accepting the authority of the Halakhah, yet more open to change than Orthodoxy. Conservative Judaism maintains that historical investigation has exposed the inadequacies of Orthodox theory. The Torah, on this view, has now to

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68. The Mishnah tractate *Pirkei Avot* (*Ethics of the Fathers*) recounts this transmission: "Moses received the Law from Sinai and committed it to Joshua, and Joshua to the elders, and the elders to the Prophets; and the Prophets committed it to the men of the Great Synagogue. They said three things: Be deliberate in judgment, raise up many disciples, and make a fence around the Law." THE MISHNAH (Herbert Danby trans., 1933) *Nezikin, Tractate Avoth*, 446.

69. JACOB NEUSNER, THE HALAKHAH: HISTORICAL AND RELIGIOUS PERSPECTIVES 74 (2002).

be seen not as a single entity revealed by God at one time in its entirety, but as the product of the historical experiences of the Jewish people over the ages in their long quest for God. In the Conservative view, Jewish observances are binding on the Jew because they are the means by which he gives expression to his religious life. Divine inspiration is seen in a dynamic way; a human element is always present to understand and co-operate with the divine. On this view God did not only give the Torah to Israel but through Israel. Accordingly, the devout Jew can allow himself to be completely open on the question of origins; this is a matter of scholarship, not of faith. But it is not origins which matter for religion. What matters is the development of ideas and institutions so as to serve the Jewish quest for God.<sup>70</sup>

It is the issue of the exact nature of Written and Oral Torah that divides Orthodoxy from movements such as Masorti Judaism. Orthodox Judaism regards divine revelation to be the central, factual element of religious life, whereas Masorti and Conservative Judaism appear to both adopt a skeptical position that accepts historical and scientific critique while they are content to understand revelation as a divinely inspired but human-centered experience. Hence, rather than simply understanding the dispute in terms of a conflict between a modern and pre-modern account of Jewish belief and practice, it is more instructive to see how the *JFS* case is asked to address basic conceptual differences in the tradition and how those differences impact religious obligation and authority. It is apparent that a traditional Orthodox understanding of Judaism contests the reduction of Judaism to historical contingency and expressions of faith. It is equally apparent why the courts have traditionally been reluctant to enter such religious debates. How then is neutrality to be applied to Judaism if the law restricts its understanding of religion to an internal or subjective belief and then disciplines Orthodox Judaism for transgressing this category?

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70. LOUIS JACOBS, *THE JEWISH RELIGION: A COMPANION* 5–6 (1995); cf. LOUIS JACOBS, *WE HAVE REASON TO BELIEVE* (1957); JONATHAN SACKS, *CRISIS AND COVENANT* (1992); Michael Harris, *Traditional Alternatives: Michael Harris On Orthodox Reservations About The Theology Of Louis Jacobs*, *JEWISH QUARTERLY* (Autumn 2006), available at <http://www.jewishquarterly.org/issuearchive/article01b5.html?articleid=231>; Masorti Judaism, *Do Masorti Jews Believe the Torah Comes From Heaven*, available at [http://www.masorti.org.uk/frequently\\_asked\\_questions.htm#Do\\_Masorti\\_Jews\\_believe\\_that\\_the\\_Torah\\_comes\\_from\\_heaven](http://www.masorti.org.uk/frequently_asked_questions.htm#Do_Masorti_Jews_believe_that_the_Torah_comes_from_heaven).

It is this deflationary understanding of Jewish religion that serves to frame Jewish religion as an unlawful ground in keeping with traditional Christianity's endeavor to define Judaism as an illegitimate or antiquated religion for the very reason that Jews as a people are bound to ancient law and practice.<sup>71</sup> What the Court in *JFS*, philosophers and theologians fail to accept is that for Orthodox Judaism the relation between the individual, nation, God and the world as a whole is maintained in and through Torah, which encompasses statutory observance, faith, knowledge, spirit, charity and good deeds of the nation of Israel as a whole. As Rabbi Tzvi Yehuda Kook explains, while Torah and performance of commandments benefit individuals, it is the concept of *Klal Yisrael*, the nation of Israel as a whole, that is central to forming a relationship with God.<sup>72</sup> Thus, "[w]ith a proper understanding of the *Clal*, the service of Hashem [God] becomes, not only a private observance of Torah and precepts, but the national observance of Torah as well."<sup>73</sup>

When considering the aspects of the case that surround membership criteria and the matrilineal test, the conflicting standpoints are sharply brought to light. While one can frame Jewish membership as an "ethnic" category under the RRA 1976 given that membership is set by descent and covenant set down before the birth of the subject, this does not accurately describe the normative relations involved. Descent is set by terms of the covenant between God and Israel, which includes descendants from the original covenant on Mount Sinai. The original acceptance of the commandments, the religious acts, binds Israel and their descendants to perform those acts. In the shadow of this covenant, one does not

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71. See, e.g., the epigraph to this Article from KANT, RELIGION, *supra* note 1. See also 2 Corinthians 3:13–18:

We are not like Moses, who would put a veil over his face to prevent the Israelites from seeing the end of what was passing away. But their minds were made dull, for to this day the same veil remains when the old covenant is read. It has not been removed, because only in Christ is it taken away. Even to this day when Moses is read, a veil covers their hearts. But whenever anyone turns to the Lord, the veil is taken away. Now the Lord is the Spirit, and where the Spirit of the Lord is, there is freedom. And we all, who with unveiled faces contemplate the Lord's glory, are being transformed into his image with ever-increasing glory, which comes from the Lord, who is the Spirit.

72. TORAT ERETZ YISRAEL: THE TEACHINGS OF HARAV TZVI YEHUDA HACHOEN KOOK 27–44 (HaRav Shlomo ed., Chaim HaCohen Aviner, trans., 1991).

73. *Id.* at 33.

simply consent to Judaism as a creedal belief; rather, a Jew is someone obligated to observe the Law. The obligation to observe the commandments precedes the subject and needs first to be incumbent on that subject for an act to have any religious purchase. It is for this reason that the conversion process is particularly sensitive in Judaism. The Orthodox tradition is deeply concerned with the need to obligate the convert before the law, not to have the convert perform a bind to which he or she is not obligated.

Consider, for example, the issue of male circumcision under Jewish law. As Zvi Zohar argues, all Israelite males are circumcised after birth “[b]ut circumcision does not make them Jews; rather, it is only because they are Jews (by birth) that their parents are bound to circumcise them.”<sup>74</sup> The obligations set down in law are only binding on Jews who satisfy the religious criteria, which is based on descent, but the descent of persons who are under obligation as understood by Jewish law.<sup>75</sup> This procedure is replicated in Orthodox conversion which includes three prescribed components: “the physical acts that constitute the formal conversion ritual, the conversion candidate’s acceptance of God’s commandments, and the participation of the Rabbinical Court, which formally accepts the convert into the community of Israel.”<sup>76</sup> The acceptance of the commandments as a religious and spiritual commitment, however, occurs prior to the obligation to immerse in a ritual bath and circumcise (for males) and “is the principal component of the conversion; indeed, it is the very essence of the conversion. True conversion is, first and foremost, an intense spiritual and religious transformation that takes place in the convert’s personality.”<sup>77</sup> It is the religious element of accepting the commandments upon oneself, that replays the original covenant on Sinai, that has become the normative Orthodox *halakhah*, which then obligates the convert in ritual practice.

While membership of the Jewish people does not require any consent if one is accepted under the matrilineal test, conversion into Israel does include consent as a binding obligation. The result of a

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74. Zvi Zohar, *Commitment versus Rebirth*, in 2 THE JEWISH POLITICAL TRADITION 262, (Michael Walzer et al., eds., 2003).

75. This is recognized by Lord Brown in dissent: “Unlike proselytizing faiths, [Orthodox Jews] ... believe that the duty to teach and learn [about the Jewish faith] applies only to members of the religion, because the obligations in question bind only them.” *JFS*, [2009] UKSC 15 ¶ 252 (Lord Brown, dissenting).

76. BABYLONIAN TALMUD, YEVAMOT 47a–b; MENACHEM FINKELSTEIN, CONVERSION: HALAKHAH AND PRACTICE 23 (2007).

77. FINKELSTEIN, *supra* note 76, at 49, 163–64.



spiritual and religious acceptance of the commandments brings with it the obligation to perform those commandments. However, acceptance, ritual and participation of the Rabbinical Court are all required to formalize obligation of law on the individual in relation to God and *Klal Yisrael*. While this process is repeated in the case of a Masorti conversion,<sup>78</sup> owing to their denial of direct revelation Orthodox Judaism rejects the authority of the Masorti *Bet Din* (religious court) and consequently questions the strength and rigor of its *halakhic* observance.

What is remarkable about the majority judgment is the clarity with which Lord Phillips claims to have seen into the issues of membership of the Jewish people, its attitude to gentiles and the conversion of non-Jews into Israel. Lord Phillips' commencement of his leading opinion with a passage from Deuteronomy (7: 1-4) serves rather to provide proof of the attitude of Jews to gentiles and intermarriage:

Neither shall you make marriages with them; thy daughter thou shalt not give unto his sons, nor his daughter shalt thou take unto thy sons. For he will turn away thy son from following me, that they may serve other gods.” (7: 3-4)<sup>79</sup>

Lord Phillips' opening hermeneutic seriously underplays the interpretive task that such an inquiry demands. While there are good reasons to return to the Biblical text, that text itself is not auto-interpreting and requires consideration of texts and commentary developed over hundreds of years in order to gain an appreciation of the complexities that surround membership, prohibition of intermarriage and conversion.<sup>80</sup> The reading that Lord Phillips draws

78. Masorti conversion includes: “1. mastery of a body of knowledge; 2. a familiarity with and observance of a range of Jewish ritual obligations including Shabbat, Kashrut and participation in the prayer-life of the Synagogue; and 3. a spiritual connection and a theological commitment to Jewish peoplehood and Jewish belief”. New London Synagogue, *Conversion*, [http://www.newlondon.org.uk/page.asp?page\\_id=16](http://www.newlondon.org.uk/page.asp?page_id=16).

79. In making this opening interpretive move, the Court can be seen to decide not only what about doctrine is essentially a religious matter (*see supra* note 34) but also “which authoritative texts are relevant to making such a determination.” *See Agrama, supra* note 5, at 503.

80. *See, e.g.*, MARTIN GOODMAN, *MISSION AND CONVERSION: PROSELYTISING IN THE RELIGIOUS HISTORY OF THE ROMAN EMPIRE* (1994); DAVID NOVAK, *THE IMAGE OF THE NON-JEW IN JUDAISM: A HISTORICAL AND CONSTRUCTIVE STUDY OF THE NOAHIDE LAWS* (2011); FINKELSTEIN *supra* note 76; DAVID ELLENSON &

on is in fact taken from the Babylonian Talmud Kiddushin 68b and Rabbi Shlomo Yitzchak's (Rashi) commentary on Deuteronomy 7:4.<sup>81</sup> The argument is terse and complex, relying on the exact wording of the text and what both "he will turn aside" and "thy son" refers to in 7:4. The Sages interpret the "he" in "he will turn aside" to mean the pagan male married to the Israelite female; consequently, the son of this pairing will be "thy son," i.e. Jewish and capable of being turned aside and corrupted by foreign gods. Because the text does not also say "she will turn aside" it is considered coherent that the marriage between a Jewish male and pagan female is not "thy son;" hence the offspring is not Jewish. This interchange between the Talmud and Rashi stretches over hundreds of years and is not the only text that one can draw on to understand the relations between Israel and gentile. While Lord Phillips is correct in stating that descent criteria and Jewish marriages are important aspects of all Jewish traditions, the reasons for accepting these restrictions is not addressed.

If one were, for example, to compare Deuteronomy 7:1-4 to the infamous story of Pinchas in Numbers 25:1-15 which finds Israel profaning itself with Moabite women and attaching itself to the cult of Baal-Peor, the reasoning in both passages is consistent. Prohibition on marriage is not for racial reasons, rather to prevent Israel from turning to other gods. The Talmudic commentary on Numbers 25:1-15 does not appear to find fault in intermixing and the sexual act itself, but rather is concerned with the motive behind the relations. Sexual desires lead to sacrifice and attachment to Baal-Peor (the physical act itself being seen as a form of worship) and finally to rejecting the God of Israel and the teachings of Moses.<sup>82</sup> The whole episode is linked to the earlier rivalry between Moab, Midian and Israel (Number 22:1-35) and Balak's wish to curse Israel through the prophet Balaam. When this fails, Balaam is interpreted as advising the elders of Moab to use sexual desire to undermine Israel and turn them away from the God of Israel.<sup>83</sup>

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DANIEL GORDIS, PLEDGES OF JEWISH ALLEGIANCE: CONVERSION, LAW, AND POLICYMAKING IN NINETEENTH- AND TWENTIETH-CENTURY ORTHODOX RESPONSA (2012).

81. CHUMASH WITH RASHI'S COMMENTARY 40-41, 192-93 (Rabbi A.M. Silbermann trans., 1934).

82. BABYLONIAN TALMUD, SANHEDRIN, 106A.

83. RAMBAN (MOSES NACHMANIDES), COMMENTARY ON THE TORAH (Charles B. Chavel, trans. 1976), Numbers 25:1.

A wider reading of the Torah discloses the religious reasoning behind these prohibitions. Ethnic or “racial” aspects of nationhood are secondary to the religious commitment to Torah and the God of Israel. The tacit assumption in *JFS* is that while for Judaism the case turns on these issues, British law need not concern itself with such matters as they can be subsumed under the category of subjective motive or, more problematically, not regarded as essentially “religious” at all provided discrimination can be proved and the “factual criteria” or “grounds” upon which such discrimination occurs is held to be subject to the jurisdiction of the RRA 1976. The acknowledgement of reliance on ethnic criteria or descent is sufficient to make this judgment.

With regards to conversion, the question of where and how to apply neutrality is again raised. Should the Court apply norms of fair treatment to the conversion criteria of religious groups, or to M as an autonomous agent, or to the conversion practice itself? For the majority, the matrilineal test in Judaism clearly contains descent-based criteria which examine the ethnic origins of the applicant and this test is also applied in conversion. There are, of course, ethnic or racial attitudes that can be referenced in ancient, medieval and modern commentators,<sup>84</sup> but what should be more relevant to the *JFS* case is that the mainstream of Jewish Orthodoxy has adopted a reasoned approach to conversion which judges converts not on their ethnic origins but on the strength of their commitment to the Jewish people and Jewish law.<sup>85</sup> Conversions are judged on religious reasons—“for the sake of Heaven”—and ulterior motives (such as conversion for marriage or wealth) are treated with suspicion; however, once the strength of commitment is tested, there is some degree of flexibility regarding reasons for conversion.

One of the key reasons for confusion in the majority judgments and the case generally is that a clear distinction between racial and non-racial grounds cannot be made owing to Judaism being entangled with ethnic criteria.<sup>86</sup> For Lord Phillips and the majority, Judaism may indeed be termed a “religion,” but it is a religion that cannot be subsumed under a non-racial category while membership rests on the

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84. Ezra 9; JUDAH HALEVI, *THE KUZARI: AN ARGUMENT FOR THE FAITH OF ISRAEL* 115 (1964).

85. MISHNAH YEVAMOT 2:4; BABYLONIAN TALMUD, YEVAMOT 24B; MAIMONIDES, *THE CODE OF MAIMONIDES, BOOK FIVE: THE BOOK OF HOLINESS*, (Louis I. Rabinowitz and Philip Grossman trans., 1965), Chapter 14; FINKELSTEIN *supra* note 76, at 221–83.

86. *JFS*, [2009] UKSC 15, ¶ 41.

mother's line and the descent thereof. In this sense, Judaism may be considered a religion, but in effect an "unlawful religion" under the RRA 1976 definition of unlawful grounds. Jewish conversion criteria also examine the ethnic origins of the mother's line and for this reason are similarly considered to be acts of racial or ethnic discrimination.<sup>87</sup> Consequently, Judaism itself and the matrilineal test that supports conversion are not lawful "non-racial" grounds under the RRA 1976. As Lady Hale states:

M was rejected because of his mother's ethnic origins, which were Italian and Roman Catholic. The fact that the Office of the Chief Rabbi would have over-looked his mother's Italian origins, had she converted to Judaism in a procedure which they would recognise, makes no difference to this fundamental fact. M was rejected, not because of who he is, but because of who his mother is . . . it was because his mother was not descended in the matrilineal line from the original Jewish people that he was rejected. This was because of his lack of descent from a particular ethnic group. In this respect, there can be no doubt that his ethnic origins were different from those of the pupils who were admitted. It was not because of his religious beliefs. The school was completely indifferent to these. They admit pupils who practise all denominations of Judaism, or none at all, or even other religions entirely, as long as they are halachically Jewish, descended from the original Jewish people in the matrilineal line.<sup>88</sup>

By their interpretation of the category of direct racial discrimination established in the RRA 1976, and the refusal to allow any justification or balancing of rights under British antidiscrimination law, the majority comprehends lawful religion in an antinomian fashion that fails to apprehend any positive comprehension of nationhood in relation to Jewish law. The result is that Jewish law is required to justify its religious status in contradistinction to its unlawful association with ethnicity rather than to open up any consideration of this *a priori* conception of religion itself. To understand what Judaism considers itself to be as a nation bound by the Sinaitic covenant would require thoughtful inquiry and

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87. *Id.* ¶ 46.

88. *Id.* ¶ 66.

a deep understanding of the relationship between election, covenant, commandments, the written and the oral law.

In conclusion, when a legal discourse such as that used in the *JFS* case discusses Judaism in terms of internal belief or subjective motive that can and ought to be separated from ethnicity for reasons of equality and fair treatment, it is clear that the legal definition of religion is incompatible with Judaism and either seeks to regulate the scope of religion in general or fails to be aware of fundamental differences in religious traditions which the law of religious freedom is commonly understood to protect.

## II. MODERN SECULAR POWER AND THE RIGHT TO RELIGIOUS FREEDOM

In his classic Foreword to the 1982 Supreme Court Term *Nomos and Narrative*, Robert Cover's target of critique was the then recent case of *Bob Jones University v. United States* which raised for decision the question whether a religious school discriminating on the basis of race could be denied tax-exempt status by the IRS.<sup>89</sup> Lord Hope cites *Bob Jones* in *JFS* stating that "[b]eliefs of that kind are not worthy of respect in a democratic society or compatible with human dignity."<sup>90</sup>

Cover's concern, however, was the deeper relationship under the American Constitution between freedom and order and, in particular, the violence of imposed order on the ways of life of plural communities. It was this concern that animated his distinctive idea of a *nomos*—a normative world—where law and narrative are inseparably related and where the creation of legal meaning—"jurisgenesis"—takes place through an "essentially cultural medium." Cover's argument pointed to the essentially dialectic nature of legal reasoning and the recognition that all normative worlds have something in common: they contain co-existing ideal-typical patterns of combining corpus, discourse and interpersonal commitment—one a *paideic* mode of "world creating," the other an *imperial* mode of "world maintaining."<sup>91</sup>

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89. 103 S. Ct. 2017 (1983). As a white, fundamentalist Christian university, Bob Jones University had revoked its rule denying admission to unmarried African-Americans when threatened with revocation of its favorable tax status by the federal government, but it had retained its rule against interracial dating and marriage and against any groups advocating these practices.

90. *JFS*, [2009] UKSC 15, ¶ 202.

91. In the "paideic" world of the *nomos*, law is a resource in the larger effort of a community to endow life with meaning. As an ideal-type, it suggests: "(1) a

In the context of American antidiscrimination law, Cover's argument points to persistent tensions in equal protection case law in the area of free exercise claims by minority religious groups. It also points to the tension between the prevailing norm of the abstract individual in the antidiscrimination principle and what Owen Fiss in 1976 termed the "group-disadvantaging" principle,<sup>92</sup> or what is today known as the "antisubordination" principle.<sup>93</sup> The difficulty with the antidiscrimination principle and a formal conception of equality is that it inevitably serves as a cloak for a majoritarian conception of the good and is thus insensitive to the free exercise claims and collective identities of minority groups. Conversely, the difficulty with the antisubordination principle and a more substantive conception of equality is that it stands in tension with the antidiscrimination principle and is thus insensitive to the autonomy claims of members of minority groups, claims often brought against those minority groups themselves.

This Article argues that the *JFS* case represents a collision between these two kinds of equality arguments: between the claim of M to individual freedom of religion, conscience and belief and the right to be free from discriminatory treatment on the one hand and the competing claim by JFS to collective freedom of religion and belief and the right to discriminate in its admissions policy on that religious

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common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law." This is a vision of a "strong community of common obligations" characteristic, for example, of Talmudic law and Christian conceptions of the Church where reciprocal obligations flow from commitment, not coercion, because people recognize the needs of others and respond to them. By contrast, in what Cover terms the imperial legal order of the liberal state, norms are "universal and enforced by institutions" in the interest of social order and discourse is "premised on objectivity—upon that which is external to the discourse itself." This finds its fullest expression in the civil community where "[i]nterpersonal commitments are weak, premised only on a minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms." Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) reprinted in *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* 105–06 (Martha Minow, Michael Ryan, and Austin Sarat eds. 1995).

92. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107 (1976).

93. Owen Fiss, *Another Equality*, ISSUES IN LEGAL SCHOLARSHIP (2004). See also the 2003 and 2004 symposium *Issues in Legal Scholarship* on "The Origins and Fate of the Antisubordination Theory" which present a wide range of responses to and critiques of Fiss's original article.

basis on the other. While ultimately decided on the basis of racial antidiscrimination law, and in particular the distinction between formal equality of treatment (direct discrimination) and substantive equality of results (indirect discrimination), the three sets of judgments provide important insights into how these claims are imagined and adjudicated in terms of the right to religious freedom.

The reasoning in the judgments indirectly relies on the right to religious liberty as a technology of secular governance and we see how this functions as an integral part of the power of the modern nation-state. In particular, the case illustrates what happens when religious freedom is understood not as a political relation between the state and “religion(s)” *per se*, but as a *right* or legal/moral relation between the state and an individual legal subject as rights-holder.

As argued elsewhere,<sup>94</sup> what is distinctive about contemporary discourse on religious freedom is how the concept of state neutrality towards religion is today defined in terms of protecting the right to religious liberty while, conversely, both identifying the relevant rights-holder and construing the meaning, scope and limitation of the right are today answered in terms of competing conceptions of “religion” and what it means for the state to treat religion(s) “neutrally.” The discourse is able to maintain its simultaneous—but ultimately paradoxical—claims to *uniqueness* (because “neutral” towards religion) and *universality* (because securing the “right” to religious freedom) by defining each concept in terms of the other.<sup>95</sup> The oscillating dialectic between secular neutrality and individual freedom in turn ensures that the nature of the public sphere, whether within a nation-state such as the United Kingdom or in international

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94. See Peter G. Danchin, *The Tangled Law and Politics of Religious Freedom*, 10 SANTA CLARA J. INT’L L. 73 (2012); Danchin, *Islam in the Secular Nomos*, *supra* note 9.

95. Consider, *e.g.*, the circular reasoning in the ECHR case of *Hasan and Chaush v. Bulgaria*:

[T]he Court considers ... that facts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain [of formal registration of religious communities] must lead to the conclusion that the State interfered with the believers’ freedom to manifest their religion within the meaning of Article 9 of the Convention. It recalls that, but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.

¶ 78, Application no. 30985/96, Strasbourg, (Eur. Ct. H.R. Oct. 26, 2000) available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58921>.

law, is dynamically related to the scope of the right to religious freedom.<sup>96</sup>

What we see shared across the judgments in *JFS* is the upholding of the individual's right to belief while simultaneously employing concepts of direct and indirect racial discrimination or more broadly the "rights of others" in order to secure the state's right to intervene and regulate the religious practices of its citizens, especially in this case of a religious minority. It is critical to see, however, that this tension between inviolability and regulation is in fact *internal* to the conceptual structure of the right to religious liberty itself and serves to generate the distinctive antinomies and contradictions that we see arising in the reasoning of the majority, concurring and dissenting judges respectively over its meaning, justification and realization.

#### A. *Racial Discrimination and Religious Freedom*

Given the finding in the case that JFS had directly (for the majority) or indirectly (for the concurrence) discriminated against M on racial grounds, the first puzzle is the relationship between the RRA 1976 and the right to freedom of religion and belief protected under Article 9 of the Human Rights Act 1998.<sup>97</sup> The judges are largely silent on this issue despite it having been raised in argument before the Court by both JFS and E and several interveners.<sup>98</sup>

Although the brief of JFS is not publically available, several of the other briefs submitted during the proceedings make clear that JFS raised at least two claims regarding the right to religious liberty. First, that "a school is entitled to prefer to give priority to children who are members of the faith, as defined by that religion [which is] a matter for that religion, not for the State, under Article 9".<sup>99</sup> Second, that holding the matrilineal test to be a test of racial and/or ethnic origins would lead to "less favourable treatment of Jews compared with other

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96. See Danchin, *Islam in the Secular Nomos*, *supra* note 9.

97. Courts are required to interpret primary legislation so as to ensure compatibility with Convention rights. Where such interpretation is impossible, however, judges may not overturn Acts of Parliament for being inconsistent with Convention rights, but may issue a declaration of incompatibility leaving it to remedial orders or the ordinary legislative process to remedy the inconsistency. Human Rights Act, 1998, c.42 (UK) §§ 3–4.

98. In addition to E and JFS, the major interveners in the case were the Board of Deputies of British Jews, the Secretary of State for Education, the Equality and Human Rights Commission, and the British Humanist Association.

99. Brief for E ¶ 25, *R(E) v. Governing Body of JFS*, [2009] UKSC 15 (UKSC 2009/0105).



religions”.<sup>100</sup> Both claims raised for consideration the meaning, scope and possible grounds of limitation on the right to religious freedom in conjunction with the demands of state neutrality toward religion(s).

In support of these claims, the brief of the Board of Deputies pointed to the Article 9 jurisprudence of the European Court of Human Rights to emphasize the importance of the right to religious freedom and the demands of state neutrality in allowing religious communities to constitute themselves.<sup>101</sup> The brief argued that E’s submission, that the RRA 1976 was a proportionate interference with the right of JFS to manifest religion, was circular because it assumed the very thing at issue: i.e. “what should be encompassed within the scope of race discrimination.”<sup>102</sup> The decision of the Court of Appeal further violated the right to equality under Article 14 because it disproportionality burdened Judaism as against other religions.<sup>103</sup>

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100. *Id.* ¶ 26; Brief for Intervener, Board of Deputies of British Jews ¶ 28, R(E) v. Governing Body of JFS, [2009] UKSC 15 (UKSC 2009/0105).

101. Brief of Board of Deputies of British Jews ¶ 22–26, R(E) v. Governing Body of JFS, [2009] UKSC 15 (UKSC 2009/0105). The brief cites the leading case of *Kokkinakis v. Greece* [1993] 17 EHRR 397, ¶ 31 to argue that the right to manifest one’s “religion or belief in worship, teaching, practice and observance,” while not unqualified, is “one of the foundations if a ‘democratic society’”. The Court’s Article 9 jurisprudence has been “robust where it concerns direct interferences by the state with the internal affairs of religious organizations: *see, e.g., Metropolitan Church of Bessarabia v. Moldova* (2002) 35 EHRR 306; *Hasan and Chaush v. Bulgaria* (2002) 34 EHRR 55.” This is especially so where, as here, “differences arise within different groups of the same religion.” Brief of Board of Deputies of British Jews, ¶ 24, R(E) v. Governing Body of JFS, [2009] UKSC 15 (UKSC 2009/0105). In such cases where religious pluralism is at stake, “in exercising its regulatory power in this sphere in its relations with the various religions, denominations and beliefs, *the State has a duty to remain neutral and impartial*” (*citing Metropolitan Church of Bessarabia*, ¶ 116 (emphasis added in brief)). Furthermore, “[o]bserving that religious communities traditionally exist in the form of organized structures, the Court has repeatedly found that the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is, thus, an issue at the very heart of the protection which Article 9 affords” *Id.* (*citing Löffelmann v. Austria*, Application No. 42967/98, 12 March 2009, ¶ 47).

102. *Id.* ¶ 27, 29.

103. *Id.* ¶ 28–30. The brief argued that the “consequence of the Court of Appeal’s approach if upheld is that it would be unlawful for an oversubscribed Jewish school to give priority to children who are Jewish according to the criteria if any of the denominations of the Jewish religion, even though it is lawful for the faith schools of other religions to have oversubscription criteria as defined by that religion.” *Id.* ¶ 28. The result is that, “[b]y failing to allow for the different ways in which different religions define their own membership, the Court of Appeal’s approach fails to respect the principle established in *Thlimmenos v. Greece*: ‘The right not to be discriminated against in the enjoyment of the rights guaranteed

These arguments were further supported in the intervening brief of the Secretary of State.<sup>104</sup>

The brief of E made two arguments in response. First, that Article 9(2) allows for legitimate limitations on the “right of Jews (and Orthodox Jews) . . . to manifest their religion” and that the RRA 1976 is “plainly a proportionate interference with the right to manifest religion, necessary in order to protect the fundamental rights of others, including the right of a child not to suffer race discrimination, and the rights of the parent and the child to access to education in accordance with their beliefs and preferences, without discrimination.”<sup>105</sup> Second, that a correct reading of the Human Rights Act 1998 favors E on the basis that Article 2 of Protocol 1, read together with Article 14, disfavors “an entrance criterion privileging members of a religion defined wholly or predominantly by reference to their membership of an ethnic group or their status from birth, and entirely without regard to the religious convictions of the children or parents themselves”.<sup>106</sup>

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under the convention is also violated when states without an objective and reasonable justification *fail to treat differently persons whose situations are significantly different.*” *Id.* ¶ 30 (emphasis added in brief) (quoting 31 Eur. H.R. Rep 411, ¶ 44 (2000)).

104. The Secretary of State observed that the “statutory regime covering religious discrimination contains carefully carved-out exceptions, which do not apply to race discrimination, but which permit less favourable treatment on grounds of religion in particular situations.” This permission to “confer benefits and services only on members of their religion . . . [was] intended to apply to all major religions.” Consequently, “if Parliament had permitted Muslim, Christian or Hindu bodies to confer benefits or offer services to those they regard as members of their religions, but rendered it unlawful for Jewish and Sikh bodies to do so, that might constitute a breach of European Convention on Human Rights Articles 9 and 14. It would interfere with the freedom to manifest religion in a way that is discriminatory.” Brief of the Secretary of State ¶ 45 *R(E) v. Governing Body of JFS*, [2009] UKSC 15 (UKSC 2009/0105).

105. Brief of E, *supra* note 99, ¶¶ 24, 167.

106. Article 2 of the First Protocol to the ECHR provides as follows: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.” European Convention on Human Rights, protocol 1, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5. For E, the focus of this article is on “the rights of the child to education; and of the parents to education for their child in accordance with their religious beliefs. It is not a mandate for a school to give priority to children *who have no religious faith, because of a status conferred on them at birth, and to deprive families who practice a particular faith of the choice of access to education in accordance with that faith.*” Brief of E, *supra* note 99, ¶ 164 (our emphasis).

In support of these arguments, the British Humanist Association argued that while oversubscription criteria that truly relate to “religious convictions or faith” can be permissible, a criterion that looks at matrilineage – “which has no necessary bearing on religious convictions or faith” – is not.<sup>107</sup> For the purposes of both the RRA 1976 and Human Rights Act 1998, there was thus no objective or reasonable justification for the latter.<sup>108</sup>

Before proceeding to consider the reasoning in the judgments, it is important to notice the structural dialectic between neutrality and right that indelibly shapes the competing argumentative positions of the parties and how, in particular, each concept is defined in terms of the other. Thus the arguments raised by JFS concerning the scope and meaning of the right to religious liberty (membership of a religious tradition is an essentially religious matter which is for the religion, not the state, to decide) are responded to by M with arguments concerning state neutrality (the RRA 1976 is a neutral law of general application) and justified limitations on the right to manifest religion to protect the rights of others (M and E have a fundamental right to be free from racial and ethnic discrimination in those spheres regulated by the RRA 1976). Conversely, the arguments raised by JFS concerning the lack of state neutrality (discriminatory treatment towards Orthodox Jews and Judaism compared with other religions under the RRA 1976) is responded to by M with arguments concerning the scope and meaning of the right to religious liberty (the right properly interpreted does not include the freedom to apply criteria such as matrilineage in a school’s admissions policy which has no necessary bearing on religious conviction or faith).

It is also important to notice how JFS and M mirror each other in the claims they make regarding direct and indirect discrimination. For JFS, the application of the RRA 1976 directly discriminates against Judaism as a religion by interfering with its essential religious criteria for determining membership. Further, even if the RRA 1976 is applied equally to all persons it indirectly discriminates against Jews as a religious minority by treating them less favorably when compared with persons of other religious traditions. For M by contrast, the application of the matrilineal test by JFS directly

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107. Brief of the British Humanist Association, ¶ 47 *R(E) v. Governing Body of JFS*, [2009] UKSC 15 (UKSC 2009/0105). Under the matrilineal test, “children would be admitted by virtue of their ‘membership’ (as maternally defined) even if they were atheists or indeed practiced another faith, whereas practicing Jews who (like E) did not qualify as members would be excluded”). *Id.* ¶ 20.

108. *Id.* ¶ 39.

discriminates against M and E on grounds of race and ethnicity. Further, even if the criteria applied by JFS is religious rather than racial and its application is held to be permissible religious discrimination, this indirectly discriminates against M and E (and “ethnic” Jews in general identified by the *Mandla* criteria) by putting them at a particular disadvantage when compared to persons regarded as Jewish by the OCR on the basis of matrilineal descent.

Interestingly, none of the judgments seriously engage these competing conceptions of the meaning of and relationship between the right to religious liberty and the demands of neutrality. For the reasons discussed in Part I, the majority judgment appears simply to assume, without argument, that the section 1(1)(a) of the RRA 1976 is compatible with Article 9 of the Human Rights Act. The assumption is that an alleged discriminator may hold a belief or adhere to values based on racial or ethnic descent-based criteria for any reason, religious or not, as absolutely protected by the right to freedom of religion, conscience and belief in the so-called *forum internum* of Article 9(1). But to the extent those “factual” criteria become the grounds for discriminatory treatment directed towards another in a sphere subject to civil jurisdiction, that treatment is unlawful under the RRA 1976 and no benign motive or religious reasons can be advanced to alter that conclusion. On this basis, the practice of Orthodox, and potentially any form of, Judaism in a sphere subject to racial antidiscrimination law is unlawful.<sup>109</sup>

Only Lord Mance amongst the majority judges seeks to justify this reasoning in relation to the right to religious freedom. Lord Mance beings by noting that the “freedom to manifest one’s religion or beliefs is . . . subject to such limitations as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others.”<sup>110</sup> He then makes clear that it is the rights of M and M’s parents to freedom and autonomy, as opposed to those of JFS, that are central in the case:

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109. “The decision of the majority means that there can in future be no Jewish faith schools which give preference to children because they are Jewish according to Jewish religious law and belief”. *JFS*, [2009] UKSC 15, ¶ 226 (Lord Rodger, dissenting). *Id.* ¶ 248 (Lord Brown, dissenting). *See also* Lord Brown: “If the argument succeeds it follows that Jewish religious law as to who is a Jew (and as to what forms of conversion should be recognized) must henceforth be treated as irrelevant. Jewish schools in future, if oversubscribed, must decide on preference by reference only to outward manifestations of religious practice.”

110. *Id.* ¶ 90.

Under the United Nations Convention on the Rights of the Child 1989, article 3, it is the best interests of the child which the United Kingdom is obliged to treat as a primary consideration. Under Protocol 1, article 2 to the [European Convention], it is the right of parents to ensure education and teaching in conformity with their own religions and philosophical convictions that the state must ensure. . . . To treat as determinative the view of others . . . that a child is not Jewish by reason of his ancestry is to give effect not to the individuality or interests of the applicant, but to the viewpoint, religiously and deeply held though it be, of the school applying the less favourable treatment. That does not seem to me either consistent with the scheme or appropriate in the context of legislation designed to protect individuals from discrimination.<sup>111</sup>

For the concurring and dissenting judges, however, the ground of decision by JFS to exclude M was found to be wholly religious and thus did not constitute direct racial discrimination under the RRA 1976. This left open the question of *indirect* racial discrimination which fell into two parts: (1) did the policy put persons of the same race or ethnic or national origins as M at a particular disadvantage when compared with other persons; and, if so, (2) can JFS show that the policy was a proportionate means of achieving a legitimate aim?<sup>112</sup>

*B. Indirect Racial Discrimination, Legitimate Aim and Proportionality*

As discussed in Part I.C, on this understanding of the category of “religious grounds” the matrilineal descent test was held not automatically to be unlawful in its application to treatment of others in a sphere subject to the jurisdiction of the RRA 1976. Rather, the law of indirect discrimination required JFS and the OCR to advance reasons why the particular disadvantage suffered by M in being refused admission to the school was the result of a policy which both had a “legitimate aim” and was applied as a “proportionate means” of achieving that aim.

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111. *Id.*

112. *Id.* ¶ 205 (Lord Hope, concurring).

The first part of the indirect discrimination test was largely conceded by Lord Pannick QC in his submissions on behalf of JFS.<sup>113</sup> Similarly, the concept of “legitimate aim” was uncontroversial between the concurring and dissenting judgments. For Lord Hope, agreeing with the reasons given by Lord Brown, JFS had a legitimate aim because a “faith school is entitled to pursue a policy which promotes the religious principles that underpin its faith” on the justification that “those who practise the faith or are members of it will best promote the religious ethos of the school.”<sup>114</sup> But the differences in reasoning in interpreting the concept of proportionality are what provide the second critical point of divergence in the case.

For the concurring judges, the question of proportionality required JFS to show that it had balanced the effects of its admission policy on M against that which was needed to achieve the legitimate aim of its policy. Had JFS, for example, considered whether less discriminatory means could have been adopted which would not undermine the religious ethos of the school, for example, by “admitting children recognized as Jewish by any of the branches of Judaism, including those who are were Masorti, Reform or Liberal”?<sup>115</sup>

For Lord Hope, there was not sufficient evidence that “the school’s governing body addressed their minds to the impact that applying the policy would have on M and comparing it with the impact on the school.”<sup>116</sup> Implicit in this balancing analysis is an assessment of the harms imposed by the policy on the valuable life choices and autonomy of M and his parents by comparison to the unchosen, arguably even irrational, benefits accorded to children recognized as Jewish by the OCR on the basis of their descent along the matrilineal line.<sup>117</sup> On this basis, Lord Hope and Lord Walker

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113. “[I]t is clear that M and all other children who are not of Jewish ethnic origin in the maternal line, together with those whose ethnic origin is entirely non-Jewish, were placed at a disadvantage by the oversubscriptions policy when compared with those who are of Jewish ethnic origin in the maternal line.” *Id.* (Lord Hope, concurring).

114. *Id.* ¶ 209 (Lord Hope, concurring).

115. *Id.* ¶ 212 (Lord Hope, concurring).

116. *Id.* ¶ 211 (Lord Hope, concurring).

117. Thus for Lord Hope, the disparate impact of the policy on children in M’s position was “very severe” in excluding them from the “very significant benefit of state-funded education in accordance with their parents’ religious convictions” whereas by contrast “there are alternatives for children recognized by the OCR although many in the advantaged group do not share the school’s faith-based reason for giving them priority.” *Id.* *Cf.* Rubens, *supra* note 12, at 406-07.

found that JFS had failed to show that its admissions policy, as applied in M's case, was proportionate.

For the dissenting judges, by contrast, the policy was found to be proportionate to the school's legitimate aim of instilling "Jewish values into children who are Jewish in the eyes of Orthodoxy."<sup>118</sup> For Lord Brown, this was for two main reasons. First, there was no material difference between JFS's admissions policy and that adopted in Muslim or Catholic schools where those who are born Muslim or have been baptized are given preference.<sup>119</sup> Second, another policy based on adherence or commitment to Judaism would not be a means of achieving JFS's aims as it would produce a school with an entirely different ethos.<sup>120</sup> Apart from running counter to the school's central aim, such a policy would also be "fraught with difficulty". In a striking final paragraph, Lord Brown concludes as follows:

Quite how such a policy will be formulated and applied on a consistent basis is not easy to discern. That said, I regard it as altogether preferable to the new policy presently dictated by the Court of Appeal's judgment: the imposition of a test for admission to an Orthodox Jewish school which is not Judaism's own test and which requires a focus (as Christianity does) on outward acts of religious practice and declarations of faith, ignoring whether the child is or is not Jewish as defined by Orthodox Jewish law.<sup>121</sup>

What is striking about the reasoning of the concurring and dissenting judgments regarding indirect racial discrimination is how closely it mirrors classic liberal rights-based discourse with its associated notions of balancing, proportionality, legitimacy, and least restrictive means. While articulated using the categories of antidiscrimination law, the judges indirectly weigh competing claims to religious freedom against the disparate impact caused by discriminatory treatment based on grounds of ethnicity or national origin.

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118. *Id.* ¶ 233 (Lord Rodger, dissenting).

119. *Cf. id.* ¶ 69 (Lady Hale) ("Other religions allow infants to be admitted as a result of their parents' decision. But they do not apply an ethnic criterion to those parents. The Christian Church will admit children regardless of who their parents are.") *Cf. Rubens, supra* note 12, at 398-401.

120. *Id.* ¶ 255 (Lord Brown, dissenting).

121. *Id.* ¶ 258. *Cf. Rubens, supra* note 12, at 415-16.

Thus the legitimacy of the aims pursued by JFS must implicitly include consideration of any religious doctrine, belief or practice protected by the right to religious liberty. Similarly, the proportionality of the impact of JFS's admissions policy on M must include the effect of that treatment on M's right to freedom of religion, conscience and belief. The obvious difficulty for the Court is that *both* M and JFS can in this way advance legitimate claims to religious freedom, albeit claims with different logics, meaning and scope. The question then is how a court is to adjudicate between such claims in a manner that is both neutral towards religion while at the same time guaranteeing the universal human right to religious freedom.

Again, what is noticeable is the extent to which the judges indirectly consider these claims through the lens of autonomy and choice, whether of M or his mother to choose a particular form of Judaism or of JFS to follow or prescribe its own norms of religious identity and membership. Implicit in the proportionality analysis of the concurrence is that neither JFS nor the OCR have considered or taken seriously enough the right of M and his mother to undergo a Masorti as opposed to an Orthodox conversion. This failure is tacitly weighed against the right of JFS in devising its admissions policy to follow the advice of the OCR in basing the criteria for membership on Orthodox Jewish religious law.

The logical implication of this line of reasoning is that indirect racial discrimination in the form of application of the matrilineal descent test as required by Orthodox Jewish religious law might legally be justified if found to be a proportionate means of achieving a legitimate aim. But the criteria used by the concurring and dissenting judges to make this assessment derives not from any putatively factually-based analysis premised on immutable characteristics but from a reason-based jurisprudence premised on the values of individual freedom and autonomy.

The freedom of choice of both M and JFS is thus subject to what we might term the rational constraints of reason as calibrated by the concurring and dissenting judges themselves through consideration of the competing rights claims at issue. The judges thus necessarily assess the reasonableness of the orthodox religious legal criteria employed by the OCR and governors of the school when they ask whether the employment of such criteria in the school's admissions policy is a legitimate aim and the effects of the policy on children such as M are proportional to the ends sought. As we discuss below, this necessarily results in judicial intervention— albeit indirectly,



unlike the majority— into the *forum internum* of Jewish religious law and belief.

The critical question that follows is what the normative criteria *internal* to legal reasoning are that allow such judgments to be made? The concurring judges suggest that it was open to JFS and thus more “reasonable” to include all branches of Judaism in its definition of who is a Jew for admissions purposes. The rationale for this proposition is that the criteria for membership based on the twin tests of matrilineal descent and orthodox conversion are insufficiently pluralistic and inclusive. But what exactly is the normative justification for this conclusion? Some anterior conception of freedom must be assumed as a standard for judgment, one that not only privileges autonomy as the highest value but privileges individual over collective autonomy.

In a similar fashion, the dissenting judges pursue a tacit liberal strategy of rights-based reasoning but, in doing so, reach the opposite conclusion. The opinion of Lord Brown adopts a more self-consciously internal point of view as regards Orthodox religious legal practices and norms. This serves to generate a more sensitive grasp of the competing normativities at issue and leads to traditional principles of judicial abstention and negative liberty in recognition of the dangers of transgressing the limits of statist legal authority. Lord Brown thus seeks both to justify, or at a minimum leave undisturbed, the authority of the OCR to interpret its own religious legal norms, even if this fails to address the harm caused to the valuable choices of M.<sup>122</sup>

In this set of moves, negative freedom is extended on associational grounds to JFS, the OCR and United Synagogue. M is now viewed as having chosen an unrecognized conversion process while at the same time being recognized to remain free to convert under Orthodox auspices if he so chooses. As an intrinsically “religious question,” this raises issues of religious freedom not only

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122. Lord Brown observes:

[There is] much debate within the Jewish community about the proper standards to apply to conversion and many would like JFS to [admit] anyone recognized as Jewish by any of the denominations. M’s real complaint here is that in deciding who is a Jew the OCR’s approach to conversion is misguided. That, however, is not an issue which is, or ever could be, before the Court. No court would ever intervene on such a question or dictate who, as a matter of orthodox religious law, is to be regarded as Jewish.

*Id.* ¶ 239 (Lord Brown, dissenting).

for M but also for JFS and the OCR. In recognition of the normative complexity of these competing claims, the dissenting judges self-limit their authority and purport to abstain from any legal judgment on what they view as a matter of both internal Jewish religious doctrine and intra-religious dispute between Jewish groups.

C. *Pluralizing the Right to Freedom of Religion and Belief*

The different forms of indirect discrimination reasoning in the concurring and dissenting judgments and the contrast between these taken together and the direct discrimination reasoning of the majority can be seen to illustrate three dominant themes which recur constantly in discourse regarding the right to religious freedom. The first is the indeterminacy of the foundational distinction at the heart of the right between a *forum internum* said to be absolutely immune from state interference and a *forum externum* viewed as subject to rational state regulation and limitation. The second is the ambiguity of the subject of the right and the issue whether religious groups and institutions may assert claims to associational autonomy. The third is the question of the conflict of rights and the twin crises of authority and legitimacy when courts must adjudicate between competing claims *internal* to the right to religious liberty, i.e. when both parties to a dispute assert a right to freedom of religion or belief. Let us consider each of these themes in turn.

1. *Forum Internum* versus *Forum Externum*

The most well-entrenched feature of the modern right to religious liberty is its bifurcated structure. Contemporary human rights provisions such as Article 9 of the ECHR are premised on a foundational distinction between the right to “freedom of thought, conscience and religion” in Article 9(1) and the right to “manifest one’s religion or beliefs” in Article 9(2). The former, referred to as the *forum internum*, is held to be absolute while the latter, the *forum externum*, is said to be subject to limitations where necessary to protect public order, morals, or the rights of others.

What is evident across divergent jurisdictions and in states with otherwise distinct religious personalities is how the second clause of the right to religious liberty authorizes the state to intervene in what appear to be mere expressions of religious belief but in fact involve the state in making substantive judgments about religion, a domain toward which it claims to be neutral.<sup>123</sup> This produces two

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123. See Saba Mahmood & Peter G. Danchin, *Immunity or Regulation? Antinomies of Religious Freedom*, 113 SOUTH ATL. Q. 129 (2014).

paradoxical effects: first, this authorizes the state's intervention into the *forum internum* which it declares to be autonomous and sacrosanct; and second, it privileges the values and commitments of the religious majority as the norm against which the religious practices of minorities are judged and sanctioned in the *forum externum*.<sup>124</sup> Each of these effects is at play in the reasoning in *JFS*.

The European Court of Human Rights has long struggled with the issue of how to define the content and scope of Article 9(1) and its religious liberty jurisprudence unsurprisingly provides no clear guidance on the proper object of the protected sphere of the *forum internum*.<sup>125</sup> What is of interest for present purposes is how the different conceptions advanced in *JFS* by the majority, concurring and dissenting judgments respectively closely track the three main approaches that have been adopted by judges on the European Court.<sup>126</sup>

For the majority, it is autonomously chosen beliefs or convictions, religious or not, that are implicitly understood to be the proper object of the *forum internum*.<sup>127</sup> As seen in Part I, for Lord Phillips religious criteria are subjective, non-factual values or beliefs to which a person may choose to assent.<sup>128</sup> For the concurring judges, however, the relevant category is something closer to conscience or faith, understood in some unspecified sense as *unchosen*, as a matter of Orthodox religious law.<sup>129</sup> Finally, for the dissenting judges it is implicit that *JFS* and the OCR as collective subjects have the right to profess and maintain a discursive religious tradition free of sovereign interference, even if this fails to address harms caused to members internal to the tradition itself.<sup>130</sup>

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124. *Id.* at 130.

125. *Id.* at 145–47.

126. *Cf.* Danchin, *Islam in the Secular Nomos*, *supra* note 9, at 675–82 (discussing this aspect of the Court's Article 9 jurisprudence).

127. Contrary to the concurrence, recall that the majority rejects the relevance of motive or reasons in determining whether the criterion for a discriminatory action is "racial." The implicit assumption is that the *forum internum* protects only the *right to choose* one's beliefs and not the *immunity* of the beliefs themselves.

128. *See supra* note 44 and accompanying text. Recall also Lord Phillip's statement that "[m]embership of a religion or faith indicates some degree of conscious affiliation with the religion or faith on the part of the member." *JFS*, [2009] UKSC 15, ¶ 44 (Lord Phillips). *See supra* note 58 and accompanying text.

129. *See supra* note 53 and accompanying text (arguing the state of the mind of the alleged discriminator cannot be reduced to a mere motive or personal belief but must take into account the unique nature of obligation imposed by *halakhah*).

130. *See supra* note 122 and accompanying text. *See also infra* Part II.B.2.

In each of the judgments, no matter how the content and scope of the *forum internum* is demarcated the Court must make substantive judgments on what constitutes or falls within the protected category. For the majority, there was no interference with the *forum internum* given that JFS and the OCR remained free to belief in the doctrine of matrilineal descent; they were restricted, however, in the manifestation of their beliefs in the *forum externum* which was legitimately subject to state regulation in the form of statutory prohibition of racial and ethnic discrimination. By contrast, for the concurring and dissenting judgments the majority approach appears to sanction state intervention directly into the *forum internum* of Orthodox Jewish religious law and belief. Rather, JFS has a fundamental right to be bound by and follow *halakhah*; but to the extent that manifestation of this right impacts in the *forum externum* upon persons such as M and E having particular ethnic or national origins, JFS must justify the reasonableness of its actions. For the concurrence, JFS failed to do this and its manifestation of religion was thus legitimately subject to limitation to protect the fundamental rights of others; but for the dissent, reasonableness required the state instead to abstain from adjudication of what it held to be an essentially religious matter and, absent a compelling state interest, to respect the collective autonomy of JFS and OCR to determine and apply its own rules of membership.

Either explicitly or implicitly then, the reasoning in each judgment considers how the restrictions imposed by the RRA 1976 and Human Rights Act 1998 seem from the internal point of view of the category demarcated as “religious.” The paradoxical result is that the courts must make determinations that are inescapably entangled with and premised on religious criteria and precepts in order to define a sphere “free” from state authority—a private space of exception—which ostensibly limits legislative and other forms of governmental authority. This ever shifting and contested process of construction and demarcation of the *forum internum* is an integral part of the public order of the state itself.<sup>131</sup>

As Hussein Agrama has observed, the ability to control these distinctions involves the fashioning of religion as an “object of continual management and intervention” and this constitutes a mode of discipline not always articulated in the practice of liberal governance.<sup>132</sup> The reasoning in *JFS*, however, allows us to see how

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131. Mahmood & Danchin, *supra* note 123, at 147.

132. Agrama, *supra* note 5, at 499.

such modes of discipline function using the technology of modern rights discourse. What becomes clear is that both the subject of the right and the scope of freedom it encompasses are indeterminate categories. Further, the reasoning in the majority, concurring and dissenting judgments alike inescapably entangles conceptions of the religious and the secular as part of the state's power and authority "to decide what shall count as essentially religious and what scope it can have in social life."<sup>133</sup>

This involves two critical determinations. First is the need to identify "what about doctrine is essentially a religious matter."<sup>134</sup> As discussed in Part I.A and B, the Court's 5:4 split on whether reliance by JFS and the OCR on the matrilineal test is a racial or religious ground of decision illustrates this first dilemma. Second is the need to distinguish between "the 'civil' and 'religious' dimensions of an act, and on that basis deciding whether the act is enforceable, punishable, or otherwise deserving of protection or exemption under the law."<sup>135</sup> The divergence between the concurring and dissenting judges on whether the exclusion of M constituted indirect racial discrimination and the ensuing lines of argument concerning the legitimacy of JFS's aim and the proportionality of its means illustrate this second dilemma.

In either case, the Court must make an assessment of the religious beliefs at issue. This necessarily generates a "modality of suspicion" as the Court considers whether acts or expressions of belief are "genuinely religiously motivated" and the nature of the "belief" itself.<sup>136</sup> What is critical to this liberal algebra is that religion be understood essentially as a type of subjective *belief* as opposed to any type of objective *knowledge*,<sup>137</sup> and that it not be allowed to

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133. *Id.* 503. For this reason, "secularism's power may lie more in the underlying question it continually provokes and obliges us to answer, than in the normativity of the categories it proposes." *Id.* 500.

134. *Id.* 503. *See supra* note 34 and accompanying text.

135. *Id.*

136. Hussein Ali Agrama, *Religious Freedom and the Bind of Suspicion in Contemporary Secularity*, in *POLITICS OF RELIGIOUS FREEDOM* (Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood and Peter Danchin eds., forthcoming 2015). A similar phenomenon can be traced in U.S. religious freedom jurisprudence where courts routinely determine (1) whether "religious acts or expressions are sincerely held to be essential to one's religion", and (2) whether "these acts and expressions are authorized and mandated by orthodox religious texts." *Id.* (citing WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005)).

137. The "circumscribed sphere of religion already articulates the principle that it ought to be separated from material power." It is this understanding of religion

express “material interests or drives towards worldly power” which are seen as potentially dangerous or threatening, especially to those values foundational to the public order of the state.<sup>138</sup>

As discussed in Part I, it is precisely the external, non-faith based imperative of matrilineal descent in the Jewish tradition that violates these secular imperatives. On the one hand, an unchosen imperative is deeply irrational for contradicting the foundational value of individual autonomy and, on the other, potentially threatening for suggesting a source of ultimate authority other than secular reason itself.<sup>139</sup>

## 2. Individual versus Group or Associational Rights

The second theme in religious liberty discourse is the proper *subject* of the right. While the majority and concurrence differ on the nature of the *forum internum*, they both agree that the essence of religion is to be found in a cognitive or rationalistic framework internal to the consciousness of the individual, whether autonomously to choose one’s beliefs (for the majority) or to have and maintain a certain category of belief (for the concurrence). This conceivably includes the fiction of a corporate entity such as JFS viewed as a legal subject acting as an individual decision-maker. For the dissenting judges, however, the proper subject of the right appears to encompass Judaism and Jewish religious practices more broadly construed.<sup>140</sup>

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and religious subjectivity that underlies the idea of state neutrality between religious and non-religious but deeply held beliefs. If this were not the case, “it would be difficult to argue that the state should remain neutral between belief and what it sees as knowledge, especially in matters concerning public order and the governance of populations, when that knowledge is considered crucial to such governance.” Agrama, *supra* note 136.

138. *Id.*

139. In *Denbigh High School*, it was held that an interference with the right to manifest religion would be unlikely to exist where a person has “voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to practice or observe his or her religion without undue hardship or inconvenience.” *R(Begum) v. Denbigh High School*, [2006] UKHL 15, ¶ 23. In its submissions, JFS argued that there were other Jewish schools that did not have orthodox rules on conversion which M was free to attend. This argument failed, however, because of the finding by the majority that the application of the matrilineal test by JFS constituted direct racial discrimination under the RRA 1976.

140. While neither Lord Brown nor Lord Rodger squarely address the question, their judgments appear to follow Talal Asad’s conception of religion as a “lived” or “discursive” tradition which encompasses a practical mode of living and

Over the last few decades, a rich albeit poorly theorized body of jurisprudence has been developed under Article 9 of the ECHR in which claims to collective religious autonomy have been adjudicated. The European Court has held in a series of cases that it has limited jurisdiction to review the processes, reasoning or substantive decisions made by religious bodies within an area covered by religious autonomy.<sup>141</sup> In similar terms, the U.S. Supreme Court has recently recognized a “ministerial exception” to generally applicable employment discrimination laws in the case of *EEOC v. Hosanna-Tabor*.

The premise of such jurisdictional approaches to issues of religious autonomy is the notion that it is not for secular courts to make determinations on matters “strictly ecclesiastical” or involving religious teachings or orthodoxy. This proposition, however, leaves open a number of puzzles and dilemmas for the courts. The first relates to how the relevant autonomous sphere is to be drawn. If the RRA 1976 was intended to apply to religious schools and domains such as employment, why should it not apply to the internal activities of religious organizations in the case of acts of racial or ethnic discrimination? Conversely, if the right to religious freedom is interpreted to provide a form of collective immunity to religious organizations from legislative intervention in their internal affairs, on what basis does the RRA 1976 seek to regulate a religious school such as JFS which has the express purpose of effectuating the obligation imposed by Jewish religious law to educate those students regarded by the OCR as Jewish? Some argument is needed to justify this particular demarcation of spheres, an argument which itself must be neutral towards religion and respect the right to religious liberty.

A second dilemma concerns how the state and state law are to relate to and recognize actually-existing systems of religious law.

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“techniques for teaching body and mind to cultivate specific virtues that have been authorized, passed on, and reformulated down the generations.” Talal Asad, *Re-reading a Modern Classic: W. C. Smith's 'The Meaning and End of Religion,'* in RELIGION AND THE MEDIA 216 (Hent de Vries & Samuel Weber eds., 2001). The danger of adopting a “pietistic conception of religion as faith that is essentially individual and otherworldly” is to situate religion ineluctably within a secular image of the world. *Id.* 220.

141. *Obst v. Germany*, no. 425/03 (Eur. Ct. H.R. Sept. 23, 2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-834>; *Lombardi-Valluari v. Italy*, no. 39128/05 (Eur. Ct. H.R. Oct. 20, 2009), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-2900937-3189238>; *Scüth v. Germany*, no. 1620/03 (Eur. Ct. H.R. Sept. 23, 2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100469>.

There are a tremendous variety of constitutional arrangements in the world today prescribing different forms of relation between the State and religion(s)<sup>142</sup> and this includes a variety of forms of recognition of and formal relation to both majority and minority religions.<sup>143</sup> In South Africa, for example, section 15(3)(a)(ii) of the post-apartheid 1996 Constitution expressly contemplates legislation recognizing “systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.” Various contingent forms of legal relation between the State and South Africa’s different religious communities, including groups living under customary law and religious minorities with their own family and personal status laws, have thus been developed through law reform efforts in the country over the last two decades.<sup>144</sup>

As discussed in Part I, British legal policy towards majority and minority religious groups has moved through at least two early phases of legislative accommodation and multicultural recognition.<sup>145</sup> But what is striking in *JFS* is how the courts today are employing quasi-constitutional liberal principles and especially classical ideas of negative liberty and judicial abstention evident in the dissenting judgments to adjudicate these forms of legal relation.

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142. On relations between religion and State in various national constitutions, see Peter G. Danchin, *Of Prophets and Proselytes: Freedom of Religion and the Conflict of Rights in International Law* 49 HARV. INT’L L.J. 249, 297–307 (2008).

143. Spain and Italy, for example, have established “concordat” systems of recognition that provide different rights and privileges to religious communities which are characterized by the use of negotiated agreements between the State and federations of religious institutions often formed for the purpose of concluding and administering the agreements. Spain has thus concluded agreements with the Federation of Evangelical Religious Entities of Spain, the Islamic Commission of Spain and the Federation of Israelite Communities of Spain. See Gloria M. Morán, *The Spanish System of Church and State*, 1995 B.Y.U. L. REV. 535, 544 (1995). Italy has similarly concluded agreements with the Waldensians, the Pentecostals, Adventists, Jews, Baptists and Lutherans. See Silvio Ferrari, *The Emerging Pattern of Church and State in Western Europe: The Italian Model*, 1995 B.Y.U. L. REV. 421, 428–29 (1995).

144. In this Special Issue, see Waheeda Amien & Annie Leatt (Dharmamegha), *Legislating Religious Freedom: An Example of Muslim Marriages in South Africa*, 29 MD. J. INT’L L. 495 (2014); see also Peter Danchin, *The Politics of Religious Establishment: Recognition of Muslim Marriages in South Africa*, in VARIETIES OF RELIGIOUS ESTABLISHMENT 165 (Lori G. Beaman & Winnifred Fallers Sullivan eds., 2013).

145. See *supra* notes 13–16 and accompanying text.



### 3. Conflicts of Rights

The final and arguably most intractable dilemma in religious liberty discourse arises when two or more claims of right come into conflict with each other. The issue here is not the conflict *per se* between M's right to be free from racial discrimination and JFS's right to discriminate in its admissions policy on the basis of religion and belief. We saw how the majority decided this issue by defining the *forum internum* of the right to religious liberty narrowly as individual belief and interpreting the RRA 1976 as a valid limitation on the right to manifest religion in the *forum externum* in order to protect the rights of others.<sup>146</sup>

Rather, it is the disagreement between the concurring and dissenting judgments on the question of indirect racial discrimination that exposes a genuine conflict of rights internal to the right to religious liberty itself. The need to justify issues of legitimate aim and proportionate means of achieving that aim opened the deliberative space for claims to religious liberty to be advanced, albeit indirectly, by *both* M and JFS as reasons either to permit or prohibit the adverse impact of the school's admissions policy on M and E (and other children not of Jewish ethnic origin in the maternal line).<sup>147</sup>

What was striking is the disagreement between the concurring and dissenting judgments in interpreting the concept of proportionality as to whether to privilege the individual autonomy of M and E in matters of religion (i.e. the right to choose conversion under the authority of a non-Orthodox (Masorti) rabbinate) or the collective autonomy of JFS and the OCR to determine their own rules of religious membership. For the concurrence, JFS was found to have failed to consider whether admitting children recognized as Jewish by any of the branches of Judaism would undermine the religious ethos of the school. Having found at the first stage of analysis that the OCR was bound by and had the right to apply Orthodox Jewish religious law, the implicit suggestion at the second stage of analysis is that Orthodox rules on conversion are insufficiently pluralistic and inclusive and that JFS should interpret and apply these rules more sensitively to the values of individual freedom and choice.

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146. This argument is especially forcefully stated in the majority judgment of Lord Mance: *see supra* note 111 and accompanying text.

147. *See supra* note 112 and accompanying text.

This argument does not address issues of racial or ethnic discrimination (recall that JFS accepted that M was “ethnically Jewish”) but rather substitutes the concurring judges’ conception of what constitutes religion and a proper religious subjectivity for that of JFS and the OCR. This in fact reverses the logic of their claims, which were premised on the notion that it is *halakhah* is immutable, while ethnicity is a social choice. It is precisely this danger of non-neutrality and interference in matters of religious doctrine and practice which drives the dissenting judgments towards judicial abstention and deference to the normative authority of JFS and the OCR which, in effect, privileges the right of JFS to collective freedom over the individual autonomy-based claims of M and E.

As a matter of justice, neither position seems entirely satisfactory. Regardless of the merits of the competing positions, the interesting question from the perspective of any theory of religious freedom is why such debates within religious communities create different normative claims to those between religious communities and the state. The idea of value pluralism allows us to see that there is in fact more than one substantive rights claim at issue. Because the right to freedom of religion is a complicated bundle of entitlements, each made up of a diversity of claims, it protects a range of human interests that are often at odds.<sup>148</sup> If this is correct, the critical question is why a majority of the U.K. Supreme Court so easily and at times without argument privileges only one of the substantive rights claims at issue. Further, if both claims are to be given their due, how should courts resolve such conflicts?

However approached, it is clear that the historical relationships between groups within particular societies and their complex interrelationship within the legal framework of the state are pivotal to any understanding of how and why conflicts raise concerns for the right to religious freedom. Such conflicts give rise to both moral and ethical questions that bear a complex relationship to different types of relations between individuals and groups. This is what Robert Cover once termed different normative worlds or paideic *nomoi*.<sup>149</sup> The general point is that the conflicts which arose in *JFS* involving competing claims of religious freedom cannot meaningfully be addressed or properly understood without taking into account these collective dimensions of the question and the broader historical and inter-group context in which these forces and actors are operating.

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148. See generally Peter Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT’L L. 1 (2008).

149. Cover, *supra* note 91.

Paradoxically, this requires judges to turn to substantive values and normative positions that transcend or lie beyond the competing rights claims themselves. This, of course, results in a constantly contested and thus oscillating series of antinomies in contradiction to the opening premises of neutrality towards religion and universality of the right.

#### CONCLUSION

The central question addressed in this Article is posed by the opening paragraph of Lord Phillips' leading judgment for the majority. While *JFS* is framed and adjudicated as a race discrimination case involving unfair treatment by a school admissions board toward one of its applicants, the opinion begins neither by setting out the relevant criteria of antidiscrimination law nor explaining the relations and duties of justice owed by one party to the other. Rather, it begins by citing the seventh chapter of Deuteronomy, the fifth book of the Hebrew Bible and the Jewish Torah, locating the source of the matrilineal test in the "clear commandment against intermarriage" in the third and fourth verses which he reads to yield the self-evident conclusion that it is a "fundamental tenet of the Jewish religion ... that the child of a Jewish mother is automatically and inalienably Jewish."

A genuine ambiguity is thus presented at the outset regarding who is on trial before the Court: is it *JFS*, for its treatment of *M*; or the ancient Israelite religion and its offspring, Judaism? This in turn generates deeper and deeply opposing anxieties. If the Court is to permit discrimination on the basis of race, ethnicity or descent solely because authorized by a religious tradition or justified on religious grounds, does this not pose a threat to the very foundations and conditions of our contemporary secularity and freedom? Conversely, if the Court is to prohibit such a long-standing practice internal to a religious tradition which entangles religious and descent-based criteria, does this not threaten the very idea of religious freedom which has long been understood to encompass the right of religious persons, groups and institutions to determine their own rules of belief, identity and membership free of state interference and regulation.

As the reasoning in the majority, concurring and dissenting judgments unfolds, we see the antinomies and contradictions characteristic of religious freedom discourse as the fundamental liberal premises of state neutrality towards religion and universality of the right to religious liberty are continually entangled with and

defined in terms of their opposites. This is seen equally in the arguments adduced by the parties. Having first claimed to be bound by immutable religious law, JFS and the OCR paradoxically invoke the right as a matter of religious freedom to decide for themselves matters of religious doctrine and orthodoxy. Conversely, having claimed the right to be free from racial and ethnic discrimination and to practice their religion freely, M and his parents paradoxically rely on a distinctly modern conception of religion understood in terms of individual belief regarded as freely chosen to apply to a modern Orthodox Jewish faith-school.

But it is the divergences in reasoning in and across the nine separate judgments that best illustrate the modern politics of religious freedom. In contrast to his opening reference to Deuteronomy, Lord Phillip thereafter steadfastly claims no interest in any religious rationale for JFS's actions: the Court will rule on the *facts* alone, not on the basis of any "religious" motivation or reason. But in arriving at this judgment, the majority draws a strong distinction between racial and religious grounds for exclusion implicitly thereby embracing a specific conception of religion as a non-racial category which itself is authorized by a prior understanding of the essential nature of religion in terms of interiorized belief.

The distinctive bifurcation of the modern right to religious liberty between a *forum internum* of sovereign individual belief and a *forum externum* of manifestation of that belief open to limitation and regulation is in this way mapped and encoded into the logic of antidiscrimination law: to discriminate *for any reason* (religious or not) on the *ground* of an immutable characteristic such as race, ethnicity or descent is axiomatically unjust because it irrationally denies the personal autonomy and valuable choices of others. In this moral economy, religion properly understood is reduced to a state of mind – belief in a set of credal propositions to which a legal subject voluntarily assents – which is "individual and otherworldly" rather than constituting "any form of activity in the world."

This Article has shown both how Judaism does not fit into these legal categories and contests this conception of immutable characteristics and valuable choices. For JFS and the OCR, the relevant immutable characteristic is *religious* as constituted by Jewish religious law (*halakhah*) while it is ethnicity which is a matter of social choice. Indeed, it was central to OCR's submissions before the Court that one could be Jewish according to religious law while explicitly rejecting any conscious affiliation with the Jewish religion or faith. The veracity and rationality of these positions are reflected in

the reasoning of the concurring and dissenting judgments taken together. These judgments reject the majority's interpretation of the distinction between racial and religious grounds finding not only that the religious motivations and reasons for the exclusionary actions of JFS are relevant to the determination of this question but that the exclusion of M was made on religious grounds as *required* by Orthodox religious Jewish law.

This yields the first major divergence in reasoning in the case. In contrast to the majority's external, volitional and subjective stance towards Judaism and the obligation to comply with *halakhah*, the concurring judgments adopt an internal, cognitive and objective point of viewing in adjudicating the first level question of the distinction between racial and religious grounds. This opens the conceptual space for a different form of contestation as the exclusion of M is now adjudicated at the secondary level of indirect racial discrimination allowing JFS and the OCR to seek to justify the reasonableness of their actions towards M.

This, in turn, yields the second major divergence in reasoning in the case. In contrast to the cognitivist conception of religion adopted by the concurrence (albeit with its recognition of the *objectivity* of reasons and obligations deriving from a different source), the dissenting judgments respond to and are more sensitive to a conception of Judaism as a living discursive tradition which encompasses a way of life with its own established and internally contested sources, justifications and hermeneutics and thus its own conceptions of religious identity, authority, membership and practice. It is this recognition that underlies the dissent's reliance on more classical liberal ideas of negative liberty and judicial abstention which at the same time fail to take seriously or engage with the individual harm suffered by M as a result of the exclusionary actions of JFS and the OCR.

Only the concurring judgments of Lord Hope and Lord Walker squarely address this issue seeking to balance the conflicting claims of right of both JFS and M using concepts common to antidiscrimination and human rights law of legitimate aim and proportionate means. Implicit in this analysis is an assessment of the harms imposed by JFS's admissions policy on the valuable life choices and autonomy of M and his parents. Importantly, this is held to include their right to choose among Orthodox, Masorti, Reform and Liberal branches of Judaism which the concurrence implicitly weighs more heavily than the (collective) right of JFS to devise its

own admissions policy and follow the advice of the OCR in basing criteria for membership on Orthodox Jewish religious law.

In doing so, the reasoning in the concurring judgments implicitly makes an assessment of the *reasonableness* not of the matrilineal test (which, unlike the majority, is found to be rational) but of the application by JFS towards M of Orthodox conversion criteria which is found to be insufficiently inclusive and pluralistic. In this sequence of legal maneuvers, the question of indirect racial discrimination based on immutable characteristics is subtly transformed into a reason-based jurisprudence premised on liberal criteria and fundamental values of individual freedom and autonomy. When this reasoning is considered alongside that of the majority, we see how Judaism is in fact indicted twice: first categorically by the majority in the *forum internum* for irrationally prescribing an immutable characteristic as part of the matrilineal descent test, and second by the concurrence in the *forum externum* for unreasonably denying the valuable choices of M and his parents regarding religion, a judgment which also implicitly scrutinizes and is suspicious of beliefs and doctrines internal to the *forum internum* of the Jewish religion.<sup>150</sup>

In response to the Court's ruling that Orthodox Judaism's membership and conversion criteria were unlawful for use in its admissions policy, JFS amended the policy to accept students on the basis of a "Certificate of Religious Practice" which gauges synagogue attendance, formal Jewish education and community participation.<sup>151</sup> This change in policy has removed the ability to accept children on the basis of the OCR's definition of Jewish membership criteria and substituted it with a state-supervised policy of religious practice which is non-discriminatory, cross-denominational and free of reference to ethnic or decent-based criteria. The school remains a faith-based school but if it employs Orthodox *halakhah* as its grounds for admission, it transgresses the boundaries of state law.

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150. The separation between private, inner belief and public, outer act or expression is in fact "reunited through a suspicion of motives of material interest or worldly power. In the context of the freedom of religious belief, it becomes imperative to determine whether acts or expressions of belief are genuinely religiously motivated. This presumes the power to pronounce upon, and if necessary probe into, the character of one's private convictions." Agrama, *supra* note 136. There is accordingly a sense in the concurring judgments that JFS and OCR are exercising their institutional authority on the issue of conversion in a way that is not entirely or genuinely religiously motivated.

151. Certificate of Religious Observance, JFS SCHOOL, <http://www.jfs.brent.sch.uk/sites/default/files/attachments/11%2B%20CRP%202015.pdf> [2014].

The *JFS* case thus finally illustrates the distinctive modalities of the exercise of modern secular power. In defining the meaning, scope, and dialectical relationship between the public sphere and individual rights, the Court regulates and delimits what constitutes religion and a proper religious subjectivity as a matter of English law. This raises considerable anxieties amongst the judges themselves as the extent of intrusion of state law into the *forum internum* of the Jewish religion becomes visible whether axiomatically as a matter of direct discrimination or pursuant to the balancing of rights and interpretation of proportionality as a matter of indirect discrimination.

In this complex set of moves, we see how the concept of neutrality towards Judaism is defined in terms of the right to religious liberty which, in turn, is defined in terms of competing conceptions of neutrality as the majority, concurring and dissenting judgments each grapple with the implications of state authority *vis-a-vis* a competing normative system. The right to religious liberty is in this sense best viewed as a sophisticated technology of modern secular power which operates to discipline actually-existing religious traditions so they conform to those secular spaces and sensibilities religion properly should inhabit and express.