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INTRODUCTION

On October 1, 2009, the Supreme Court of the United Kingdom heard its first case as the newly configured highest judicial authority in Great Britain, *R(E) v. The Governing Body of JFS*[1] (hereafter the JFS case). In what seems like an odd choice for the debut of this judicial body, the Court took up a particularly contentious case involving a dispute over the preferential admissions process at a popular Jewish school in London. On the most basic level the judges attempted to resolve a dispute involving three particularly difficult interrelated questions: (1) who is a Jew; (2) who gets to decide; and (3) does the orthodox Jewish practice of determining Jewish status by matrilineal descent violate the Race Relations Act of 1976?[2]

As will be discussed in this case study, twelve-year-old "M" applied for admission to the Jews' Free School (JFS) in London. The well-regarded Orthodox Jewish school had more applicants than seats, and thus JFS employed a policy of giving preference to those

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1. [2009] UKSC 15, [2010] 2 A.C. 728 (S.C.) (appeal taken from Eng.).

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 Race Relations Act, 1976, c. 74 (U.K.), *amended by* Race Relations Act, 2000, c. 34 (U.K), *repealed by* Equality Act, 2010, c. 15 (U.K.).

applicants who were "recognised as being Jewish by the Office of the Chief Rabbi (OCR)."[3] M was denied entry to JFS because he was not recognized as Jewish according to Orthodox Jewish standards as determined by an Orthodox interpretation of the *halacha* (Jewish law): M would be considered Jewish if his mother was Jewish or if M wished to undergo a conversion.[4] M did not satisfy the OCR's matrilineal test, and M himself did not wish to undergo an Orthodox conversion.[5] While M's father was Jewish by birth, M's mother had converted to Judaism under the supervision of the Masorti Jewish rabbinate.[6] England's OCR does not recognize the validity of Masorti conversions.[7] Thus, according to the OCR, M was not Jewish because his mother was not Jewish by OCR standards when she gave birth to M.

M's father sued JFS, arguing that in utilizing the matrilineal test JFS's admissions policy violated the United Kingdom's Race Relations Act of 1976.[8] The British Supreme Court explained that while religious discrimination is permissible under British law for religious schools, racial discrimination is not under the Race Relations Act. The Court ruled that when JFS utilized the matrilineal test the school was engaged in ethnic discrimination, rather than religious discrimination.[9] As Lady Hale said in the majority opinion: "M was rejected, not because of who he is, but because of who his mother is."[10] The Court instructed JFS to establish a new test that did not make determinations of Jewish identity based on ethnicity, but rather based on practice and belief.

In England, religious schools are permitted to give admissions preference to applicants who share the school's religious affiliation. Usually this preference is a matter of mutual agreement between the students and the schools. Yet as this case demonstrates, religious communities sometimes disagree about matters of communal membership, practice, and observance. The Orthodox Jewish community does not agree with Masorti Jewish interpretations

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3. *JFS*, 15 UKSC at ¶ 24 (Lord Phillips).
4. *See id.* at ¶ 2 (explaining the "matrilineal test").
5. *Id.* at ¶ 6.
6. *Id.* at ¶¶ 6–7.
7. *Id.* at ¶ 166 (Lord Hope, concurring).
8. *Id.* at ¶ 5 (Lord Phillips).
9. *Id.* at ¶ 41, 45, 50, 51 (Lord Philips); *id.* at ¶ 66 (Lady Hale); *id.* at ¶ 103 (Lord Mance); *id.* at ¶ 124 (Lord Kerr); *id.* at ¶ 148 (Lord Clarke).
10. *Id.* at ¶ 66 (Lady Hale).

of the *halacha*, and does not recognize the authority of Masorti Jewish rabbis to perform conversions.[11] Until this court decision, the OCR, the designated authority over Orthodox Judaism in England, instructed Orthodox Jewish schools that a child was considered Jewish if he or she was born to a Jewish mother, regardless of his or her level of religious observance. Failing this, a child could also apply to undergo a conversion that would be recognized by the OCR. However, in December 2009, the OCR's matrilineal test was declared illegal in *JFS*. In the aftermath of this decision, England's Orthodox Jewish schools have had to develop different means of determining Jewishness for the admissions process that are no longer grounded in their interpretation of the *halacha*, but rather are grounded in an arguably Protestant Christian framework that determines religious identity in terms of belief and practice. Additionally, this case appears to resolve denominational differences on determining Jewish status internal to England's Jewish community, making this apparently secular court the arbiter of a religious dispute. In the wake of the JFS decision, we are left to wonder if religious freedom can exist beyond the borders of Protestant Christian terms and concepts.

I. CONTEXTS

Is Judaism a religion? Are Jews a distinct race or ethnicity? Do Jews constitute a people or nation? Is Jewishness a cultural reality? As many notable Jewish Studies and Religious Studies scholars have shown,[12] these questions regarding the status of Judaism and Jewishness are historically modern ones. Before the development of the nation-state, determining Jewish identity was a relatively unambiguous yes/no proposition. For Jews living in the medieval and early modern historical periods, these questions simply did not exist in distinct spheres – you either were a Jew or you were not a Jew. So

11. *See id.* at ¶ 181 (Lord Hope, concurring) ("The OCR does not recognize the validity of conversions carried out by non-Orthodox authorities, as they do not require converts to subscribe fully to the tenets of Orthodox Judaism.").

12. *See, e.g.*, LEORA BATNITZKY, HOW JUDAISM BECAME A RELIGION: AN INTRODUCTION TO MODERN JEWISH THOUGHT 1 (2011); JACOB KATZ, TRADITION AND CRISIS: JEWISH SOCIETY AT THE END OF THE MIDDLE AGES 52–62 (Bernard Dov Cooperman trans., Syracuse Univ. Press, 2000); DAVID RUDERMAN, EARLY MODERN JEWRY: A NEW CULTURAL HISTORY (2010).

what changed all of this? The development of individual citizenship and the modern nation state, which involved the reimagining of the role of religion and religious laws in political and public life, and the status of a person vis-à-vis her community.

Prior to the eighteenth-century, Jews lived in self-governing, politically autonomous Jewish communities under the protection of nobilities that permitted their existence. In the medieval and early modern period, a Jew would have been born into her Jewish community, and her entire life—political, social, religious, cultural—was lived within that Jewish community. Matters of ritual observance, as well as day-to-day social and political concerns, were adjudicated by the Jewish community according to Jewish law. Each community had its own legal, educational and health systems in place to take care of the members of that particular Jewish community. Understanding this fully integrated pre-modern Jewish community, and its very sparse interaction with other similarly situated Christian neighboring communities, helps us better comprehend the so-called "Jewish Question" of the modern period.

With the development of centralized nation states, and the dissolution of localized, feudal governance, parsing the status of the Jewish community, and the Jewish person, was critical to the self-fashioning of these new governments. "The Jew" was understood to be paradigmatic to the Enlightenment era discussions regarding the relationship between the theological and the political. At the heart of the debate stood the so-called "Jewish Question": could a Jew be a citizen of the state?

Some argued no: Jews could not become full participant citizens in the emerging European "states" because the Jewish people constituted a "state within a state;"[13] Jewish communities were separate communal entities and Jews would prioritize their allegiance to the Jewish community and Jewish law above and against their fellow citizens and the laws of the state. Others argued yes: Jews could be full citizens of the states where they lived because Judaism was principally a religion, and Jewish identity was not communal, but rather a matter of individual private praxis that involved personal

13. *See* Johann Gottlieb Fichte, *A State Within a State (1793)*, *in* THE JEW IN THE MODERN WORLD: A DOCUMENTARY HISTORY 309–10 (Paul Mendes-Flohr & Jehuda Reinharz eds., 1995).

observance of the *halacha*—that is keeping Jewish law.[14] The *halacha* was not to be understood as a competing political or legal structure to the State, but rather was apolitical—it simply related to regulating religious praxis.[15] This position was first argued by Moses Mendelsshon in *Jerusalem: Or on Religious Power and Judaism*.[16] While certainly not all Jews agreed with Mendelssohn's characterization of Judaism and Jewish law, from this point forward, the conversation about Jewishness, and Jewish identity, had significantly changed. While in the pre-modern period Jews were a people, a culture, and a religious community all-in-one, it was now possible to articulate a Jewish identity in discrete terms. Jewishness could be understood as a religious identity apart from a political identity. Jewishness could also be understood as a cultural heritage, devoid of religious content. Jews could be Jewish, but not keep Jewish law or follow any ritual observance. In large measure, the possibilities of understanding Jewish identity in all of these forms (and of course, many other derivations) created the environment of the *JFS* case.

A. What is religion?

When one asks the question, "Is Judaism a religion?" there is a presumption that "religion" is an identifiable, neutral quantity. Yet as Jonathan Z. Smith, Talal Asad, and others have shown, this is not the case.[17] Tracing the etymology of the term "religion" from its Latin

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14. The experience of the Jewish communities of Western Europe differed from the experience of Jews living in Eastern Europe in large part because of the differing political structures. The Austro-Hungarian and Russian empires were formed by a variety of peoples rather than individuals, thus the Jewish community remained a corporate unit in Eastern Europe. As the JFS case occurred in England, we have focused attention the changing political and cultural landscape of Western Europe, and how that affected Western European Jews.

15. MOSES MENDELSSOHN, JERUSALEM: OR ON RELIGIOUS POWER AND JUDAISM 130 (Allan Arkush trans., 1983).

16. *Id.*

17. *See, e.g.*, Jonathan Z. Smith, *A Matter of Class: Taxonomies of Religion*, 89 HARV. THEOLOGICAL R. 387, 393, 397 (1996) (arguing that while the classification of religion can be an important scholarly tool, it is often a flawed process, not fully encompassing the complexity of religion as a varying concept among the world's people); Talal Asad, *Anthropological Conceptions of Religion: Reflections on Geertz*, 18 MAN 237, 252 (1983) (exploring Clifford Geertz's essay,

origins to its contemporary usage, one quickly learns that the meaning of "religion" has evolved over time and that the current usage of "religion" is popularly defined in a Protestant Christian mode. Religion is seen as the (1) voluntary (2) faith and/or belief of (3) an autonomous individual. Religion is a matter of personal choice and requires affirmative assent in the form of belief. This faith is manifested in practice and actions. It is my contention that this Protestant Christian definition of "religion" is what animates the decision of the Majority in the *JFS* case. This raises the very real question of whether one can fault a non-Christian religion for not fitting neatly into Christian categories. Indeed, this struggle is not a new one, but is also part of the history of the "Jewish Question" in the modern period.

Even while Moses Mendelssohn argued in *Jerusalem: Or on Religious Power and Judaism* that Judaism was a religion, Mendelssohn did not hold that religion should be equated with voluntary individual belief.[18] He writes that "Judaism knows of no revealed religion in the sense in which Christians understand this term," and "Judaism boasts no exclusive revelation of eternal truths" to which a Jew is required to assent.[19] In making these claims Mendelssohn aims to demonstrate that Judaism, by requiring *no* belief in dogma, is more compatible with Enlightenment notions of reason. But more importantly for our purposes, Mendelssohn is presenting a competing definition of "religion" as a result of this move. Religion, in his Jewish terms, need not have anything to do with belief or personal assent. Rather the Jewish religion involved being a member of the Jewish people, upon whom it was incumbent to keep the *halacha* and engage in Jewish practices.

Since religious schools are allowed to engage in "religious discrimination" in their admissions process, defining religion is central to understanding the *JFS* decision. One of the arguments made by Didi Herman in her valuable book An Unfortunate Coincidence: Jews, Jewishness and English Law is that English judicial discourse in the last century have frequently understood Jews

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"Religion as a Cultural System," and finding that the concept of religion as a universal, cultural phenomenon hinders the understanding of religion by divorcing it from the various cultures and social settings from which it emerged and from our own personal knowledge and responses).

18. *See* MENDELSSOHN, *supra* note 15, at 89–90, 97.

19. *Id.*

and Jewishness through a Protestant Christian lens, which has resulted in some fundamental misapprehensions about Jews and Judaism.[20] In her concluding chapters, Herman demonstrates that the judgments in the *JFS* case further demonstrates a Christian bias in defining religion.[21] In the aftermath of this case, England's Jewish schools have had to create Jewish belief and practice tests to determine the Jewish status of the applicant.[22] Religious identity is defined by voluntary, individual belief. According to the court, religion is not, and cannot be, based on collective peoplehood or a sense of communal belonging that was not rooted in belief and was not the result of one's own free choice.[23] That notion of Jewish identity, the court found, was not religion.[24] One wonders then if there is any true religious freedom that goes beyond the borders of Protestant Christian terms.

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20. *See* Didi Herman, '*An Unfortunate Coincidence': Jews and Jewishness in Twentieth-Century English Discourse*, 33 J.L & SOC'Y. 277, 300 (2006) (suggesting that while other minorities could make the same claim, "the nearly 2000-year history of Jewish peoples in England, combined with the role Jews, the 'Old Testament', and a 'Jewish State' play in Christian theology, have produced a very particular trajectory of 'race' in England," leaving the area of race studies in the English legal system bereft of a well-rounded exploration).

21. DIDI HERMAN, AN UNFORTUNATE COINCIDENCE: JEWS, JEWISHNESS, AND ENGLISH LAW (2011).

22. *See infra* notes 85–92 and accompanying text; s*ee also* R(E) v. Governing Body of JFS, [2009] UKSC 15, [2010] 2 A.C. 728 (S.C.) ¶ 50 (appeal taken from Eng.) (Lord Phillips) (noting that after the Court of Appeals decision, JFS changed its admission policy for September 2010 admissions to examine applicants' level of faith practice through a points system, including such factors as synagogue attendance).

23. *JFS*, 15 UKSC at ¶¶ 69–70 (Lady Hale) (interpreting the Equality Bill and U.K. anti-discrimination legislation to preclude a conflation of ethnicity with religious practice; noting that while the Jewish law governing ethnicity and people has helped its people survive discrimination and persecution for centuries, "no other faith schools in [the United Kingdom] adopt descent-based criteria for admission" and any allowances for exception "should be made by Parliament").

24. *See id.* at ¶ 45 (Lord Phillips) ("But one thing is clear about the matrilineal test; it is a test of ethnic origin. By definition, discrimination that is based upon that test is discrimination on racial grounds under the Act.").

B. Judaism(s) in the Modern Period

Jewish denominationalism as it exists today was also a development of the modern period, and tracing its nineteenth century development helps illuminate the intra-Jewish conversation central to the *JFS* case. I discuss Reform Judaism, Orthodox Judaism, and Conservative (Masorti)[25] Judaism in chronological order.[26]

1. Reform Judaism

Reform Judaism is the first of the Jewish responses to the changing cultural and political landscape of the modern period. Reform Judaism began in Germany in the nineteenth century when a few Jewish rabbi-scholars began to modify Jewish ritual and observance. These modifications were based upon the belief that while core teachings were revealed by God to Moses at Mt. Sinai, Judaism had been (and continued to be) an evolving religious tradition. In brief, Judaism was subject to historical change and thus Judaism could be modified to respond to the current historical moment. The ability to reinterpret *halacha* and modify observance further allowed the Jewish communities of western Europe to "confine" their Jewishness to a religious sphere as they began to embrace their emerging rights as citizens in the newly forming nation states.

2. Orthodox Judaism

In opposition to the emergence of Reform Judaism, several Jewish rabbis rejected the notion that Judaism was subject to historical change and that observance of the *halacha* could be reinterpreted or modified. These Jews did not wish to see Judaism diminished to the status of religion and confined to spending Sabbath at the synagogue. Rather they understood Jewish identity and Jewish observance of the *halacha* to fully encompass the life of the individual. Yet even while holding that the *halacha* could not be modified, these newly identified Orthodox Jews understood themselves to also be fully compatible with the emerging political and cultural changes occurring in Europe—they did not believe that

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25. In the United States and Canada, this movement is known as Conservative Judaism. In Israel, England, and elsewhere in the world, it is known as Masorti Judaism.

26. This is not an exhaustive list of the various expressions of Judaism available (e.g. Reconstructionist) but rather aims to highlight the three numerically largest segments of the Jewish population.

their observance of the *halacha* would be in conflict with political and cultural developments.

3. Conservative (Masorti) Judaism

Chronologically, Conservative (Masorti) Judaism was the third Jewish response to modernity, and these rabbis and Jewish leaders sought middle ground between Reform and Orthodox iterations of Judaism. Originally known as "Positive-Historical Judaism," this strand of Jewish belief and observance did not embrace the full extent of the changes posed by some Reform Jewish leaders (for example, many wanted to keep Hebrew language central, as well as observe a kosher diet), yet at the same time they did not reject the historical-critical approach to Jewish history and what adopting those told meant for understanding the *halacha* (e.g. they were open to the possibility of changes to ritual observance).

4. Denominationalism and the *JFS* Case

The rise of Jewish denominationalism and the possibility of choosing whether to be Jewish is a modern phenomenon. Each of the Jewish communities (as well as other iterations of Jewish identity not explored here) has a different method for determining Jewish status and Jewish membership, and the communities do not agree about those parameters. The two central questions to this case are: (1) who should set the parameters for Jewish status; and (2) how should those membership guidelines be established?

C. The Education System in England

Prior to 1870, schooling in England was done on an *ad hoc* basis exclusively by religious communities. Principally, schools were built and run by the Church of England, although other religious groups, such as Jews and Roman Catholics, also built their own schools. By 1870, the religious communities had not been able to open a sufficient number of schools to meet the education needs of all of England's children. Hence the Elementary Education Act of 1870 was passed to allow government to build and run elementary schools where such schools were needed.[27] The existing religious schools continued to operate as before. Government's first foray into building

27. Elementary Education Act, 1870, 33 & 34 Vict., c. 75 (Eng.).

a school system was to "fill-in-the-gaps"—to have the government provide schools in regions inadequately served by religious schools. These new government built-and-run schools became popularly known as "provided schools" or "board schools," as they were provided and operated by school boards. From this point forward, a dual system of religious and government schools in England formally came into being. All subsequent discussions of elementary education reform in Great Britain deal with this dual system of religious and government schools. Since the 1950s, both religious and government schools receive government funds, and most contemporary discussions of education reform continue to debate the role of government funding and oversight for religious schools.

II. JUDGMENTS (EDITED AND ANNOTATED)

All nine judges wrote separate judgments for this case, demonstrating the complexity of the issues under consideration, as well as the nuanced differences in judicial reasoning utilized by the judges in crafting their judgments. With such a large number of legal voices, it is unsurprising that certain judges explicated various sections of this case more comprehensively, and with more clarity, than others. As a result, I have chosen to not use just one judgment in this case study, but have drawn from several judgments in order to make the *JFS* case, and the legal and religious questions it raises, accessible to a wide readership. After each extended excerpt I note the quoted judge.

A. Factual Background

1. JFS—A Brief History of the School & the School's Mission

While almost all the judges restated the facts of this case, Lord Hope's exposition is comprehensive of the major issues. The following are excerpts from Lord Hope's opinion:

> JFS, formerly the Jewish Free School, is a voluntary aided comprehensive secondary school which is maintained by the local authority, the London Borough of Brent. It has a long and distinguished history which can be traced back to 1732. It has over 2000 pupils, and for more than the past 10 years it has been over-subscribed. It regularly has twice the number of applicants for the places that are available. Clause 8 of its Instrument of Government dated 18

> October 2005 provides:
>
> "Statement of School Ethos
>
> Recognising its historic foundation, JFS will preserve and develop its religious character in accordance with the principles of orthodox Judaism, under the guidance of the Chief Rabbi of the United Hebrew Congregations of the Commonwealth. The School aims to serve its community by providing education of the highest quality within the context of Jewish belief and practice. It encourages the understanding of the meaning of the significance of faith and promotes Jewish values for the experience of all its pupils."
>
> Further information is given by the school on its website, which states:
>
> "The outlook and practice of the School is Orthodox. One of our aims is to ensure that Jewish values permeate the School. Our students reflect the very wide range of the religious spectrum of British Jewry. Whilst two thirds or more of our students have attended Jewish primary schools, a significant number of our Year 7 intake has not attended Jewish schools and some enter the School with little or no Jewish education. Many come from families who are totally committed to Judaism and Israel; others are unaware of Jewish belief and practice. We welcome this diversity and embrace the opportunity to have such a broad range of young people developing Jewish values together."
>
> The culture and ethos of the school is Orthodox Judaism. But there are many children at JFS whose families have no Jewish faith or practice at all.[28]

DISCUSSION QUESTIONS: Lord Hope's final comment here illuminates an underlying conceptual challenge for the judges

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28. R(E) v. Governing Board of JFS, [2009] UKSC 15, [2010] 2 A.C. 728 (S.C.) ¶ 164 (appeal taken from Eng.) (Lord Hope, concurring).

throughout the case. While there are many children at JFS whose families have no "faith" or "practice" in the opinion of the court, they are still considered to be Jewish by the Orthodox Chief Rabbi and the Orthodox Jewish community. Can there be an Orthodox Jewish atheist? Why would JFS, and the Orthodox Jewish community, have an interest in educating such a child? Why is this concept difficult for the Court to address? Could this difficulty arise because such a category does not map easily onto Christian norms? Who defines what "religion" is?

There are a variety of Judaisms practiced today all over the world (Reconstructionst, Reform, Conservative, Masorti, Orthodox, etc.). Should legal courts recognize the very real differences between these communities in understanding Jewish identity? Would you expect the court to recognize the real differences between various Christians (Presbyterian, Methodist, Roman Catholic, Anglican, Evangelical, Mormon, etc.) and their various interpretations of Christian identity? Should matters of community membership be determined by "secular" courts or by the communities themselves?

2. JFS Admissions Policy & Criteria for Determining Jewish Status

As mentioned in the introduction, religious schools are permitted to give admissions preference to applicants who share the school's religious affiliation. Within the Jewish community, conversion and matrilineal descent have been two main ways of determining Jewish status for centuries.[29] This case deals with both aspects: the mother's Masorti (and not Orthodox) conversion is part of the dispute, as well as the question of whether one should consider maternal status at all when determining the Jewish identity of a child. It is important to note that while some Reform Jewish communities have interpreted *halacha* to include patrilineal descent as well matrilineal descent in determining Jewish status in the modern period, no Jewish community has ever entirely rejected parental descent as a marker for Jewish identity. The identity of the parents continues to be essential in discussion of the identity of the child in all Jewish communities. Patrilineal/matrilineal descent as a marker for Jewishness has no real analogue to other religious frameworks, making it challenging for the judges to comprehend. Below is Lord Hope's engagement with the

29. *Id.* at ¶ 182 (Lord Hope, concurring); *id.* at ¶ 248 (Lord Brown, dissenting).

issue of determining Jewish identity according to Orthodox Jewish standards:

> Prior to the decision of the Court of Appeal in this case the principal admissions criterion of JFS was that, unless undersubscribed, it would admit only children who were recognised as being Jewish by the OCR. Its policy for the year 2008/09, which can be taken to be the same as that for the year in question in this case, was as follows:
>
> "It is JFS ("the School") policy to admit up to the standard admissions number children who are recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth (OCR) or who have already enrolled upon or who have undertaken, with the consent of their parents, to follow any course of conversion to Judaism under the approval of the OCR."
>
> The Chief Rabbi is the head of the largest groups of Orthodox synagogues in the United Kingdom. But he does not represent all Orthodox communities, nor does he represent the Masorti, Reform and Progressive Jewish communities. In accordance with Jewish law, the OCR recognises as Jewish any child who is descended from a Jewish mother. The mother herself must be descended from a Jewish mother or must have been converted to Judaism before the birth of the child in a manner recognised as valid by the OCR. Such a child is recognised by the OCR as Jewish regardless of the form of Judaism practised by the family (Orthodox, Masorti, Reform or Progressive). He is so recognised even if the entire family has no Jewish faith or observance at all. A family may be entirely secular in its life and outlook. Its members may be atheists or even be practising Christians or practising Muslims. Yet, if the child was himself born of a Jewish mother, he will be recognised as Jewish by the

OCR and eligible for a place at JFS.[30]

3. M's Jewish Status—According to the OCR & Self-Identification

> These proceedings have been brought in relation to a child, M on the application of his father, E. M's father is of Jewish ethnic origin. M's mother is Italian by birth and ethnic origin. Before she married E she converted to Judaism under the auspices of a non-Orthodox synagogue. Her conversion is recognised as valid by the Masorti, Reform and Progressive Synagogues. But it was undertaken in a manner that is not recognised by the OCR. She and E are now divorced and M lives mainly with his father. He and his father practise Judaism, and they are both members of the Masorti New London Synagogue. M practices his own Jewish faith, prays in Hebrew, attends synagogue and is a member of a Jewish Youth Group. But the OCR does not recognise him as of Jewish descent in the maternal line. His mother is not recognised as Jewish by the OCR and he has not undergone, or undertaken to follow, a course of approved Orthodox conversion.
>
> Consequently he was unable to meet the school's criterion for admission. In April 2007 he was refused a place at JFS for year 7 in the academic year 2007-2008.[31]

DISCUSSION QUESTIONS: Since JFS is an Orthodox Jewish school that recognizes the authority of the OCR in Jewish matters, should the school be forced to recognize other Jewish authorities? Would you apply the same criterion to Christian schools—should a Roman Catholic school be forced to accept a Presbyterian or a Latter-Day-Saints student applicant as part of its preferential pool because all parties are arguably Christian? Who should make this determination?

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30. *Id.* at ¶ 165 (Lord Hope, concurring).
31. *Id.* at ¶ 166.

B. Procedural Background

E, on behalf of M, sought to appeal the admissions decision, utilizing first the internal appeals process available to him at the school.[32] When that process failed, and M was still denied preferential admissions, E next appealed to the civil courts arguing that in utilizing the test of matrilineal descent to deny E Jewish status, JFS was in violation of the Race Relations Act of 1976.[33] Lord Phillips described the posture of the case when it arrived in the Supreme Court:

> E failed in these judicial review proceedings in which he challenged the admissions policy of JFS before Munby J, but succeeded on an appeal to the Court of Appeal. The question of M's admission has already been resolved between the parties, but the Governing Body of JFS is concerned at the finding of the Court of Appeal that the school's admissions policy infringes the 1976 Act, as are the United Synagogue and the Secretary of State for Children, Schools and Families. Indeed this case must be of concern to all Jewish faith schools which have admissions policies that give preference to Jews.[34]

It is important to note that E & M are not disputing the right of the Jewish school to give preferential admissions treatment to Jews. Rather they are disputing the School's use of Orthodox Jewish standards, in accordance with the Office of the Chief Rabbi, to determine Jewish status, which determines eligibility for the admissions preference.[35] E & M are making the claim that in conferring Jewish status according to Orthodox standards that utilize matrilineal descent the school is in violation of the Race Relations Act and that the school must find another method of determining Jewish status.[36]

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32. *Id.* at ¶ 167.
33. *Id.* at ¶¶ 167–68.
34. *Id.* at ¶ 7 (Lord Phillips).
35. *Id.* at ¶ 6.
36. *Id.* at ¶ 7.

DISCUSSION QUESTIONS: If JFS had utilized a different criterion to distinguish between the Orthodox and Masorti Jewish communities, and in effect excluded M from the school, by saying that M did not qualify for a place because he was a practicing Masorti Jew, and not an Orthodox Jew, would that have changed the Court's ruling? Would that have changed the Court's willingness to even take up the case? What would have happened to the school's stated interest in educating secular and atheist Jewish children whose families have no affiliation with synagogues?

C. The Race Relations Act of 1976

The following are excerpts from the relevant laws under consideration for these judgments. First is the relevant portion of the Race Relations Act of 1976. It is important to note that the judges understood the test of Jewish matrilineal descent to be a test concerning "ethnic origins" as defined by Section 3 of this Act.[37]

> Section 1 of the Race Relations Act 1976 defines race discrimination. It was amended by the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626) which, implementing Council Directive 2000/43 EC of 29 June 2000, rewrote in European terms the concept of indirect discrimination. So far as material it provides as follows:
>
> "(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if –
>
> (a) on racial grounds he treats that other less favourably than he treats or would treat other persons …
>
> (1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –

37. Race Relations Act, 1976, c. 74, § 3 (U.K.); *id*. at ¶ 190 (Lord Hope, concurring).

> (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,
>
> (b) which puts or would put that other at that disadvantage, and
>
> (c) which he cannot show to be a proportionate means of achieving a legitimate aim."
>
> …

Section 3 of the 1976 Act provides:

> "(1) In this Act, unless the context otherwise requires –
>
> 'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins;
>
> 'racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.
>
> (2) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of this Act.
>
> …
>
> (4) A comparison of the case of a person of a particular racial group with that of a person not of that group under section 1(1) or (1A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."[38]

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38. *JFS*, 15 UKSC at ¶¶ 170–71.

DISCUSSION QUESTIONS: What would you surmise is the purpose of this 1976 Act: to combat racism and other acts of discrimination grounded on racial, ethnic, religious or national stereotypes, or to categorize certain persons in the UK by racial, ethnic, religious, or national groups? Let's say a group of young men assaulted another man because they believed him to be Muslim. The victim of the assault was not in fact Muslim, but Sikh. Does the actual identity of the victim matter or rather does the intention of the group of young men (racial animus) matter? How would this analogy apply to the *JFS* case?

D. The Religious Charter of Schools Regulations

Next, the Court recognized the ability of religious schools to give admissions preference to those applicants who are identified as being members of that religion. However, the Court noted that the faith-based criteria applied to the applicants must not be in violation of any other discriminatory legislation.

> Paragraphs 2.41-2.43 of the School Admissions Code for 2007 deals with faith-based oversubscription criteria. Paragraph 2.41 states that schools designated by the Secretary of State as having a religious character (faith schools) are permitted by section 50 of the Equality Act 2006 to use faith-based oversubscription criteria in order to give priority in admission to children who are members of, or who practise, their faith or denomination. *It also states that faith-based criteria must be framed so as not to conflict with other legislation such as equality and race relations legislation* [emphasis added].
>
> Paragraph 2.43 of the 2007 Code states:
>
> "It is primarily for the relevant faith provider group or religious authority to decide how membership or practice is to be demonstrated, and, accordingly, in determining faith-based oversubscription criteria, admission authorities for faith schools **should** only use the methods and definitions agreed by their faith provider group or religious authority."
>
> Paragraph 2.47 states:
>
> "Religious authorities may provide guidance for the admission authorities of schools of their faith that sets

> out what objective processes and criteria may be used to establish whether a child is a member of, or whether they practise, the faith. The admission authorities of faith schools that propose to give priority on the basis of membership or practice of their faith **should** have regard to such guidance, to the extent that the guidance is consistent with the mandatory provisions and guidelines of this Code."[39]

E. The Legal Questions

To restate, under British Law religious schools (even those who accept government funding) are allowed to give preference in admissions to students who are members of the school's religious community.[40] JFS, as a government recognized Jewish school, is allowed to give admissions preference to Jews. What is under question in this case is whether the method (i.e. Jewish status as determined by the Office of the Chief Rabbi which means either conversion recognized by Orthodox authorities, or matrilineal descent from a woman recognized as Jewish by the Orthodox authorities) utilized by the JFS admissions committee to determine whether or not an applicant is Jewish is a religious test, and thus permissible, or an ethnic test, and thus an impermissible violation of the Race Relations Act.

There were two forms of unlawful discrimination under the Race

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39. *Id.* at ¶¶ 176–77.

40. Current British Law is governed by the Equality Act of 2010, which states that unless a school falls under the Special Schools Exception, it shall be held to the discrimination standard established under the Act. *See* Equality Act, 2010, c. 15, § 85(7)(b) (U.K.). The Secretary of State is empowered to create a code regulating school admission policies. *See* School Standards and Framework Act, 1998, c. 31, § 84(1)–(2) (U.K.). This code, known as the "School Admission Code," outlines the criteria for faith-based oversubscription admission policies. The 2007 code was in place during the decision of *JFS.* DEP'T. EDUC., SCH. ADMISSIONS. CODE, §§ 2.18–2.20 (2007). School Admissions Code 2012, in force since Feb. 1, 2012, is the current guidance and it deals with faith-based oversubscription in schools with a religious character. DEP'T. EDUC., SCH. ADMISSIONS CODE, §§ 1.36–1.38 (2012).

Relations Act: direct and indirect discrimination.[41] In trying to determine whether the test of matrilineal descent was a religious or an ethnic test, the judges utilized this distinction in an attempt to narrowly define the legal question at hand, as direct and indirect discrimination are understood to be "mutually exclusive" by the judges in the majority.[42] The majority of the Court found the admissions process utilizing matrilineal descent to be in direct violation of the Act, thus absolving the court from discussing the issue of indirect discrimination.[43]

In summing up the majority's position to limit its decision to determining whether direct discrimination occurred, Lord Philips wrote:

> It is common ground that JFS discriminated against M in relation to its terms of admission to the school. The issue of whether this amounted to unlawful direct discrimination on racial grounds depends on the answer to two questions: (1) What are the grounds upon which M was refused entry? (2) Are those grounds racial?[44]

Lady Hale summarizes the distinction between direct and indirect discrimination as determined by precedent.

> The basic difference between direct and indirect discrimination is plain…The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or

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41. Race Relations Act, 1976, c. 74, §§ 1(1)(a)–1(1)(b) (U.K.) (amended 2000); *see JFS*, 15 UKSC at § 78, 93 (Lord Mance) (discussing direct and indirect discrimination).

42. *JFS*, 15 UKSC at ¶ 57 (Lady Hale); *id.* at ¶ 237 (Lord Walker, concurring).

43. *Id.* at ¶ 51 (Lord Phillips); *id.* at ¶ 71 (Lady Hale); *id.* at ¶ 103 (Lord Mance); *id.* at ¶ 123 (Lord Kerr); *id.* at ¶ 154 (Lord Clarke).

44. *Id.* at ¶ 12 (Lord Phillips).

> national origins.
>
> Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in Elias, at para 117, "The conditions of liability, the available defences to liability and the available defences to remedies differ." The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.
>
> But it is significant that section 57(3) provides that, in respect of the earlier form of indirect discrimination under section 1(1)(b), "no award of damages shall be made if the respondent proves that the requirement or condition in question was not applied with the intention of treating the claimant unfavourably on racial grounds." We are concerned with the later form of indirect discrimination, under section 1(1A), to which section 57(3) does not apply, but the fact that this exception to the available remedies was made suggests that Parliament did not consider that an intention to discriminate on racial grounds was a necessary component of either direct or indirect discrimination. One can act in a discriminatory manner without meaning to do so or realising that one is. Long-standing authority at the highest level confirms this important principle.[45]

Two cases are key to the court's understanding of direct discrimination: *R v Birmingham City Council, ex p. Equal Opportunities Commission*[46] and *James v Eastleigh Borough*

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45. *Id.* at ¶¶ 56–57 (Lady Hale).

46. [1989] 1 A.C. 1155 (H.L.) (appeal taken from Eng.) (finding that the Council's merit-based admission policy for single-sex schools constituted unlawful discrimination under the Sex Discrimination Act of 1975 because female students had to ultimately earn higher marks in the entry exams than male students).

Council.[47] Both involve sex discrimination by local government authorities.[48] In *R v Birmingham* admission to a selective single-sex grammar school was at issue:

> As is well known, there were more grammar school places for boys than for girls in Birmingham with the result that girls had to do better than boys in the entrance examination in order to secure a place. The council did not mean to discriminate. It bore the girls no ill will. It had simply failed to correct a historical imbalance in the places available. It was nevertheless guilty of direct discrimination on grounds of sex.[49]

In a quotation from the *James v. Eastleigh B.C.* opinion, Lord Phillips points out the language that has come to stand in for the judicial logic: would someone have received different treatment "but for" his sex/race/age/religion?[50] If yes, direct discrimination has occurred:

> "There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys **but for** their sex."[51]

In *James v. Eastleigh B.C.*, entrance to a public swimming pool was free for all persons who were of pensionable age, which was 60 for women and 65 for men.[52] In utilizing pension age to determine the cost of swimming, the court found the council engaged in direct discrimination of men by refusing to provide swimming facilities.[53]

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47. [1990] 2 A.C. 751 (H.L.) (finding the Council's policy of allowing free entry to citizens of pensionable age as a discrimination based upon gender as pensionable age for females is 60 years of age and the age for men is 65 years of age).

48. *Birmingham*, [1989] 1 A.C. at 1155; *James*, [1990] 2 A.C. at 751.

49. *JFS*, 15 UKSC at ¶ 58 (Lady Hale).

50. *Id.* at ¶ 16 (Lord Phillips) (citing Lord Goff's judgment from *James*, 2 A.C. at 765, as outlining a "but for" question in identifying the factual criterion at the basis of the discrimination).

51. *Id.* at ¶ 13 (emphasis added) (quoting R v. Birmingham City Council, ex p. Equal Opportunities Commission, [1989] A.C. 1155, 1194 (U.K.)).

52. *James*, [1990] 2 A.C. at 751.

53. *Id.* at 782.

> The Council discriminated between men and women, aged between 60 and 65, in relation to the terms on which they were admitted to swim in a leisure centre run by the Council. Women in this age band were admitted free whereas men had to pay an entry charge. The motive for this discrimination could perhaps be inferred by the manner in which this rule was expressed, namely that those of pensionable age were to be admitted free of charge; women became of pensionable age when they were 60, men when they were 65. Counsel for the Council explained . . . that the council's reason for giving free access to those of pensionable age was that their resources were likely to have been reduced by retirement. The Court of Appeal had treated this motive as being the relevant "ground" for discriminating in favour of women and against men rather than the factual criterion for discrimination, which was plainly the sex of the person seeking admission to the centre.[54]

In both of these cases, the Court ruled that the girls in *R v Birmingham City Council* and the men in *James v. Eastleigh B.C.* suffered direct discrimination because of their sex.[55] The majority found in both cases that the individuals were treated differently "but for" their sex.[56] These decisions, in the opinion of Lord Phillips, were based upon an evaluation of the criteria used in making a decision and not upon a motive for that decision:

> The contrast between the reasoning of the majority and of the minority in this case is, I believe, clear. I find the reasoning of the majority compelling.

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54. *JFS*, 15 UKSC at ¶ 14 (Lord Phillips) (citing *James*, [1990] 2 A.C. at 758) (distinguishing the Court of Appeals' treatment of motive for discrimination from the factual criterion required to determine discrimination).

55. *Birmingham*, [1989] 1 A.C. at 1196–97 (Lord Goff); *James*, [1990] 2 AC. at 782; *see also JFS*, 15 UKSC at ¶ 20 (Lord Phillips) (stating that discrimination should be based on the factual criterion applied, rather than the motive for the discrimination).

56. *Birmingham*, [1989] 1 A.C. at 1196–97 (Lord Goff); *James*, [1990] 2 A.C. at 782; *see also* JFS, 15 UKSC at ¶ 20 (Lord Phillips).

> 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.[57]

Indeed, it is this legal logic that undergirds the majority's decision in this case and radically differentiates the thinking of the majority from the minority.[58]

DISCUSSION QUESTIONS: Does the "but for" test apply to issues of membership when the categories are ambiguous? Or more aptly for the *JFS* case, does the "but for" distinction work when the issue at hand is that of a religious community when the dispute is happening *within* that community? The examples given for this "but for" test work around the existence of distinct/discrete groups (men/women, boys/girls) but do not seem to apply when two groups are claiming to have one (shared?) identity. In other words, unlike the *JFS* case, determining whether an individual was a man or a woman was not the central dispute to these precedent cases. Thus, I suggest the precedents might be entirely unhelpful. Does the "but for" test help, or hinder, a discussion of determining discrimination in cases where the category of identity itself is contested?

1. Determining "Racial Grounds": Jewish Identity as Ethnicity

Of course a key part of determining whether or not direct discrimination occurred in violation of the Race Relations Act rests upon how the court understands the term "racial grounds." And in the specific context of the *JFS* case, the Court must grapple with how it understands Jewishness in terms of the category of race. All the judges, as well as both E & M and JFS, agree that a Jewish ethnic group exists for the purposes of this Act.[59] Yet at the same time, both the Court and the litigants also recognize Jewishness as a religious category as well.[60] In determining who is an ethnic Jew, one also must attend to religious definitions as well.

JFS argued to the Court that there was indeed a Jewish ethnic

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57. *JFS*, 15 UKSC at ¶ 20 (Lord Phillips).

58. *See infra* Part II.C.

59. *See, e.g.*, *JFS,* 15 UKSC at ¶ 38 (Lord Phillips); *id.* at ¶ 67 (Lady Hale); *id.* at ¶ 121 (Lord Kerr); *id.* at ¶ 183 (Lord Hope, concurring).

60. *See, e.g.*, *id.* at ¶ 2 (Lord Phillips); *id.* at ¶ 76 (Lord Mance).

group according to the Act.[61] However, the school argued that at the same time there was also a Jewish religious group and that these two groups were not coterminous.[62] The school argued that this dispute over admissions had to do with the recognition of the validity of the mother's conversion—that she had undergone a Masorti Jewish conversion not recognized by the Orthodox Jewish community.[63] Thus, this was a religious dispute and was a question of the Orthodox Jewish religious community determining its own standards for membership members through religious law.

The precedent utilized by the Court when considering how to define ethnic groups was set in *Mandla v. Dowell Lee*.[64] Lord Phillips explains this case, as well as how the lawyers arguing for JFS understand its applicability to this dispute:

> I shall summarise the case advanced by Lord Pannick QC for JFS in my own words. There exists a Jewish ethnic group. Discrimination on the ground of membership of this group is racial discrimination. The criteria of membership of this group are those identified by Lord Fraser of Tullybelton in Mandla v Dowell Lee [1983] 2 AC 548. In that case a declaration was sought that refusing admission to a school of a Sikh wearing a turban was indirect racial discrimination. The critical question was whether Sikhs comprised a "racial group" for the purposes of the 1976 Act. It was common ground that they were not a group defined by reference to colour, race, nationality or national origins.
>
> It was contended, however, that they were a group defined by "ethnic origins." In considering the meaning of this phrase, Lord Fraser at pp 561–562

61. *Id.* at ¶ 242 (Lord Brown, concurring).
62. *Id.* at ¶ 76 (Lord Mance).
63. *Id.* at ¶ 6 (Lord Phillips).
64. [1983] 2 A.C. 548 (H.L.) (U.K.) (finding a private school's refusal to admit a Sikh student who refused to cease wearing a turban and to cut his hair a case of indirect discrimination, and developing a seven-factor test in analyzing ethnicity); *JFS,* 15 UKSC at ¶ 28.

> referred to a meaning of "ethnic" given by the Supplement to the Oxford English Dictionary (1972): "pertaining to or having commo§n racial, cultural, religious, or linguistic characteristics, esp. designating a racial or other group within a larger system…" His comments in relation to this definition have been set out in full by Lord Mance at paragraph 83 of his judgment and as Lord Mance remarked they merit reading in full. It suffices, however, to cite the passage at p. 562 where Lord Fraser set out the seven characteristics, some of which he held would be shared by, and would be the touchstone of, members of an ethnic group:
>
> "The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.
>
> A group defined by reference to enough of these characteristics would be capable of including converts, for example, persons who marry into the group, and of excluding apostates. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member."
>
> [. . .]

> It is possible today to identify two different cohorts [of Jews], one by the Mandla criteria and one by the Orthodox criteria. The cohort identified by the Mandla criteria forms the Jewish ethnic group. They no longer have a common geographical origin or descent from a small number of common ancestors, but they share what Lord Fraser regarded as the essentials, a long shared history, of which the group is conscious as distinguishing it from other groups and the memory of which it keeps alive and a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. The man in the street would recognise a member of this group as a Jew, and discrimination on the ground of membership of the group as racial discrimination. The Mandla group will include many who are in the cohort identified by the Orthodox criteria, for many of them will satisfy the matrilineal test. But there will be some who do not.
>
> So far as the cohort identified by the Orthodox test is concerned, many of these will also fall within the Mandla group. But there will be some, indeed many, who do not. Most of these will be descendants from Jewish women who married out of and abandoned the Jewish faith. They will not satisfy the two vital criteria identified by Lord Fraser. Indeed, they may be unaware of the genetic link that renders them Jewish according to the Orthodox test.

Thus, in Lord Pannick's submissions the Orthodox test is not one that necessarily identifies members of the Jewish ethnic group. It is a test founded on religious dogma and discrimination on the basis of that test is religious discrimination, not racial discrimination.[65]

2. The Role of the Chief Rabbi: Jewish Identity as Religious

As mentioned, JFS stated that the school would recognize an applicant as Jewish if that applicant would also be recognized as

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65. *Id.* at ¶¶ 28, 30–32 (Lord Phillips).

Jewish by the Office of the Chief Rabbi. The Court claims that it takes no issue with a religious school utilizing the guidance of a religious authority in determining religious community membership.[66] Rather the majority focuses narrowly on whether the particular standards given by the Chief Rabbi to JFS to determine Orthodox Jewish identity were discriminatory on racial grounds.[67] Implicit in this limiting move is a judicial evaluation of both the authority of the Chief Rabbi, as well as a judicial evaluation of the religious tenets espoused by the Chief Rabbi. While the Court wants to get itself out of the business of evaluating the content of religion, it seems to be doing just that.

But for the purposes of clarity, below are excerpts of how various judges understood both the position of the Chief Rabbi and the advice given to JFS by the Chief Rabbi. Lord Hope provides a useful summary of the Chief Rabbi's guidance to JFS on determining Jewish identity:

In connection with JFS's admissions for the year 2009 an application form, *Application for Confirmation of Jewish Status,* was issued by the OCR. Parents were required to select from the following options:

> "(a) I confirm that the child's biological mother is Jewish by birth.
>
> (b) I confirm that the child's biological mother has converted to Judaism.
>
> (c) I confirm that the child is adopted [in which case the child's Jewish status must be separately verified]."

The guidance notes to the application form state:

> "Jewish status is not dependent on synagogue affiliation *per se*, though Jewish status will not be confirmed if the child, or any of his/her maternal antecedents, converted to Judaism under non-orthodox auspices.

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66. *Id.* at ¶ 75 (Lord Mance) (noting that Equality Act of 2006, § 50(1) exempts schools having a religious character under the 1998 School Standards and Framework Act from the prohibition against discrimination on the grounds of religious belief).

67. *See, e.g.*, *id*. at ¶ 27 (Lord Phillips); *id.* at ¶ 65 (Lady Hale); *id.* at ¶ 127 (Lord Clarke).

> If the child's parents were not married under orthodox auspices, further investigation will be necessary before confirmation of Jewish status is issued. This usually entails obtaining additional documentary evidence down the maternal line."
>
> If the child's mother was not herself born to a Jewish mother but converted to Judaism before the birth of the child, further inquiries are undertaken by the OCR before it is prepared to recognise the child as Jewish. The OCR does not recognise the validity of conversions carried out by non-Orthodox authorities, as they do not require converts to subscribe fully to the tenets of Orthodox Judaism.
>
> The exacting process that is indicated by the wording of the application form is firmly rooted in Orthodox Jewish religious law. Religious status is not dependent on belief, religious practice or on attendance at a synagogue. It is entirely dependent upon descent or conversion. It depends on establishing that the person was born to a Jewish mother or has undergone a valid conversion to Judaism. That is a universal rule that applies throughout all Orthodox Judaism. M's ineligibility for admission to JFS was due to the fact that different standards are applied by the Chief Rabbi from those applied by the Masorti, Reform and Progressive communities in the determining of a person's religious status. Nothing that I say in this opinion is to be taken as calling into question the right of the OCR to define Jewish identity in the way it does. I agree with Lord Brown that no court would ever dictate who, as a matter of Orthodox religious law, is to be regarded as Jewish. Nor is it in doubt that the OCR's guidance as to the effect of Orthodox Jewish religious law was given in the utmost good faith. The question that must now be faced is a different question. It is whether it discriminates on racial grounds against persons who are not recognised

by the OCR as Jewish.[68]

DISCUSSION QUESTIONS: The Court and all parties to the lawsuit agree that Jewish identity is both an ethnic identity and a religious identity. The central challenge of this case is to disentangle the religious from the ethnic in determining making their judgments, as religious discrimination is permissible, while racial discrimination is not. The issue then, is this—do you think the matrilineal test is a religious test or a racial one? Or is it both? Is the Court the best place to adjudicate such a decision?

3. Legal Outcomes—The Court's Ruling

The Court decided that the JFS Admissions Requirements that determined Jewish status by matrilineal descent was in violation of the Race Relations Act of 1976.[69] Five of the judges determined that utilizing matrilineal descent was an example of direct racial discrimination in violation of the Race Relations Act;[70] two judges determined that utilizing matrilineal descent was an example of indirect racial discrimination, which are not justified, in violation of the Race Relations Act; [71] and two judges determined that utilizing matrilineal descent was not racial discrimination but instead was religious discrimination.[72] The same two judges found that, even if the policy was indirect racial discrimination, discrimination was for a legitimate purpose and was proportionate to that purpose.[73]

The judges found this case to be legally vexing, as is demonstrated by the fact that all nine judges wrote an opinion voicing the distinct legal warrants for their interpretation of the facts and the limits—or lack thereof—of judicial reach into the religious arena.

While the selected four excerpts below do not attempt to capture the nuance of each of the nine opinions, they summarize the basic contours of the four outcomes of this case in the judges' own words.

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68. *Id.* at ¶¶ 181–82 (Lord Hope, concurring).

69. *Id.* at ¶ 45 (Lord Phillips); *id.* at ¶ 71 (Lady Hale); *id.* at ¶ 86 (Lord Mance); *id.* at ¶ 117 (Lord Kerr); *id.* at ¶ 136 (Lord Clarke).

70. *Id.*

71. *Id.* at ¶ 218 (Lord Hope, concurring); *id.* at ¶ 235 (Lord Walker, concurring).

72. *Id.* at ¶ 230 (Lord Rodger, concurring); *id.* at ¶ 242 (Lord Brown, dissenting).

73. *Id.* at ¶ 233 (Lord Rodger, concurring); *id.* at ¶ 256 (Lord Brown, dissenting).

i. The Majority: JFS's Admissions Requirements are Direct Racial Discrimination (Lord Phillips, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke)

While each judge chose to write his or her own opinion, there is a basic shared logic to all the judges who found the admissions policy of JFS to be an example of direct racial discrimination. Namely, all are operating within a significantly narrow judicial scope: is the criteria used to determine Jewish status an example of racial/ethnic test? In this narrow realm, the context for the matrilineal descent test is irrelevant, as is the motive for applying the matrilineal test. Rather, the judges chose to limit their examination simply to the "factual criteria" of the test itself.

Lady Hale summarizes this position:

> This case is concerned with discrimination on account of "ethnic origins." And the main issue is what that means—specifically, do the criteria used by JFS to select pupils for the school treat people differently because of their "ethnic origins"?
>
> My answer to that question is the same as that given by Lord Phillips, Lord Mance, Lord Kerr and Lord Clarke and for the same reasons. That we have each written separate opinions underlines the fact that we have each reached the same conclusion through a process of independent research and reasoning. It is only because the debate before us and between us has called in question some fundamental principles of discrimination law that I feel it necessary to underline them yet again.
>
> . . .
>
> There is absolutely no doubt about why the school acted as it did. We do not have to ask whether they were consciously or unconsciously treating some people who saw themselves as Jewish less favourably than others. Everything was totally conscious and totally transparent. M was rejected because he was not considered to be Jewish according to the criteria adopted by the Office of the Chief Rabbi. We 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, as in Birmingham or James, in reality ethnicity-based, it matters not whether he was adopting it because of a sincerely held religious belief. No-one doubts that he is honestly and sincerely trying to do what he believes that his religion demands of him. But that is his motive for applying the criterion which he applies and that is irrelevant. The question is whether his criterion is ethnically based.

So at long last I arrive at what, in my view, is the only question in this case. Is the criterion adopted by the Chief Rabbi, and thus without question by the school, based upon the child's ethnic origins? In my view, it clearly is. 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. That in itself is not enough. If M had been rejected because his mother shopped in Waitrose rather than Marks and Spencer, that would not have been because of her or his ethnicity. But 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.

There is no doubt that the Jewish people are an ethnic group within the meaning of the Race Relations Act 1976. No Parliament, passing legislation to protect

against racial discrimination in the second half of the twentieth century, could possibly have failed to protect the Jewish people, who had suffered so unspeakably before, during and after the Holocaust. If Parliament had adopted a different model of protection, we would not be here today. Parliament might have adopted a model of substantive equality, allowing distinctions which brought historically disadvantaged groups up to the level of historically advantaged groups. But it did not do so. It adopted a model of formal equality, which allows only carefully defined distinctions and otherwise expects symmetry. A man must be treated as favourably as a woman, an Anglo-Saxon as favourably as an African Caribbean, a non-Jew as favourably as a Jew. Any differentiation between them, even if it is to redress historic disadvantage, must be authorised by legislation.

This means that it is just as unlawful to treat one person more favourably on the ground of his ethnic origin as it is to treat another person less favourably. There can be no doubt 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 favourably on grounds of his ethnic origin. As Lord Kerr explains, there can be no logical distinction between treating a person less favourably because he does have a particular ethnic origin and treating him less favourably because he does not.

Some may feel that discrimination law should modify its rigid adherence to formal symmetry and recognise a greater range of justified departures than it does at present. There may or may not be a good case for allowing Jewish schools to adopt criteria which they believe to be required by religious law even if these are ethnically based. As far as we know, no other faith schools in this country adopt descent-based criteria for admission. 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. Yet the Jewish law has enabled the Jewish people and the Jewish religion to survive throughout centuries of discrimination and persecution. The world would undoubtedly be a poorer place if they had not. Perhaps they should be allowed to continue to follow that law.
>
> But if such allowance is to be made, it should be made by Parliament and not by the courts' departing from the long-established principles of the anti-discrimination legislation. The vehicle exists in the Equality Bill, which completed its committee stage in the House of Commons in the 2008-09 session and will be carried over into the 2009-10 session. The arguments for and against such a departure from the general principles of the legislation could then be thoroughly debated. The precise scope of any exception could also be explored. We know from the helpful intervention of the Board of Deputies of British Jews that the Masorti, Reform and Liberal denominations of Judaism have welcomed the result, if not the reasoning, of the decision of the Court of Appeal and would not wish for the restoration of the previous admission criteria. That is a debate which should not be resolved in court but by Parliament. We must not allow our reluctance to enter into that debate, or to be seen to be imposing our will upon a wellmeaning religious body, to distort the well settled principles of our discrimination law. That is to allow the result to dictate the reasoning.
>
> This was, in my view, a clear case of direct discrimination on grounds of ethnic origin. It follows that, however justifiable it might have been, however benign the motives of the people involved, the law admits of no defence.[74]

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74. *Id.* at ¶¶ 54–55, 65–71 (Lady Hale).

ii. Concurring in the Result: JFS's Admissions Requirements are Indirect Racial Discrimination (Lord Hope, Lord Walker)

Lord Hope and Lord Walker both found the admissions policy of JFS to be in violation of the Race Relations Act, but unlike the majority, they refused to examine the test of Jewish status by matrilineal descent apart from its religious context.[75] In bringing the religious factor back into the legal discussion, and expanding the scope of judicial view slightly, Judges Hope and Walker still found that the admissions policy was discriminatory, but indirectly so.[76] Lord Hope wrote:

> At one level there is no dispute about the reason why M was denied admission to JFS. The school's admissions policy was based on the guidance which it received from the OCR. Thus far the mental processes of the alleged discriminator do not need to be examined to discover why he acted as he did. The dispute between the parties is essentially one of categorisation: was the OCR's guidance given on grounds of race, albeit for a religious reason, or was it solely on religious grounds? For JFS, Lord Pannick QC submits that M failed only because JFS was giving priority to members of the Jewish faith as defined by the religious authority of that faith, which was a religious criterion. That was the ground of the decision. The Court of Appeal was wrong to hold that the ground was that M was not regarded as of Jewish ethnic origin, and that the theological reasons for taking this view was the motive for adopting the criterion: para 29. For E, Ms Rose submits that Lord Pannick's submissions confused the ground for the decision with its motive. The ground spoke for itself. It was that M was not regarded according to Orthodox

75. *See id.* at ¶ 204 (Lord Hope, concurring); *id.* at ¶ 235 (Lord Walker, concurring).

76. *Id.* at ¶ 218 (Lord Hope, concurring); *id.* at ¶ 235 (Lord Walker, concurring).

> Jewish principles as Jewish. This meant that he was being discriminated against on grounds relating to his ethnicity. This was racial discrimination within the meaning of the statute.
>
> These contradictory assertions must now be resolved. I wish to stress again that the issue is not simply whether M is a member of a separate ethnic group from those who are advantaged by JFS's admissions policy. That is not where the argument in this case stops. I agree with Lord Rodger that the decision of the majority which, as it respectfully seems to me, does indeed stop there leads to extraordinary results. As he puts it in para 226, one cannot help feeling that something has gone wrong. Lord Brown makes the same point when, in para 247 he stresses the importance of not expanding the scope of direct discrimination and thereby placing preferential treatment which could be regarded as no more than indirectly discriminatory beyond the reach of possible justification. The crucial question is whether M was being treated differently on grounds of that ethnicity. The phrase "racial grounds" in section 1(1)(a) of the 1976 Act requires us to consider what those words really mean—whether the grounds that are revealed by the facts of this case can properly be described as "racial". Only if we are satisfied that this is so would it be right for this Court to hold that this was discrimination on racial grounds.
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> …
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> Here the discrimination between those who are, and those who are not, recognized as Jewish was firmly and inextricably rooted in Orthodox Jewish religious law which it is the duty of the Chief Rabbi to interpret and apply. The Chief Rabbi's total concentration on the religious issue, to the exclusion of any consideration of ethnicity, can be illustrated by two contrasting examples. Several similar examples were referred to in the course of argument. 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. By contrast B is the child of parents, and the grandchild of grandparents, all of whom have faithfully observed Jewish religious practices and joined actively in the social and cultural life of the Jewish community, but there is unimpeachable documentary evidence that more than a century ago the mother of B's maternal grandmother was converted in a non-Orthodox synagogue. To the OCR B is not Jewish, despite his obvious Jewish ethnicity. Descent is only necessary because of the need, in these examples, to go back three generations. But having gone back three generations, the OCR applies a wholly religious test to what has been identified as the critical event. For the reasons given by Lord Rodger, the part that conversion plays in this process is crucial to a proper understanding of its true nature. It cannot be disregarded, as Lady Hale suggests in para 66, as making no difference. It shows that the inquiry is about a religious event to be decided according to religious law.
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> For these reasons I would hold that the decision that was taken in M's case was on religious grounds only. This was not a case of direct discrimination on racial grounds. On this issue, in respectful agreement with Lord Rodger, Lord Walker and Lord Brown, I would set aside the decision reached by the Court of Appeal.
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> …
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> In my opinion, for the reasons that Lord Brown gives in paras 252-253, JFS has shown that its aim is a legitimate one. The essential point is that a faith school is entitled to pursue a policy which promotes the religious principles that underpin its faith. It is

> entitled to formulate its oversubscriptions criteria to give preference to those children whose presence in the school will make it possible for it to pursue that policy. The legitimacy of the policy is reinforced by the statutory background. It has not emerged out of nowhere. It has been developed in accordance with the Code which permits faith schools to define their conditions for admission by reference either to membership of the faith or to practice. The justification for the Code lies exclusively in a belief that those who practise the faith or are members of it will best promote the religious ethos of the school. In Orphanos v Queen Mary College [1985] AC 761, 772–773 Lord Fraser said that a typical example of a requirement which could be justified without regard to the nationality or race of the person to whom it was applied was Panesar v Nestlé Co Ltd (Note) [1980] ICR 144, where it was held that a rule forbidding the wearing of beards in the respondent's chocolate factory was justifiable on hygienic grounds notwithstanding that the proportion of Sikhs who could conscientiously comply with it was considerably smaller than the proportion of non-Sikhs who could comply with it. It was, he said, purely a matter of public health and nothing whatever to do with racial grounds. I would apply the same reasoning to this case.
>
> This leaves, however, the question of proportionality. The Court of Appeal, having concluded that the criterion did not have an aim that was legitimate, did not attempt to examine this issue: para 47. Before Munby J it was submitted by Ms Rose that JFS's admissions policy did not properly balance the impact of the policy on those like M adversely affected by it and the needs of the school: para 199. He rejected this argument for two reasons. One was that the kind of policy that is in question in this case is not materially different from that which gives preference in admission to a Muslim school to those who were born Muslim or preference in admission to a Catholic school to those who have been baptised. The other was that an alternative admissions policy based on such

> factors as adherence or commitment to Judaism would not be a means of achieving JFS's aims and objectives: paras 200-201. In my opinion these reasons miss the point to which Ms Rose's submission was directed. The question is whether putting M at a disadvantage was a proportionate means of achieving the aim of the policy. It was for JFS to show that they had taken account of the effect of the policy on him and balanced its effects against what was needed to achieve the aim of the policy. As Peter Gibson LJ noted in *Barry v Midland Bank plc* [1999] ICR 319, 335–336 the means adopted must be appropriate and necessary to achieving the objective.
>
> I do not think that JFS have shown that this was so. Lord Pannick submitted that there was no other way of giving effect to the policy. If the school were to admit M, this would be to deny a place to a child who was regarded as Jewish by the OCR. This was inevitable as the school was oversubscribed. But what is missing is any sign 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. As Ms Rose pointed out, the disparate impact of the policy on children in M's position was very severe. They are wholly excluded from the very significant benefit of state-funded education in accordance with their parents' religious convictions, whereas there are alternatives for children recognised by the OCR although many in the advantaged group do not share the school's faith-based reason for giving them priority. The school claimed to serve the whole community. But the way the policy was applied deprived members of the community such as M, who wished to develop his Jewish identity, of secondary Jewish education in the only school that is available.
>
> There is no evidence that the governing body gave thought to the question whether less discriminatory means could be adopted which would not undermine the religious ethos of the school. Consideration might

> have been given, for example, to the possibility of admitting children recognised as Jewish by any of the branches of Judaism, including those who were Masorti, Reform or Liberal. Consideration might have been given to the relative balance in composition of the school's intake from time to time between those recognised as Jewish by the OCR who were committed to the Jewish religion and those who were not, and as to whether in the light of it there was room for the admission of a limited number of those committed to the Jewish religion who were recognised as Jewish by one of the other branches. Ms Rose said that the adverse impact would be much less if a different criterion were to be adopted. But the same might be true if the criterion were to be applied less rigidly. There may perhaps be reasons, as Lord Brown indicates (see para 258), why solutions of that kind might give rise to difficulty. But, as JFS have not addressed them, it is not entitled to a finding that the means that it adopted were proportionate.
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> …
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> The problem that JFS faces in this case is a different one, as the context is different. Under section 1(1A)(c) of the Race Relations Act 1976 the onus is on it to show that the way the admissions policy was applied in M's case was proportionate. It is not for the court to search for a justification for it: see Mummery LJ's valuable and instructive judgment in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213, paras 131–133. JFS failed to discharge its duty under section 71 of the Act to have regard to the need to eliminate discrimination. It is having to justify something that it did not even consider required justification. The question, as to which there is no obvious answer either way, was simply not addressed. As a result the court does not have the statistical or other evidence that it would need to decide whether or not the application of the policy in M's case was proportionate. It may well be, as Lord Brown indicates, that devising a new oversubscriptions policy that is consistent with the school's legitimate aim

> would be fraught with difficulty. But it was for JFS to explore this problem and, having done so, to demonstrate that whatever policy it came up with was proportionate. So, although I do not arrive at this conclusion by the same route as Lord Mance, I agree with him that on the material before the Court the admissions policy cannot be held to have been justified.
>
> I would hold that, by applying the oversubscription criteria to M in a way that put him at a particular disadvantage when compared with others not of the same ethnicity by reason of matrilineal descent, JFS discriminated against him in breach of section 1(1A) of the Race Relations Act 1976, and that E is entitled to a declaration to that effect.[77]

iii. The Dissent: JFS's Admissions Requirements are not Direct Discrimination, but Permitted Religious Discrimination (Lord Rodger, Lord Brown)

Lord Rodger and Lord Brown found that this case principally involves a religious dispute between two Jewish communities and thus this is not a dispute that a secular court should resolve.[78] Their determination that this dispute is religious, and not racial, depends heavily upon a different understanding of the facts of the case, and the grounds for the admissions decision. Lord Rodger wrote:

> The purpose of designating schools as having a religious character is not, of course, to ensure that there will be a school where Jewish or Roman Catholic children, for example, can be segregated off to receive good teaching in French or physics. That would be religious discrimination of the worst kind which Parliament would not have authorised. Rather, the whole point of such schools is their religious character. So the whole point of designating the

77. *Id.* at ¶¶ 187–88, 203–04, 209–12, 214–15 (Lord Hope, concurring).

78. *Id.* at ¶¶ 224–25 (Lord Rodger, dissenting); *id.* at ¶¶ 239, 248–249 (Lord Brown, dissenting).

> Jewish Free School as having a Jewish character is that it should provide general education within a Jewish religious framework. More particularly, the education is to be provided within an Orthodox religious framework. Hence the oversubscription admission criteria adopted after consulting the Chief Rabbi. The School's policy is to give priority to children whom the Orthodox Chief Rabbi recognises as Jewish. From the standpoint of Orthodoxy, no other policy would make sense. This is because, in its eyes, irrespective of whether they adhere to Orthodox, Masorti, Progressive or Liberal Judaism, or are not in any way believing or observant, these are the children—and the only children—who are bound by the Jewish law and practices which, it is hoped, they will absorb at the School and then observe throughout their lives. Whether they will actually do so is, of course, a different matter.
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> The dispute can be summarised in this way. E, who is himself a Masorti Jew, wants his son, whom he regards as Jewish, to be admitted to the School as a Jewish child. He complains because the School, whose admission criteria provide that only children recognised as Jewish by the Office of the (Orthodox) Chief Rabbi are to be considered for admission, will not consider admitting his son, who is recognised as Jewish by the Masorti authorities but not by the Chief Rabbi. If anything, this looks like a dispute between two rival religious authorities, the Office of the Chief Rabbi and the Masorti authorities, as to who is Jewish. But E claims—and this Court will now declare—that, when the governors refused to consider M for admission, they were actually treating him less favourably than they would have treated a child recognised as Jewish by the Office of the Chief Rabbi "on racial grounds": Race Relations Act 1976, section 1(1)(a).
>
> 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. If the

> majority are right, expressions of sympathy for the governors of the School seem rather out of place since they are doing exactly what the Race Relations Act exists to forbid: they are refusing to admit children to their school on racial grounds. That is what the Court's decision means. And, if that decision is correct, why should Parliament amend the Race Relations Act to allow them to do so? Instead, Jewish schools will be forced to apply a concocted test for deciding who is to be admitted. That test might appeal to this secular court but it has no basis whatsoever in 3,500 years of Jewish law and teaching.
>
> The majority's decision leads to such extraordinary results, and produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can't help feeling that something has gone wrong.
>
> The crux of the matter is whether, as the majority hold, the governors actually treated M less favourably on grounds of his ethnic origins. They say the governors did so, but for a bona fide religious motive. If that is really the position, then, as Lord Pannick QC was the first to accept on their behalf, what the governors did was unlawful and their bona fide religious motive could not make the slightest difference. But to reduce the religious element in the actions of those concerned to the status of a mere motive is to misrepresent what they were doing. The 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. Similarly, so far as the oversubscription criteria are concerned, the governors consider or refuse to consider children for admission on the same religious grounds. The only question is whether, when they do so, they are ipso facto considering or refusing to consider children for admission on racial grounds.
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> Lady Hale says that M was rejected because of his

> mother's ethnic origins which were Italian and Roman Catholic. I respectfully disagree. His mother could have been as Italian in origin as Sophia Loren and as Roman Catholic as the Pope for all that the governors cared: the only thing that mattered was that she had not converted to Judaism under Orthodox auspices. 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. The governors automatically rejected M because he was descended from a woman whose religious status as a Jew was not recognised by the Orthodox Chief Rabbi; they did not reject him because he was descended from a woman whose ethnic origins were Italian and Roman Catholic.
>
> As in any complaint of racial discrimination, the point can be tested by reference to the appropriate comparator. The starting point is that both E and M believe M to be Jewish by descent. So E applied to the School to admit M on the basis that he was Jewish because his Italian Catholic mother had converted to Judaism before he was born. The mother's Jewish status as a result of her conversion was accordingly the only issue which the governors were asked to consider or did consider. They refused E's application because her conversion had been under non-Orthodox auspices. Therefore the appropriate comparator is a boy with an Italian Catholic mother whom the governors would have considered for admission. He could only be a boy whose mother had converted under Orthodox auspices. The question then is: did the governors treat M, whose mother was an Italian Catholic who had converted under non-Orthodox auspices, less favourably than they would have treated a boy, whose mother was an Italian Catholic who had converted under Orthodox auspices, on grounds of his ethnic origins? Plainly, the answer is: No. The ethnic origins of the two boys are exactly the same, but the stance of the governors varies, depending on the auspices under which the mother's conversion took place.

> Faced with a boy whose mother had converted under Orthodox auspices, the governors would have considered him for admission without pausing for a single second to enquire whether he or his mother came from Rome, Brooklyn, Siberia or Buenos Aires, whether she had once been a Roman Catholic or a Muslim, or whether he or she came from a close-knit Jewish community or had chosen to assimilate and disappear into secular society. In other words, the "ethnic origins" of the child or his mother in the Mandla v Dowell Lee [1983] 2 AC 548 sense would not have played any part in the governors' decision to admit him. All that would have mattered was that his mother had converted under Orthodox auspices. Equally, in M's case, the governors did not refuse to consider admitting him on grounds of his Mandla ethnic origins. Even supposing that the governors knew about his origins, they were quite irrelevant and played no part in their decision. The governors were simply asked to consider admitting him as the son of a Jewish mother. They declined to do so because his mother had not converted under Orthodox auspices. It was her non-Orthodox conversion that was crucial. In other words, the only ground for treating M less favourably than the comparator is the difference in their respective mothers' conversion—a religious, not a racial, ground.[79]

DISCUSSION QUESTIONS: In allowing religious schools to practice religious discrimination in their admissions process, while prohibiting other forms of discrimination, the government is pressed to make a working definition of religion for these schools. In each of the above opinions what is the operating definition of religion, generally? Of Judaism in particular? Who determines those terms?

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79. *Id.* at ¶¶ 223–30 (Lord Rodger, dissenting).

iv. The Dissent: JFS's Policy was Legally Permissible Indirect Discrimination for a Legitimate Reason, Through Proportionate Means (Lord Rodger, Lord Brown)

The two dissenting judges, Lord Brown and Lord Rodger, having found no direct discrimination, went on to consider indirect discrimination. Lord Brown doubted whether even indirect discrimination had occurred,[80] but found that, if it had, discrimination was for a legitimate reason and was proportionate.[81] Lord Rodger, concurring with Brown succinctly stated the reasoning:

> The aim of the School, to instill Jewish values into children who are Jewish in the eyes of Orthodoxy, is legitimate. And, from the standpoint of an Orthodox school, instilling Jewish values into children whom Orthodoxy does not regard as Jewish, at the expense of children whom Orthodoxy does regard as Jewish, would make no sense. That is plainly why the School's oversubscription policy allows only for the admission of children recognised as Jewish by the Office of the Chief Rabbi. I cannot see how a court could hold that this policy is a disproportionate means of achieving the School's legitimate aim.[82]

Lord Brown expanded on the question of legitimacy, highlighting the religious nature of JFS's objective in admitting no practicing, but halachically Jewish students:

> The legitimacy of JFS's aim is surely clear. Here is a designated faith school, understandably concerned to give preference to those children it recognises to be members of its religion, but so oversubscribed as to be unable to admit even all of these. The School Admissions Code expressly allows admission criteria based either on membership of a religion or on practice. JFS have chosen the former. Orthodox Jews regard education about the Jewish faith as a fundamental religious obligation. Unlike proselytising faiths, however, they believe that the duty to teach and

80. *See id.* at ¶ 250 (Lord Brown, dissenting).
81. *Id.* at ¶ 256.
82. *Id.* at ¶ 233 (Lord Rodger, dissenting).

> learn applies only to members of the religion, because the obligations in question bind only them.[83]

Lord Brown found JFS's policy proportionate for two reasons, which he quoted from the judgment of the High Court:

> Given JFS's legitimate aim of educating children recognised to be Jewish, is their policy of invariably giving preference to these children over those not so recognised a proportionate means of achieving that aim? Answering that question in the affirmative, Munby J, in the course of a lengthy, impressive and to my mind convincing judgment, said this:
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> "[. . .] Two quite separate considerations drive me to this conclusion. In the first place, the kind of admissions policy in question here is not, properly analysed, materially different from that which gives preference in admission to a Moslem school to those who were born Moslem or preference in admission to a Catholic school to those who have been baptised. But no-one suggests that such policies, whatever their differential impact on different applicants, are other than a proportionate and lawful means of achieving a legitimate end. Why, [counsel] asks rhetorically, should it be any different in the case of Orthodox Jews? . . . I agree. Indeed, the point goes even wider than the two examples I have given for, as [counsel] submits, if E's case on this point is successful then it will probably render unlawful the admission arrangements in a very large number of faith schools of many different faiths and denominations.
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> [. . .] The other point is that made both by the Schools Adjudicator and by [counsel for JFS]. Adopting some alternative admissions policy based on such factors as adherence or commitment to Judaism (even assuming that such a concept has any meaning for this purpose in Jewish religious law) would not be a means of

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83. *Id.* at ¶ 252 (Lord Brown, dissenting).

> achieving JFS's aims and objectives; on the contrary it would produce a different school ethos. If JFS's existing aims and objectives are legitimate, as they are, then a policy of giving preference to children who are Jewish applying Orthodox Jewish principles is, they say, necessary and proportionate—indeed, as it seems to me, essential—to achieve those aims. . . JFS exists as a school for Orthodox Jews. If it is to remain a school for Orthodox Jews it must retain its existing admissions policy; if it does not, it will cease to be a school for Orthodox Jews. Precisely. To this argument there is, and can be, no satisfactory answer."
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> I find myself in full agreement with all of that.[84]

III. RESPONSES TO RULING/CURRENT STATUS

In the aftermath of the *JFS* decision, Jewish schools across the United Kingdom had to develop new means of determining Jewish status for the admissions process that did not make determinations of Jewish identity based on ethnicity. As a result, Orthodox Jewish schools have created "Jewish Religious Practice Tests."[85] A little more than six months after the *JFS* decision, London's *Jewish Chronicle* reported that as a result of this admissions test innovation, a Jewish applicant was denied admission at a different Jewish school because she failed the school's newly crafted Jewish religious practice test.[86] Kayleigh Chapple had applied for admission to King David High School in Liverpool, England. Like JFS, King David grants admissions preference for Jewish students. There were ninety spots available, and ten Jewish applicants who potentially qualified for the admissions preference. Kayleigh was the only Jewish applicant denied admission to the Orthodox Jewish school because her family could not satisfy the "Jewish Religious Practice Test."[87] Kayleigh was born of a Jewish mother, making Kayleigh

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84. *Id.* at ¶¶ 255–56 (Lord Brown, dissenting) (quoting R(E) v. Governing Body of JFS, [2008] EWHC 1535 (Admin), [2008] ACD 87, ¶¶ 200–01 (Munby, J.)).

85. Riazat Butt, *Jewish Faith Schools Introduce Religious Observance Tests*, GUARDIAN, Sept. 28, 2009, at Educ. 1.

86. Jonathan Kalmus, *Jewish Girl's King David Places Goes to Non-Jew*, JEWISH CHRONICLE (June 11, 2010), http://www.thejc.com/news/uk-news/32947/jewish-girls-king-david-place-goes-non-jew.

87. *Id.*

Jewish according to Orthodox law and the Chief Rabbi. Indeed, Kayleigh's mother is even an alumna of King David. However, the Chappelle family is not religiously observant.[88] The family initially threatened to sue because Kayleigh has been denied the preferential admission to King David that the Chief Rabbi has instructed she deserves. Kayleigh was eventually accepted at a different Jewish school in Manchester, and the Chapple family decided to not pursue legal action.[89]

For the 2013 admissions process, applicants to JFS must complete a "Certificate of Religious Practice" form in order to be eligible for preferred admissions status.[90] According to the form, applicants may accumulate "points" by attending synagogue services, engaging in formal Jewish education, or engaging in a Jewish communal or welfare organization.[91] Synagogue attendance must be verified by a rabbi or another synagogue official for the form.[92]

CONCLUSION: "SOMETHING HAS GONE WRONG": JEWISH IDENTITY IN PROTESTANT CHRISTIAN TERMS

Lord Rodger, writing a strong dissenting opinion in *JFS* states:

> 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. . . . Instead, Jewish schools will be forced to apply a concocted test for deciding who is to be admitted. That test might appeal to this *secular court* but it has no basis whatsoever in 3,500 years of Jewish

88. *Id.*

89. Jonathan Kalmus, *Girl Denied Faith School Place Treks 60 Miles*, JEWISH CHRONICLE (Sept. 7, 2010), http://www.thejc.com/news/uk-news/37973/girl-denied-faith-school-place-treks-60-miles.

90. JEWISH FREE SCH., ADMISSION POLICY 2014/15 (2013), *available at* http://www.jfs.brent.sch.uk/sites/default/files/attachments/JFS%20Admissions%20Policy%202014-15.pdf.

91. JEWISH FREE SCH., CERTIFICATE OF RELIGIOUS PRACTICE (2013), *available at* http://www.jfs.brent.sch.uk/sites/default/files/attachments/11%2B%20CRP%202014.pdf.

92. *Id.*

> law and teaching. The majority's decision leads to such extraordinary results, and produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can't help feeling that something has gone wrong.[93]

I agree with Lord Rodger that something went wrong with the Majority ruling in the *JFS* decision – but what exactly? I think that both Lord Rodger and the Majority believe the Court is operating in a secular space, and that the term "religion" used in a legal context is not defined by a particular religious idiom. However, I hold that the results of the *JFS* case point to a more complicated reality for legally defined religion, and demonstrates the limits of religious freedom for religious minorities.

The main task before the Court was to evaluate whether the Orthodox Jewish practice of determining Jewish status through matrilineal descent was a test of racial or religious discrimination. If it is a racial test, then it is illegal, but if it is a religious test, then it is legally protected. But what if it is both? What if an ethnic test is religion? Indeed, as the *JFS* case shows this is not a what-if scenario, but points to a specifically Jewish definition of religion that lacks a Christian analog.

The Majority in the *JFS* case is working with a very specific definition of religion that has been shaped by Protestant Christianity. As I stated above, religion for the Majority is seen as the (1) voluntary (2) faith and/or belief of (3) an autonomous individual. Religion is a matter of personal choice and requires affirmative assent in the form of belief. It is my contention that this Protestant Christian definition of "religion" is what animates the decision of the Majority in the *JFS* case, and why the Majority do not understand how the little boy "M," who self-identifies as Jewish, speaks Hebrew, and regularly attends synagogue, could not be Jewish according to Orthodox Jewish standards. Indeed, when the same school regularly admits children as Jewish, with little to no Jewish education or regular religious practice, the judges were somewhat confounded. In a Protestant Christian frame, M's belief, practice, and self-identification would indicate him as religiously Jewish; the

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93. R(E) v. Governing Board of JFS, [2009] UKSC 15, [2010] 2 A.C. 728 (S.C.), ¶¶ 225–26 (appeal taken from Eng.) (Lord Hope, concurring) (emphasis added).

religious status of M's mother would not matter. The Majority could not accommodate the Orthodox Jewish practice of identifying Jewish children through their mother as religion. This was not religion in their view, but an ethnic test, and thus was not legally permissible.

The result of the *JFS* case draws our attention to a challenging question: are the definitions of religion operating in the courtrooms of America and Europe *de facto* Christian definitions? If yes, as this case suggests, what are the legal remedies for non-Christian religious minorities who have beliefs, practices, and religious realities that go beyond the Christian definitions? Is it possible to articulate a legal definition of religion that is not grounded in a particular religious framework, and thus exclusionary to those religious individuals who do not share in that framework? The *JFS* case highlights a fundamental challenge to lawmakers who enshrine religious liberty into their legal codes and to judges who must interpret those laws. Namely, lawmakers and judges have to define and delimit what religion is, and as this case demonstrates, that is no simple task.