

RELIGION: INDIVIDUAL EXPRESSION OR INTERTWINED WITH CULTURE?

FREE EXERCISE JURISPRUDENCE IN THE UNITED STATES AND GREAT BRITAIN

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In contemporary Western society, an individual's freedom to believe or not believe in any particular religion is considered a fundamental human right.¹ Part of an individual's religious belief includes the ability to express that belief through the individual's interactions with the greater society.² However, it is also accepted that states reserve the right to restrict an individual's expression of his or her belief in order to facilitate societal benefits, such as "public safety, order, health, or morals or the fundamental rights and freedoms of others."³ The tension between these two fundamental beliefs is articulated through the different ways national judiciaries work out systems of discerning the pivotal moment when a government's interest in its citizens' benefits as a whole allows the government to intervene and restrict an individual's expression of his or her religious beliefs.⁴ Moreover, the way in which a country's judiciary

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1. *E.g.*, International Covenant on Civil and Political Rights art. 18, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

2. *Freedom of Religion or Belief Toolkit*, FOREIGN & COMMONWEALTH OFFICE 4 (2011), <http://www.fco.gov.uk/resources/en/pdf/global-issues/human-rights/freedom-toolkit>.

3. ICCPR, *supra* note 1.

4. *Compare* *Employment Division v. Smith*, 494 U.S. 872, 878 (1990) (holding that "if prohibiting the exercise of religion . . . is not the object...but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."), *with* *R (on the Application of Begum) v. Headteacher and Governors of Denbigh High School*, [2006] UKHL 15, [2007] 1 A.C. 100 (H.L.) [114] (appeal taken from Eng.) (holding that "a limitation [on religion] . . . must be . . . necessary . . . for a permissible purpose...and must be proportionate in scope and effect).

chooses to draw the line between an individual's free expression and the government's right to intervene provides an illustration of how that nation characterizes the fundamental nature of religious beliefs.

The United Kingdom and the United States share a common legal system and a common heritage, as Great Britain served as the "parent" from which the United States was born. The two countries' background of protection for free expression of religion and the judicial structures for preserving that freedom are, however, very different. The United States has a long history of seeking to protect both religious belief and expression from state control. These freedoms were inscribed into the U.S. Constitution,⁵ commented on in writings by the Founding Fathers,⁶ and supported by the U.S. Congress.⁷ The United States' dual court system containing both federal and state courts, as well as the evolution of Supreme Court jurisprudence as a result of various compositions of the Court's bench, have produced a complex system for protecting free expression. Most importantly, the American system has evolved to focus on an individual's self-expression of religion. American courts have specifically chosen not to attempt to determine what constitutes a religious belief or practice.⁸ A religious belief may not be "acceptable, logical, consistent, or comprehensible,"⁹ and it may not be held by other adherents to that religion.¹⁰ The courts, however, have considered any inquiry into the legitimacy of the belief as being "not within the judicial function and judicial competence."¹¹ Once a petitioner has claimed a violation of the First Amendment's freedom of expression clause, the court may only determine whether the individual's action is one which has crossed the line into an area governed by a "compelling state interest."¹²

In contrast, the United Kingdom views religion and religious beliefs as intimately tied to culture, ethnicity, and a larger religious community of

5. U.S. CONST. amend. I (stating "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

6. See generally Letter from Thomas Jefferson, to Danbury Baptist Association (Jan. 1, 1802) (on file at the Library of Congress), available at <http://www.loc.gov/loc/lcib/9806/danpre.html>.

7. See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 439 (2006) [hereinafter *O Centro Espirita*] (explaining Congress' decision to pass RFRA: "Congress recognized that 'laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "strike sensible balances between religious liberty and competing prior governmental interests.").

8. See *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 714 (1981).

9. *Id.*

10. *Id.* at 715-16.

11. *Id.* at 716.

12. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

believers.¹³ The United Kingdom does not possess a written constitution guaranteeing any form of human rights or freedoms.¹⁴ Issues of freedom of belief, religious expression, or any other human right must be resolved by reference to U.K. legislation, general common law, European Union law, or the European Convention on Human Rights (ECHR).¹⁵ Prior to the establishment of the European Union, and the adoption of the ECHR, freedom of expression claims could only come before British courts if they were based on some form of statutory authority, generally the Race Relations Act of 1976.¹⁶ The use of the Race Relations Act to resolve free expression cases resulted in the British court making determinations about the authenticity and validity of the plaintiff's claim religious expression.¹⁷ The court adopted this form of judicial inquiry to determine whether the disputed religious expression could be protected as an aspect of a particular ethnic or racial group.¹⁸ The British statutory system offers a different view of the nature and function of religion, seeing it as an element that binds a particular community together and thereby is protectable under the same statutory regime that protects communities bound by other elements such as language, race or ethnicity.

The adoption of the ECHR through the United Kingdom's Human Rights Act of 1998¹⁹ offers a second type of protection regime for plaintiffs. Plaintiffs now have the ability to request relief under ECHR Article 9, a more general protection provision similar to Article I of the U.S. Constitution.²⁰ When British courts apply the ECHR, however, they rely upon precedent from the European Court of Human Rights.²¹ In contrast to both the British system's focus on religion as part of a community culture, and the American focus on religion as a method of self-expression, the European Court of Human Rights has chosen not to characterize the nature of claims for free expression of religion. Instead, it has simply deferred to the national laws under which these suits arise. As a

13. *See generally* R. (on the Application of E) v. Governing Body of JFS, [2009] UKSC 15, [2010] 2 A.C. 728 (S.C.) (appeal taken from Eng.); *Mandla (Sewa Singh) v. Dowell Lee*, [1983] 2 A.C. 548 (H.L.) (appeal taken from Eng.).

14. *The Legal System of the United Kingdom*, CHARTERED INST. OF LEGAL EXECES., http://www.ilex.org.uk/about_cilex_lawyers/the_uk_legal_system.aspx (last visited May 5, 2012).

15. *Id.*

16. *See generally, e.g., Mandla*, 2 A.C. 548.

17. *See generally, e.g., Begum*, 1 A.C. 100.

18. *See generally, e.g., Mandla*, 2 A.C. 548; *JFS*, 2 A.C. 728.

19. Human Rights Act, 1998, c. 42 (U.K.), <http://www.legislation.gov.uk/ukpga/1998/42>.

20. *See generally, e.g., R (on the Application of Williamson) v. Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 A.C. 246 (H.L.) (appeal taken from Eng.) [hereinafter *Williamson*].

21. *See Begum*, 1 A.C., at 113.

result, the court has repeatedly not upheld claims for protection for free expression of religion if there were any other way an individual could practice the religious expression without the inconvenience or hardship that generated the lawsuit.²² The British system offers an understanding of religion that is tied to a cultural framework based on the adoption of other statutes, such as the Race Relations Act, to the plaintiff's free expression plea.²³ The interpretations offered by the European Court of Human Rights do not change or add to this interpretive framework, as the conclusions drawn by the European Court of Human Rights merely uphold the British jurisprudence under which the case arose.

Any substantive discussion concerning the different judicial systems used to draw the line between an individual's right to free expression of his or her religious beliefs, and the state's right to restrict that expression, requires an understanding of the ways in which different systems characterize the nature of religion. This note seeks to explore the two different characterizations of religion offered by the United States and the United Kingdom, and how those characterizations are used to protect free exercise in both nations. The American system shows an appreciation for religious exercise as a method of individualism, and religious expression is something that is undertaken as an individual. The judicial question is therefore only whether that individual's expression has crossed a line into conduct that the government has determined to be prohibited. The United Kingdom offers a contrasting approach, viewing religion as something which is part of a larger cultural and community-based identity. Therefore, the validity of the religious expression can be analyzed to determine if it fits within the expressions deemed necessary for that community.

In this paper, I argue that while both of these methods offer valuable jurisprudence, the American system's characterization results in a stronger judicial basis of support for free exercise claims. While the British system attempts to provide broad protection for free expression, the British system is constrained by its need to fit the free exercise claim into a cultural or ethnic context. This produces somewhat strained jurisprudence. These weaknesses are then compounded in cases brought under the ECHR, because the U.K. must rely on the decisions made by the European Court of Human Rights whose free exercise decisions offer plaintiffs little hope of success.

The structure of this note is as follows: first, I explain the evolution of the United States' system of protection for free exercise, as well as its

22. *Id.*

23. *See generally, e.g., JFS, 2 A.C. 728.*

current status. I then turn to the British system and describe the various ways a free exercise case can be brought in the United Kingdom, as well as discuss the outcomes of those cases and possible implications of choosing one strategy over another. Third, I analyze three ways in which the different methods used by the U.S. and the U.K. to characterize religion affect their free exercise jurisprudence, and why the characterization offered by the United States provides plaintiffs with a stronger basis for judicial support for their free exercise claims. Finally, I offer a brief conclusion and summary.

I. THE AMERICAN SYSTEM

A. The Constitution and Basic Foundation of Free Exercise

The foundation for American protection of freedom of expression is the First Amendment to the U.S. Constitution, which states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”²⁴ The idea of establishing a government without a corresponding state religion was an innovative concept, but one which the Founders were eager to embrace,²⁵ particularly given that many early settlers to the United States immigrated in order to escape religious persecution and several states were founded on freedom of religion.²⁶ The intention of the founders appeared to be that individual exercise of religion would be enhanced, were religion not tied to the national government, as articulated by James Madison:

If a further confirmation of the truth could be wanted, it is to be found in the examples furnished by the States, which have abolished their religious establishments. I cannot speak particularly of any of the cases excepting that of Virg[inia][,] where it is impossible to deny that Religion prevails with more zeal, and a more exemplary priesthood than it ever did when established and patronized by Public authority.²⁷

The general homogenization of religious practices in early American, however, resulted in little use being made of the free exercise clause until the late 1800s, when Mormons wishing to continue their practice of

24. U.S. CONST. amend I.

25. *See generally* Letter from James Madison, to Edward Livingston (July 10, 1822) (on file with the Princeton University Library); Letter from Thomas Jefferson, *supra* note 6.

26. The Pilgrims coming to America to worship freely, as well as the founding of Pennsylvania and Maryland as states which provided religious havens for Quakers and Catholics respectively, are requisite parts of any United States History class for grade school children.

27. Letter from James Madison, *supra* note 25.

polygamy after Utah became a U.S. territory relied on its protection.²⁸ The Supreme Court, however, swiftly and sharply struck down these Constitutional appeals on the grounds that while “Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion . . . it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity.”²⁹ For the next half century, the rule appeared to be that while no state could prohibit religious belief, it could prohibit certain forms of religious conduct.

It was not until the late 1940s that the Supreme Court began to articulate what would develop into the contemporary free exercise jurisprudence. In *Everson v. Board of Education*, the Supreme Court upheld a law permitting tax-raised funds to pay for the busing of all New Jersey children to school, including Catholic schoolchildren attending parochial schools.³⁰ Despite their approval of state funds being used in this manner, the Court expressed for the first time its view that a “wall of separation” must exist between church and state.³¹ The Court maintained, however, that while there was to be a “wall” between church and state so as to avoid the establishment of religion, the state “cannot hamper its citizens in the free exercise of their own religion . . . it cannot exclude individual[s] . . . because of their faith or lack of it, from receiving the benefits of public welfare legislation.”³² This statement by the Court meant that citizens of states were free to take advantage of public legislation which would facilitate a citizen’s individual exercise of his or her religion, without such action being considered an endorsement or “establishment” of that religion.

B. *Sherbert v. Verner*

It was not until the 1960s that the Supreme Court developed a firm test for determining when the government might curtail an individual’s right to free expression of religion, whereby an infringement of free exercise rights could only be justified by “a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.”³³ In 1963, a

28. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890); *Mormon Church v. United States*, 136 U.S. 1 (1890).

29. *Reynolds*, 98 U.S. at 162, 165.

30. *Everson*, 330, U.S. at 18 (1947).

31. *Id.* at 18.

32. *Id.* at 16.

33. *Sherbert*, 374 U.S. at 403.

case was brought by a Seventh-Day Adventist appellant, arguing that the state of South Carolina could not deny her unemployment compensation on the grounds that her refusal to work on Saturdays, the holy day of her faith, meant that she had refused employment without good cause.³⁴ The South Carolina Supreme Court had found that her “ineligibility infringed no constitutional liberties” because the statute requiring her not to refuse employment without good cause placed no restrictions on her freedom of belief or the free exercise of her religion.³⁵ In contrast, the appellant argued that the free exercise clause should prevent the state from disallowing her benefits.³⁶

The Court noted that while the government could not regulate religious beliefs, it could regulate conduct when the “actions so regulated have . . . posed some substantial threat to public safety, peace or order,”³⁷ but *only* if the burden on free exercise resulted from a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.”³⁸ Moreover, if the burden on free exercise was the effect of a law which impeded religious observance, or discriminated between religions, such a law was invalid even if the burden on free exercise was indirect.³⁹

The Court found that the appellant’s disqualification indirectly burdened her free exercise because the disqualification exerted severe pressure on her to abandon her religious beliefs.⁴⁰ In addition, South Carolina had specifically exempted Sunday observers from having to make a similar choice.⁴¹ Finally, the Court found there was no compelling state interest behind the enforcement of the statute, as appellees had suggested only that people requesting unemployment might falsely claim religious objections to Saturday work.⁴² The Court found that even if this was a legitimate concern, the state would have to show that “no alternative forms of regulation would combat such abuses without infringing *First Amendment* rights.”⁴³ Through *Sherbert*, the Supreme Court put the burden on the *state* to prove that a limitation on free expression was the *only*

34. *Id.* at 399-400.

35. *Id.* at 401.

36. *See id.* at 402.

37. *Id.* at 402-03.

38. *Id.* at 403.

39. *Id.* at 404.

40. *Id.*

41. *Id.* at 406 (noting that as the state had passed a law permitting textile workers “conscientiously opposed to Sunday work” to not lose their job or their seniority by their refusal).

42. *Id.* at 407.

43. *Id.* (emphasis added).

solution to a compelling problem.

C. *Wisconsin v. Yoder*

The Supreme Court expounded upon the *Sherbert* compelling interest test in *Wisconsin v. Yoder* and maintained the Court's legal conviction that an individual's First Amendment right to free exercise of his or her religion was something courts should strongly protect. In *Yoder*, the defendants were Old Order Amish parents who refused to send their children to public school beyond 8th grade⁴⁴ on the grounds that it was against the tenants of their faith.⁴⁵ Wisconsin had recently introduced a law mandating that all children attend public school until age 16, and the Amish parents were found to be in violation of this law.⁴⁶ The Amish parents appealed under the First Amendment, arguing that it was within the free exercise of their religion to refuse to allow their children to attend public school after 8th grade.⁴⁷

In *Yoder*, the Supreme Court applied the *Sherbert* test, repeating that "activities of individuals, even when religiously based, are often subject to regulation by the States . . . [but] there are areas of conduct protected by the Free Exercise Clause . . . [that are] beyond the power of the State to control."⁴⁸ In contrast, however, to their statements in *Sherbert*, which focused almost exclusively on the state's action, in *Yoder* the Court spent significant time establishing that the Amish peoples' beliefs were sincere, that they were the product of a long and notable religious tradition,⁴⁹ and that there would be no ill effects resulting from the decision to permit the Amish to remove their children from formal school after completion of 8th grade.⁵⁰ The Court noted that "we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent."⁵¹ This wording was quite different from *Sherbert*, which made no attempt to determine whether the respondent's religious belief in Saturday as the Sabbath was "inseparable and interdependent" from a mode of life which required her to not work on the Sabbath.

44. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

45. *Id.* at 209 (noting that Old Order Amish communities believed children's attendance at high school was contrary to the Amish religion and way of life).

46. *Id.* at 207-08.

47. *Id.* at 208-09.

48. *Id.* at 220.

49. *Id.* at 210 (explaining that the Amish have rejected material culture since the 16th century, and that the objection to formal education is grounded in this belief).

50. *See id.* at 212 ("[T]he Amish succeed in preparing their high school age children to be productive members of the Amish community.").

51. *Id.* at 215.

The Court clearly stated that Amish parents were permitted, under the free exercise clause, to refuse to send their children to public school after 8th grade.⁵² However, the Court seemed to wrestle with the reasoning behind this ruling, resulting in a lengthy discussion on the history and authenticity of the Amish faith, and their repeated declarations that imposing the public education requirement on Old Order Amish would severely limit their religious expression.⁵³ In addition, the Court appeared eager to show that the state's interest in children remaining in school until 16 could be achieved in other ways.⁵⁴ *Yoder* appeared to solidify the "compelling state interest" test, ensuring that the state would carry a heavy burden when attempting to show the necessity of burdening free exercise of religion.

D. *Employment Division v. Smith*

With the application of the "compelling interest" test in *Yoder*, it appeared that the Supreme Court had firmly established the American law, for both state and federal courts, as regards the free exercise clause. The evolution of the Supreme Court, however, from a conglomerate of more liberal justices in the 1960s and 1970s, to the more conservative Rehnquist Court in the early 1990s,⁵⁵ created a dramatic shift in free exercise interpretation, notably expressed in *Employment Division v. Smith*.

The ingestion of peyote, a form of cactus,⁵⁶ was deemed by Oregon to be possession of a "controlled substance" in violation of the Federal Controlled Substances Act,⁵⁷ even when such ingestion was part of a religious ceremony where the drug was used as a sacrament.⁵⁸ Respondents were fired from their jobs and denied unemployment benefits after having ingested peyote as part of a Native American Church ceremony.⁵⁹ Upon

52. *Id.* at 234.

53. *Id.* at 219 ("[T]he unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.").

54. *Id.* at 224 (noting that should Amish children choose to leave the church, their practical training would make it unlikely that they would become burdens on society).

55. Chief Justice Rehnquist began as an Associate Justice on the court in 1972, was promoted to Chief Justice in 1986 and led an increasingly conservative bloc of justices. See *William H. Rehnquist, THE SUPREME COURT HISTORICAL SOCIETY*, <http://www.supremecourthistory.org/history-of-the-court/chief-justices/william-rehnquist-1986-2005/>.

56. OMAR C. STEWART, *PEYOTE RELIGION: A HISTORY* 3 (University of Oklahoma Press 1987).

57. *Smith*, 494 U.S. at 874.

58. *Id.* at 874-75.

59. *Id.* at 874.

first examination, it appeared that the *Smith* case would follow the “compelling interest” test expressed in *Yoder*, and the state would be forced to establish compelling arguments for why religious peyote use should not be permitted. Justice Scalia’s majority opinion, however, declared that the Supreme Court had “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate”⁶⁰ and that the free exercise clause did not excuse an individual from an “obligation to comply with a valid and neutral law of general applicability.”⁶¹

In addition, the Court stated that “[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.”⁶² The Court further noted that *Smith* did not present this form of dual claim.⁶³ In respect to the *Sherbert* test, the Court wrote, “We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation[.]”⁶⁴ and commented that, in recent cases, it had declined to even apply the *Sherbert* test.⁶⁵ The Court held instead that *Sherbert* was inapplicable to free exercise challenges to prohibitions on particular forms of religious conduct.⁶⁶

The Court’s decision in *Smith* produced severe protests by religious groups and an almost immediate response from Congress. A coalition of both left- and right-wing religious rights groups⁶⁷ formed to request Congressional action. Within two years of *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), which restored the *Sherbert* test as an acceptable defense for people who found their free exercise of religion burdened by governmental legislation.⁶⁸ RFRA specifically stated

60. *Id.* at 878-79.

61. *Id.* at 879 (internal quotation marks omitted).

62. *Id.* at 881.

63. *Id.* at 882.

64. *Id.* at 883.

65. *Id.* at 883-84.

66. *Id.* at 884-86.

67. The coalition included such unfamiliar bedfellows as the American Civil Liberties Union, the National Association of Evangelicals, the Southern Baptist Convention, the Mormon Church, and the American Jewish Congress. Peter Steinfelds, *Clinton Signs Law Protecting Religious Practices*, THE NEW YORK TIMES, (Nov. 17, 1993), available at <http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html?pagewanted=1&src=pm>.

68. Religious Freedom Restoration Act of 1993 (RFRA) § 2(b)(1), 42 U.S.C. § 2000bb *et seq.* [hereinafter RFRA] (“The purposes of [the Act] are— (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to

that in order to burden religion, the government must prove that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁶⁹ Despite the Supreme Court’s rejection of the “compelling interest” test for free exercise, it appeared that public opinion and Congressional legislation had been able to preserve the *Sherbert* test.

E. Development of the Current Bifurcated State and Federal System

The Supreme Court, however, was not inclined to have its decision in *Smith* dismissed so quickly through an act of Congress. In *City of Boerne v. Flores*, the Catholic Archbishop of San Antonio applied for a building permit to enlarge his church.⁷⁰ When the permit was denied under an ordinance preserving historic buildings, he brought suit under RFRA to challenge the ordinance,⁷¹ but the District Court ruled that, as applied to state laws, RFRA was not a proper exercise of Congress’s Section 5 power to enforce the 14th Amendment.⁷²

The Supreme Court agreed with the District Court, noting that “Congress’ power under Section 5 . . . extends only to enforcing the provisions of the Fourteenth Amendment . . . not the power to determine what constitutes a constitutional violation.”⁷³ The Court noted that RFRA appeared to “attempt a substantive change in constitutional protections . . . [which] apply to every agency and official of the Federal, State and local Governments,”⁷⁴ which it found to be highly in excess of the forms of Congressional action permitted under the Constitution. In addition, the Court worried that “[t]he stringent test RFRA demands of state laws reflect a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved”⁷⁵ and concluded that “the provisions of the federal statute here invoked are beyond congressional authority.”⁷⁶ *City of Boerne* therefore created a bifurcated system, wherein free exercise claims brought under state law would be subject to the Supreme Court’s test of

guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”).

69. RFRA, *supra* note 69, at 3(b)(1),(2).

70. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

71. *Id.*

72. *Id.*

73. *Id.* at 519 (internal quotation marks omitted).

74. *Id.* at 532.

75. *Id.* at 533.

76. *Id.* at 536.

Formal Neutrality, as explain in *Smith*,⁷⁷ while free exercise claims brought under federal law would still be subject to the *Sherbert* test as described in RFRA.

The right to bring a free exercise claim against federal law under RFRA was upheld in *O Centro Espirita v. Gonzales*, where a minority Brazilian religious sect who practiced in Florida was permitted, as part of a religious ritual, to drink tea which included a hallucinogenic plant.⁷⁸ The Court noted that under RFRA, the government must establish (1) a compelling government interest in burdening an individual's free exercise of religion, and (2) the burden must be the least restrictive method of furthering that interest.⁷⁹ The Court concluded that the government's interest in preventing the diversion of the tea from the church members to recreational users was a slippery-slope argument not compelling enough to restrict the church's use of the tea.⁸⁰ In doing so, the Court affirmed the use of RFRA as a tool for courts to recognize exceptions to federal laws which infringe on free exercise,⁸¹ thereby maintaining the *Sherbert* test as the legitimate standard for courts to apply when dealing with federal regulations.

As a result of the evolution of American common law, the United States currently applies the *Sherbert* test to any federal law deemed to impede the free exercise of religion. The federal government must, therefore, show that (1) there was a compelling government interest for the enactment of the law and (2) the law which created a burden on free exercise must be the least restrictive method of furthering that government interest. However, with the exception of those areas covered by the Religious Land Use and Institutionalized Persons Act (RLUIPA),⁸² state laws are still governed by the *Smith* test, which requires only that the law be neutral on its face, but permits laws which have the effect of burdening free exercise of religion.

77. *Id.* at 536 (“[I]t is this court’s precedent, not RFRA, which must control.”). This is not true of all state claims. Under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*, states are prohibited from imposing burdensome zoning laws on religious buildings, and may not impose burdens on the free exercise of religion by state prisoners. This provision was upheld in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

78. *O Centro Espirita*, 546 U.S. at 423.

79. *Id.* at 424.

80. *Id.* at 436.

81. *Id.* at 434.

82. RLUIPA prevents the imposition of burdensome land use regulations on religious assemblies or institutions, and protects the free exercise of religion for institutionalized persons. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2006)

II. THE BRITISH SYSTEM

A. An Overview of the British Legal System

The United Kingdom's legal system includes law which applies to all four countries—Scotland, Ireland, Wales, and England, as well as the bodies of laws which are created by and regulate the individual countries.⁸³ There is no written constitution in the United Kingdom, and, therefore, law that would be considered “constitutional” in other countries arises instead from statutes, judicial precedent or common law conventions.⁸⁴ As a member of the European Union, the United Kingdom also incorporates European legislation into their judicial system, including the European Convention on Human Rights (ECHR), and recognizes the jurisdiction of and precedents from the European Court of Justice and the European Court of Human Rights.⁸⁵ According to the British House of Lords, if there is a conflict between EU law and the law of the United Kingdom, the EU law must be supreme.⁸⁶ The House of Lords was the highest Court of Appeal for Great Britain, until the establishment of a Supreme Court in 2005.⁸⁷

The Church of England is still the established church of the nation, but its power is largely symbolic and its existence appears to neither enhance nor impede British protection of free exercise.⁸⁸ The United Kingdom does not currently possess any statutes specifically requiring the state to uphold free exercise, though the Equality Act of 2006 includes religion as one of its protected characteristics.⁸⁹ As a result, plaintiffs must rely either on another statutory provision which can be adapted to cover free exercise claims, or, more recently, bring such claims under the ECHR.

B. Claims Brought Under the Race Relations Act of 1976

The Race Relations Act of 1976 (Race Relations Act) was intended to provide “racial groups” with an ability to seek relief from discrimination on

83. Sarah Carter, *A Guide to the UK Legal System*, GLOBALEX, (Nov. 2005), http://www.nyulawglobal.org/globalex/United_Kingdom.htm#BACKGROUND. The law discussed in this note is the general law which governs all four kingdoms, but will be referred to as British law because the cases discussed arise under the court system in Great Britain.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. See generally Andrew Lynch, *The Constitutional Significance of the Church of England in LAW AND RELIGION* 168-196 (Peter Radan, et al. eds., 2005).

89. The Equality Act, 2006, c. 3 (U.K.), available at http://www.legislation.gov.uk/ukpga/2006/3/pdfs/ukpga_20060003_en.pdf.

racial grounds.⁹⁰ The term “racial group” included color, race, nationality, and ethnic or national origins of a person.⁹¹ Since many religions, and particularly minority religions, are in some way tied to ethnic groups, the expansion of the definition of “racial group” allowed people to bring free exercise claims under the Race Relations Act, provided they could show that their religion was strongly tied to a racial or ethnic component.

1. *Mandla v. Dowell Lee*

In *Mandla v. Dowell Lee*, a Sikh boy was denied admission to a private school on the grounds that the school’s uniform policy did not permit the wearing of a turban in school.⁹² Although such a case could clearly be viewed as a free exercise claim, under British law the boy’s father brought an action against the school for racial discrimination. The father sought a declaration that Sikhs were a racial group under the Race Relations Act that wearing a turban was a requirement of the Sikh religion, and therefore, his son could not be denied entrance to school based on his religious requirement to wear a turban.⁹³

In order to receive such protection, however, Sikhs had to qualify as a racial group under the requirements of the Race Relations Act. The House of Lords determined that the phrase “ethnic group,” as used in the Race Relations Act, meant that the group “must . . . regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics.”⁹⁴ The court then defined seven characteristics of an ethnic group, including “a common religion different from that of neighboring groups or from the general community surrounding it.”⁹⁵ Since House of Lords determined that Sikhs were “a distinctive and self-conscious community” who fit the enumerated characteristics of an ethnic group, discrimination against Sikhs was determined to be a violation of the Race Relations Act.⁹⁶

One form of discrimination under the Race Relations Act was the application of “a requirement or condition which . . . would apply equally . . . but . . . is to the detriment of [the] other because [the other]

90. Race Relations Act, 1976, c. 74 (U.K.), available at http://www.legislation.gov.uk/ukpga/1976/74/pdfs/ukpga_19760074_en.pdf.

91. *Id.* at 3(1).

92. *Mandla*, 2 A.C.559.

93. *Id.*

94. *Id.* at 562.

95. *Id.* (noting that a shared history and cultural tradition were considered “essential” characteristics of an ethnic group, while being a minority or an oppressed group, a common geographical origin, and common language, common literature and common religion which all differed from the surrounding majority were considered “relevant”).

96. *Id.* at 565.

cannot comply with it.”⁹⁷ The court determined that, since ethnic origins were inherited and unalterable, such compliance must be “consistent[] with the customs and cultural conditions”⁹⁸ of the ethnic group. Since wearing a turban was a religious condition imposed by Sikh “customs and cultural conditions,” a requirement to not wear a turban was a condition the son could not comply with, and, therefore, was racially discriminatory.⁹⁹

2. *R (Watkins-Singh) v. Governing Body of Aberdare Girl’s High School*

Although the ECHR was adopted in 1998 and provided a statute under which plaintiffs could bring free exercise claims,¹⁰⁰ plaintiffs found it was preferable to bring claims under the Race Relations Act when possible, as courts were more likely to find in their favor.¹⁰¹ In this case, a young Sikh girl was forbidden to wear a Kara, a silver bangle bracelet worn by observant Sikhs, to her high school, as such an item was forbidden under the school’s dress code policy.¹⁰² The *Mandla* decision had already defined Sikhs as an ethnic group, and so the U.K. Supreme Court proceeded with an analysis of whether the claimant had a religious obligation stemming from her ethnicity to wear the Kara.¹⁰³ The Court determined that while wearing it was not mandatory, the claimant felt it was an extremely important indication of her faith.¹⁰⁴

The Court adopted four steps to determine whether the claimant had been subjected to indirect discrimination.¹⁰⁵ First, the Court determined that the “provision, criterion or practice” at issue was the school’s policy permitting only one pair of stud earrings to be worn and no other jewelry.¹⁰⁶ Second, the policy’s effect on the claimant, in prohibiting the claimant to practice this aspect of her religion, was compared to the policy’s effects on other students whose religious practices were not in conflict with the policy.¹⁰⁷ Third, the Court found that since the policy did

97. Race Relations Act, at 1(1)(b)(iii).

98. *Mandla*, 2 A.C.566.

99. *Id.*

100. *See generally* Human Rights Act, 1998, (U.K.).

101. *See infra* Part II.C (discussing British case law appealed under article 9 of the ECHR). *See generally* *JFS*, 2 A.C. 728; *R. (on the Application of Watkins-Singh) v. The Governing Body of Aberdare Girls’ High School*, [2008] EWHC 1865 (Admin), [2008] W.L. 2872609, available at <http://www.bailii.org/ew/cases/EWHC/Admin/2008/1865.html>.

102. *Watkins-Singh*, W.L. 2872609 ¶ 10.

103. *See id.* ¶ 23-30.

104. *Id.* ¶ 29.

105. *Id.* ¶ 38.

106. *Id.* ¶ 39.

107. *Id.* ¶ 43.

not harm other students whose religious practices were not in controversy with the policy, it must examine whether the claimant suffered a “particular disadvantage or determinant” by the policy, based on whether “(a) that person genuinely believed . . . that wearing this item was a matter of *exceptional* importance to . . . racial identity or . . . religious belief and (b) the wearing of this item can be shown objectively to be of *exceptional* importance to his or her religion or race, even if . . . not an actual requirement”¹⁰⁸ Fourth, the Court contended that the prohibition against wearing the Kara was disproportionate and not justifiable, because the Kara was a small item, and the prohibition on wearing it constrained the claimant’s religious freedom.¹⁰⁹ The claimant should, therefore, be permitted to wear the Kara as an expression of her religion as connected to her Sikh ethnicity.

3. *R. v. Governing Body of JFS and Admissions Appeal Panel of JFS*

The interconnection between ethnicity and religion was strengthened in *R. v. Governing Body of JFS and Admissions Appeal Panel of JFS*, where the Court determined that adoption of certain religions permitted a person to adopt a new ethnicity as well. A person could thereby claim the protection of the Race Relations Act for their right to free exercise of their newly adopted religion. A teenage boy whose father was ancestrally Jewish, but whose mother was an Italian Catholic who had converted to Masorti Judaism wished to attend JFS, a public Orthodox Jewish School.¹¹⁰ The claimant was denied admission because the school required that all pupils be of Jewish descent as defined in the Orthodox tradition: each pupil’s mother must have either been born Jewish, or have converted to Orthodox Judaism.¹¹¹

The Court reviewed the *Mandla* test for ethnicity and determined that Jews qualified as an ethnic group. The Court, however, concluded that adopting the Jewish faith also automatically granted a person Jewish ethnicity as well, because for Jews, religion and ethnicity were intertwined.¹¹² Significantly, the Court held that *any* adoption of the Jewish faith, no matter what form (conservative, reform, orthodox, etc.), would convey on the convert both the Jewish faith and the Jewish ethnicity.¹¹³ As

108. *Id.* ¶ 56.

109. *See id.* ¶¶ 72-91.

110. *JFS*, 2 A.C. 744. In the UK it is very common for public, state-supported schools to be religiously affiliated and limit their enrollment to members of that religion.

111. *Id.* at 753.

112. *Id.*

113. *See id.*

a result, JFS's refusal to admit the claimant because the claimant was not "properly" Jewish was deemed to be direct racial discrimination under the Race Relations Act.¹¹⁴

The claimant wished to freely exercise his religion by requesting admission to a school which observed the religious faith that he determined he belonged to. The Court deemed that the school could not deny him admission based on religious reasons because through his mother's conversion, he acquired both a religion and an ethnicity. His Jewish ethnicity protected against the religious discrimination, because it was fully imparted regardless of how his mother converted to Judaism. The Court repeatedly emphasized that for Jews, "it is almost impossible to distinguish between ethnic status and religious status."¹¹⁵ This case was deemed a free exercise case because it barred the school from denying the claimant the ability to be viewed as Jewish for purposes of admission standards.

C. Claims Brought Under the ECHR Art. 9

The European Convention on Human Rights was incorporated into British law through the Human Rights Act of 1998.¹¹⁶ It included Article 9, which states:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.¹¹⁷

For the first time in British law, this gave plaintiffs a statutory provision under which they could bring free exercise of religion suits.¹¹⁸ In addition, the application of the ECHR meant that British courts could now rely on the precedents of the European Court of Justice and the European Court of Human Rights, known as the Strasbourg Court.¹¹⁹ It is nonetheless questionable whether this actually provides more protection for free exercise, as the Strasbourg Court has consistently upheld the rights of states to restrict free exercise of religion, as long as the state can establish a

114. *Id.* at 754.

115. *Id.* at 752.

116. *See generally* Human Rights Act, 1998, (U.K.).

117. European Convention on Human Rights art 9, Nov. 4, 1950, ETS 5 [hereinafter ECHR] available at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG>.

118. *See* EDWARD J. EBERLE, CHURCH AND STATE IN WESTERN SOCIETY 34 (Ashgate Publishing, 2011).

119. *Id.*

legitimate reason for doing so.¹²⁰

1. R v. Williamson

Since 1987, school teachers in state schools or schools which received public funding were banned from administering corporal punishment to children.¹²¹ The claimants, however, adhered to a fundamentalist form of Christianity, which prescribed corporal punishment as an appropriate disciplinary action for misbehaving children.¹²² They were the head teachers, teachers and parents of children at four Christian schools who claimed that the statutory ban interfered with their right to freely exercise their religious beliefs.¹²³ The Court notes that “religious faiths call for more than belief,”¹²⁴ but notes that the “freedom to manifest belief is qualified” under Article 9 in order to maintain a peaceful pluralistic society.¹²⁵

Where a claimant’s professed belief is at issue, Article 9 requires the Court to inquire into the genuineness of the claimant’s belief so as to ensure that the religious belief is made in good faith.¹²⁶ The Court, however, is not to inquire into the validity of the espoused belief.¹²⁷ The standard requirements for a belief is that it must be consistent with basic standards of human dignity or integrity, it must relate to matters that are more than trivial, it must possess an adequate degree of seriousness and importance, and it must be coherent.¹²⁸ Though the Court considered whether a belief in corporal punishment could be considered inconsistent with basic standards of human integrity, it chose to consider the belief valid.¹²⁹

Although the Court recognized that the ban on corporal punishment acted as an interference on a valid religious belief, it deemed that interference justified because it was, within the meaning of Article 9, interference “necessary in a democratic society . . . for the protection of the

120. See generally e.g., *Cha’are Shalom Ve Tsedek v. France*, App. No. 27417/95, ECHR (2000), available at <http://strasbourgconsortium.org/document.php?DocumentID=172>; *Karaduman v. Turkey*, App. No. 16278/90, ECHR (1993), available at <http://strasbourgconsortium.org/document.php?DocumentID=4237>; *Ahmad v. United Kingdom*, 4 EHRR 126 (1981); *Sahin v. Turkey*, App. No. 44774/98, ECHR (2010), available at <http://strasbourgconsortium.org/document.php?DocumentID=2103>.

121. *Williamson*, 2 A.C., at 253-54.

122. *Id.* at 255.

123. *Id.*

124. *Id.* at 257.

125. *Id.*

126. *Id.* at 258.

127. *Id.*

128. *Id.* at 258-59.

129. See *id.* at 260.

rights and freedoms of others.”¹³⁰ The Court explained that the statute pursued the legitimate aim of protecting vulnerable children, because it was known that corporal punishment deliberately inflicted physical violence and the legislation was intended to protect against harmful effects that might result from such violence.¹³¹ The Court also noted that the statute was not disproportionate, as parents were still free to administer mild corporal punishment to their children within the privacy of their homes.¹³² The Court concluded that the legislature, while bound to respect the parents’ religious beliefs, was permitted to determine that manifesting those beliefs was not in the best interests of children, and therefore, a broad social policy against such practices was warranted.¹³³

2. *R (Begum) v. Headteacher and Governors of Denbigh High School*

The *R (Begum) v. Headteacher and Governors of Denbigh High School*¹³⁴ decision was notable for its extensive use of precedent from the European Court of Human Rights and for its holding that not only can the state determine limitations on the free expression of religion, but such responsibilities can also be delegated to sub-entities, such as schools, and these entities’ decisions concerning the limitations of free expression are to be respected. The claimant in *Begum* attended a secondary school whose dress code included the *shalwar kameez*, a Middle Eastern garment, as a uniform option for Muslim female students.¹³⁵ For the first few years at school, the claimant wore the *shalwar kameez*, but after living with her older brother, came to school and stated that she wished to wear a *jilbab*, a more conservative Muslim garment.¹³⁶ The school denied her request, and the claimant brought suit under Article 9 of the ECHR.¹³⁷

In making their decision, the Court cited extensively from Strasbourg Court precedent, noting that “[t]he Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief . . . where a person has voluntarily accepted . . . [a] role which does not accommodate that practice . . . and there are other means . . . to practice or observe his or her religion . . .”¹³⁸ Since the claimant had been given full opportunity to attend other schools where she could wear the *jilbab*, the

130. *Id.* at 264 (quoting ECHR, *supra* note 117, art. 9).

131. *Id.*

132. *See id.* at 264-65.

133. *Id.* at 265.

134. [2007] 1 A.C.100.

135. *L.*, at 108.

136. *Id.* at 108-09.

137. *Id.* at 111.

138. *Id.* at 112-13.

Court found that upholding the school's rule against a claim for free exercise was supported by precedent.¹³⁹ The Court also found that under British law, the school's decision to create and enforce a dress code which sought a middle ground between varying Muslim traditions of dress was justifiable.¹⁴⁰ As to the issue of proportionality, the Court noted that the school "had taken immense pains to devise a uniform . . . which respected Muslim beliefs . . . in an inclusive, unthreatening and uncompetitive way."¹⁴¹ Finally, the Court concluded that the "power of decision" had been given to the school as it was "best placed to exercise it" and, therefore, should be trusted to make appropriate decisions, even if those decisions infringed upon free exercise.¹⁴²

3. *Eweida v. British Airways*

In a case which was popularized by the news media,¹⁴³ a Christian working as a check-in staff member of British Airways requested the right to visibly wear a silver cross during work.¹⁴⁴ Her request was denied under BA's dress code policy.¹⁴⁵ The Court found that the airline's position was justified because it had the right to create a basic dress code for its employees, and the dress code did not place Christians in general at a disadvantage.¹⁴⁶ The Court thereby appeared to uphold its view that institutions such as a school (in *Begum*) or an employer could make reasonable decisions concerning various requirements, including a dress code, by which its employees, students, or people who utilized its services had to abide.

The Court continued its precedent of showing strong favoritism towards institutional discretion by repeating its standard that the institution's policy could only be overcome if the appellant showed a strict religious duty to wear a certain item or act in a certain way, and an absolute inability to receive the same or similar service or benefit if the appellant's claim was denied. The Court noted that there was no suggestion that the claimant's beliefs *required* her to wear a cross.¹⁴⁷ In addition, no precedent

139. *Id.* at 114.

140. *Id.* at 108.

141. *Id.* at 117 (appearing deeply concerned that allowing one girl to wear the jilbab may create pressure for other Muslim girls to wear such garment who otherwise would choose not to wear it).

142. *Id.*

143. *Shirley Chaplin and Nadia Eweida Take Cross Fight to Europe*, BBC NEWS, (Feb. 12, 2010, 12:41 GMT), <http://www.bbc.co.uk/news/uk-england-devon-17346834>.

144. *Eweida v. BA* [2010] EWCA (Civ) 80, [2010] I.C.R. 890 [892].

145. *Id.*

146. *See id.* at 899-900.

147. *Id.* at 900-01.

under Article 9 of the ECHR supported the claimant's position, as she was free to seek other employment where she could wear a cross.¹⁴⁸

Finally, the Court appeared to add a new requirement for free exercise claims when they stated that "disadvantage to a single individual arising out of her wish to manifest her faith in a particular way"¹⁴⁹ was not sufficient to be deemed religious discrimination and necessitate a ruling under Article 9. The Court noted that "the detriment of [the appellant] was suffered by her alone: neither . . . was anyone else similarly disadvantaged."¹⁵⁰ This new requirement reinforces the necessity of proving that the action at issue is a strict religious duty imposed on all members of that religious group. Without the ability to prove this, most free exercise claims will fail because they would be deemed "disadvantages to a single individual," rather than religious discrimination against an entire group.

III. ANALYSIS AND COMPARISON

A. Characterization through Case Law

In the American system, the characterization of free exercise as an individual right is evidenced in both the constitutional protection and statutory protections. The inclusion of free exercise in the amendment protecting freedom of speech and the press indicates that the founders conceived of free exercise as a right which one exercised as an individual, much like an individual's right to speak.¹⁵¹ The introduction to RFRA shows that when the Supreme Court had, in the view of the American people, abrogated their responsibility to uphold an individual's right to free exercise, Congress intervened to ensure that any burden on free exercise be done only out of great necessity.¹⁵² They did not, however, qualify this protection with any stipulations concerning the nature, authenticity or validity of the religious belief.

In addition, while the facial neutrality test of *Smith* appeared to reduce the level of protection for free exercise, the breadth of its scope is evidence

148. *Id.* at 897-98.

149. *Id.* at 901.

150. *Id.* at 899.

151. *See, e.g.*, Letter from Thomas Jefferson, *supra* note 6; Letter from James Madison, *supra* note 25.

152. *See* RFRA §§ 2(a)(1)-(b)(2) (stating "[T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution . . . governments should not substantially burden religious exercise without compelling justification...the purposes of this Act are . . . to provide a claim or defense to persons whose religious exercise is substantially burdened by government.")

that the Supreme Court chose to uphold its characterization of religious expression as an individual matter, because they provided no cultural or ethnic-based exceptions to *Smith*. It has been argued that *Smith* “draw[s] upon a long history of official United States accommodation of religious practice” which favors majority religions.¹⁵³ Even if this were true, the favoring of majority religions is different than characterizing religion as one element within the greater framework of a majority or minority culture. Moreover, the *Smith* test has been understood by some scholars to “discourage government hostility to religion”¹⁵⁴ on the grounds that “the inquiry into neutrality is designed to place religious claimants on par with other claimants in society [particularly when concerning] government aid.”¹⁵⁵ Part of being placed “on par with other claimants” is that religion is viewed as its own separate element, to be protected or infringed on apart from other protected elements (i.e. gender, ethnicity, race). Though the *Smith* test may have resulted in a lack of judicial protection, its creation indicates that the Court’s characterization of religion as an individual right did not change.

The *Smith* test has now been partially overruled by RFRA.¹⁵⁶ In dealing with facially neutral laws, the Court has determined that not only is *mere* facial neutrality not determinative,¹⁵⁷ but that “the effect of a law in its real operation is strong evidence of its object.”¹⁵⁸ Should it be determined that a law was designed to be “an impermissible attempt to target petitioners and their religious practices,” such a law will not be permitted to stand, even though it can be deemed facially neutral.¹⁵⁹ Again, there is no stipulation that the religious practices be appropriate or valid, merely that the plaintiffs sincerely hold these practices to be religious.¹⁶⁰

The United Kingdom provides statutory protection for free exercise claims under the Equality Act of 2006 and the Race Relations Act of 1976,¹⁶¹ as well as Human Rights Act of 1998 which incorporated the

153. See EBERLE, *supra* note 119, at 161 (noting that in *Mueller v. Allen*, formal neutrality enabled the court to uphold a statute allowing taxpayers to deduct expenses from gross income up to a certain amount if they chose to send their children to a private, usually religious, school).

154. *Id.* at 157.

155. *Id.* at 156-57.

156. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (stating that “it is this Court’s precedent, not RFRA, which must control”); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 434 (2006) (stating that RFRA would apply to federal laws)

157. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993).

158. See *id.* at 535.

159. *Id.*

160. See *id.* at 531 (noting that a petitioner’s religious assertion “cannot be deemed bizarre or incredible”).

161. See EBERLE, *supra* note 119, at 33, 35.

ECHR.¹⁶² British courts have not decided free exercise cases under the Equality Act of 2006, choosing instead to protect minority religious rights under the Race Relations Act.¹⁶³ Implicit in the application of this statute is the requirement that any religious practice protected under it be deemed part of an ethnic group.¹⁶⁴ Such a characterization allows British courts to show respect for religious practices which are an integral part of a particular culture.¹⁶⁵ This characterization subordinates religion to race and ethnicity. Religious expression is not viewed as something which an individual undertakes on his or her own, but rather something which is practiced within a greater community.¹⁶⁶ In the end, the religious exercise is protected because it is part of cultural or ethnic community, but it is not protected on its own merits as an individual right.

As a result, while minority religions which are strongly attached to a particular culture and ethnicity will fit *Mandla* definition of an ethnic group as a “distinct community by virtue of certain characteristics,”¹⁶⁷ such a standard does not work as easily when dealing with large, diverse religions such as Christianity, Judaism, and Islam. These larger religions transcend the requirement of a “distinct community” because their adherents are widespread and extremely culturally and ethnically diverse. When the British courts attempted to apply the *Mandla* test to free exercise claims brought by adherents of these religions, the result was a somewhat strained judicial interpretation. In *JFS*, for example, the British Supreme Court ruled that all people who claim to be Jewish, regardless of their original background, the form of Judaism they practice, or actual ancestry, were to be deemed part of a single Jewish ethnic group.¹⁶⁸ The British Supreme Court was clearly seeking to preserve the plaintiff’s ability to freely identify himself as Jewish for the purpose of seeking admission to JFS, in straining the Race Relations Act to accommodate this type of free exercise. However, in straining the court’s jurisprudence so as to make Judaism into an ethnicity, the decision resulted in a severe requirement that religion be subordinated to another protected class such as ethnicity. In addition, the

162. See generally Human Rights Act, 1998, (U.K.).

163. See generally, *R. (on the Application of E) v. Governing Body of JFS*, [2009] UKSC 15; [2010] 2 A.C. 728 (S.C.) (appeal taken from Eng.); *Mandla (Sewa Singh) v. Dowell Lee* [1983] 2 A.C. 548 (H.L.) (appeal taken from Eng.).

164. See Race Relations Act art. 1(1)(b)(ii).

165. See generally *Mandla*, 2 A.C. 548.

166. See generally *id.*; *R. (on the Application of Begum) v. Headteacher and Governors of Denbigh High School*, [2006] UKHL 15; [2007] 1 A.C. 100 (H.L.) [114] (appeal taken from Eng.).

167. *Mandla*, 2 A.C. at 562.

168. See *JFS*, 2 A.C. at 753 (stating that “whatever their racial, national and ethnic background, conversion unquestionably brings the convert within the *Mandla* definition of Jewish ethnicity”).

court's disregard of the definition of "Jewish" offered by the U.K.'s Chief Rabbi and their adoption of their own definition solidified the court's position as the ultimate judge of whether or not a religious expression was valid enough to receive protection. As a result, while British courts are as equally open to hearing free exercise claims as American courts, the characterization of religion as something which is a part of an ethnic group results in a much higher bar for plaintiffs to overcome. Moreover, the addition of the requirement that the religious expression be valid and necessary means that many claims will fail, particularly those brought by members of larger religions, such as Christianity and Islam, whose traditions are so diverse that it is hard to determine whether or not a certain action is truly "necessary."¹⁶⁹

B. Characterization and Inquiry into Sincerity of Belief and Necessity of Practice

The contrasting characterizations of religion offered by the British and American courts have resulted in a different view of the scope of judicial functions performed by the courts when they hear a free exercise case. In the United States, the Supreme Court's understanding of religion as an individual right has led to the requirement that there be no inquiry into the sincerity of the plaintiff's beliefs, nor any analysis of whether the practice is an integral part of the plaintiff's belief system or is widely adhered to among followers of that belief system.¹⁷⁰ Since religion is an individual matter, it follows that individuals can hold different views on what is or is not a religious duty or what actions should be performed as an exercise of that religion. The purpose of the Court is merely to determine whether or not the plaintiff's right of free exercise was violated, not whether or not the plaintiff's claim to that right was valid. In contrast, the U.K.'s understanding of religion as an element of a broader cultural and ethnic community permits courts the freedom to inquire into the validity and authenticity of a claimed form of religious expression.¹⁷¹ Courts may request advice from religious community leaders as to whether the person's faith is authentic and whether their free exercise claim is an action deemed "necessary" for the adherents of that religion.¹⁷²

169. See, e.g., *Eweida v. BA* [2010] EWCA (Civ) 80, [2010] I.C.R. 890 [892]; *Begum*, 1 A.C. 100.

170. See *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

171. See *Williamson*, 2 A.C. at 258.

172. See, e.g., *JFS*, 2 A.C. at 754 (citing the Registrar of the London Beth Din and the Chief Rabbi of the UK as authorities who were questioned concerning how a person would be defined as a Jew); *Watkins-Singh*, W.L. 2872609, ¶ 23 (citing Professor Eleanor Nesbitt as a witness concerning Sikh traditions and customs).

In the United States, the Supreme Court has specifically stated that “Courts should not undertake to dissect religious beliefs . . . the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect . . . [and] Courts are not arbiters of scriptural interpretation.”¹⁷³ Assuming that religious beliefs and practices are individual expressions, it follows that a religious practice does not need to be “acceptable, logical, consistent, or comprehensible to others” in order to merit First Amendment protection.¹⁷⁴ A practice may even be deemed “bizarre or incredible” without falling outside of the First Amendment.¹⁷⁵ While there are some cases where the Court will discuss the petitioner’s beliefs in detail, the Court may only use these discussions to establish whether the issue at hand is one in which the government has a compelling interest and can therefore regulate. For example, in *Yoder*, the Court discussed the history and structure of the Amish faith to articulate their belief that the Amish educational system would adequately prepare Amish children for adult life, and, therefore, the Amish could freely exercise their right to have children refrain from attending formal school after 8th grade.¹⁷⁶ In addition, in *Smith* the Court refrained from discussing whether the plaintiffs were required to use peyote as an element of their faith, and whether the belief that they had to ingest the drug was in accordance with the wider Native American community’s stance on peyote.¹⁷⁷

In contrast, since British law views religion as an element within a larger framework of culture and ethnicity, British courts are permitted to make significant inquiries into the sincerity with which the claimant hold the religious view, the validity of that form of religious expression, and the level of duty the religion imposes on its members to take that particular action. For analyzing sincerity, the British Supreme Court has stated that “when the genuineness of a claimant’s professed belief is in issue in the proceedings, the Court will inquire into and decide this issue as an issue of fact.”¹⁷⁸ In addition, to be protected under article 9 of the ECHR, a belief must satisfy a list of characteristics including “consisten[cy] with basic standards of human dignity or integrity” and “an adequate degree of seriousness.”¹⁷⁹

173. *Thomas*, 450 U.S. at 715-16.

174. *Id.* at 714.

175. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

176. *See Yoder*, 406 U.S. at 212 (stating “the testimony...showed that the Amish succeed in preparing their high school age children to be productive members of the Amish community”).

177. *See generally Smith*, 494 U.S. 872.

178. *Williamson*, 2 A.C. at 258.

179. *Id.* at 258-59. The Court attempted to mitigate potential favoritism of majority religions by noting that “threshold requirements should not . . . deprive minority beliefs of . . . protection.”

In order to determine the authenticity of a religious belief, British courts can request information from religious leaders and other authoritative members of the community.¹⁸⁰ However, the court remains the ultimate judge of whether or not a belief is “necessary” enough to be given free exercise protection. For example, in *Watkins-Singh* the Court determined that the petitioner should be granted free exercise protection to wear her Kara because it was a common expression of observance among Sikhs, even though the petitioner’s wearing of the Kara was not required by Sikhism as she had not been fully initiated by a guru.¹⁸¹ The court’s decision to seek outside advice concerning the necessity of the practice can benefit smaller religions whose views and actions are fairly consistent. When dealing with large religions like Christianity or Islam, however, this can result in a plaintiff receiving little protection. In *British Airways*, the petitioner claimed that wearing a visible silver cross was an integral part of her practice of Christianity.¹⁸² The Court denied her claim noting that “neither [the claimant] nor any witness . . . suggested that the visible wearing of a cross was more than a personal preference . . . there was no suggestion that her religious belief, however profound, called for it.”¹⁸³ In this case, the court drew a distinction between an action which the plaintiff claim was an integral part of her individual practice of Christianity, and the status of that action as a required method of religious expression for the greater Christian community. While the British system still offers protection for free exercise claims, the inquiry into a petitioners’ sincerity and the religious legitimacy of their action risks alienating people for whom sincerity is difficult to prove, and adherents to religions which contain a diverse number of traditions, any one of which might be deemed necessary by some practitioners and unnecessary or a mere personal preference by others.

C. The ECHR and Broad Statutory Protections

With the passage of the U.K. Human Rights Act in 1998¹⁸⁴ which incorporated the ECHR into British law,¹⁸⁵ British citizens were given the statutory provision of Article 9 under which they could sue for free exercise rights.¹⁸⁶ It is true that in some ways Article 9 can be seen as a

180. See, e.g., *JFS*, 2 A.C., at 754; *Watkins-Singh*, W.L. 2872609, ¶ 23.

181. See *Watkins-Singh*, W.L. 2872609, ¶ 29.

182. See *British Airways*, I.C.R., at 900-01.

183. *Id.*

184. EBERLE, *supra* note 119, at 32.

185. CARTER, *supra* note 84.

186. See generally Human Rights Act, *supra* note 19.

parallel to the U.S. protections established in RFRA, as both provide a broad, statute-based provision which parties can sue under for the right to free exercise. However, the jurisprudence surrounding these statutes reflects the distinctive characterizations of religion held by the United States and the United Kingdom.

Since the Supreme Court has clearly stated that the United States looks only to precedent within the nation's court system itself, and not to any form of international law, claims brought in U.S. courts will be subject only to the jurisprudence developed by American courts.¹⁸⁷ Therefore, under RFRA and its case law, free exercise may not to be disturbed unless the government can establish that the disturbance "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."¹⁸⁸ As part of the European Union, however, U.K. courts must also recognize jurisprudence developed under EU courts, including the European Court of Human Rights.¹⁸⁹ The text of Article 9 allows free exercise of religion to be curtailed by "such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others."¹⁹⁰ These terms appear to place the burden on the government to show the validity of its limitations on free exercise, similar to the way RFRA requires the U.S. government to establish a compelling governmental interest. However, the inclusion of terms such as "public safety," "public order," and "health or morals" has allowed the European Court of Human Rights to establish a much broader interpretation of state interests that takes precedent over an individual's right to free exercise.

Under U.S. law, the government must show there was no viable alternative method of action that the government could have taken so as not to interfere with the individual's right to free exercise.¹⁹¹ The Supreme Court has stated that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" – the particular claimant whose sincere exercise of religion is being substantially burdened."¹⁹² Furthermore, the Court announced that "we must searchingly examine the interests that the

187. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010) (stating that "judgments of other nations and the international community are not dispositive").

188. RFRA §§ 3(b)(1), (2).

189. *See Begum*, 1 A.C., at 113.

190. ECHR, art 9.2.

191. *See RFRA* § 3(b)(2).

192. *O Centro Espirita*, 546 U.S., at 430-31.

State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption.”¹⁹³

In contrast, the Strasbourg Court has strongly established that before a country will be required to permit free exercise, the plaintiff must establish that there is no alternative measure or solution which would permit the plaintiff to continue his or her life while still freely expressing his or her religion. Such alternative solutions are extremely broad. For example, the Strasbourg Court held the following as viable alternatives that rendered Article 9 claims moot: the ability to leave the church and no longer serve as a clergyman,¹⁹⁴ the ability to seek and accept another form of employment which would permit duties of religious observance,¹⁹⁵ the ability to attend a private university which permitted the wearing of a headscarf, instead of attending the public university which banned headscarves,¹⁹⁶ the ability to resign one’s job rather than be forced to work during a Holy Day,¹⁹⁷ and the ability to import ritually slaughtered meat from another country, instead of slaughtering it oneself.¹⁹⁸

The European Court of Human Rights appears to interpret the core of Article 9 as a protection only in cases where the appellant would have absolutely no alternative way to freely exercise his or her religion. As a result of this incredibly high standard, plaintiffs bringing cases before British courts which look to the decisions of the European Court of Human Rights will find it very difficult to establish enough necessity to make the British courts require that the activity be permitted. Since plaintiffs almost

193. *Yoder*, 406 U.S., at 221.

194. *See X v. Denmark*, App. No. 7374/76, ECHR (1976), The Law ¶ 1 (stating “their right to leave the church guarantees their freedom of religion in case they oppose its teachings.”).

195. *See Ahmad*, 4 EHRR 126, ¶15 (stating “the applicant remained free to resign if and when he found that his teaching obligations conflicted with his religious duties.”).

196. *See Karaduman*, App. No. 16278/90, at The Law ¶2 (stating “The Commission takes the view that by choosing to pursue her higher education in a secular university a student submits to those university rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs.”).

197. *See Konttinen v. Finland*, App. No. 24949/94, ECHR (1996), The Law ¶ 2, available at <http://strasbourgconsortium.org/document.php?DocumentID=4753> (“Having joined The Seventh-day Adventist Church in 1991, he was free to relinquish his work if he considered that his professional duties were not reconcilable with his religious convictions. He could also have taken those Fridays off when the beginning of the Sabbath obliged him to leave work before his evening shift had ended.”).

198. *See Cha’are Shalom Ve Tsedek*, App. No. 27417/95, at The Law ¶ 80-81 (“[T]here would be interference with the freedom to manifest one’s religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable. But that is not the case. It is not contested that the applicant association can easily obtain supplies of “glatt” meat in Belgium.”).

always have the ability to change their job, change their living location, import necessary items from another location and modify their choices in life, these precedents make it very difficult to even conceive of a case in which a plaintiff could bring an Article 9 claim and the state would *not* have an appropriate reason as to why the plaintiff's free exercise right should fall before the country's stipulations. Therefore, plaintiffs bringing cases for free exercise in the U.K. must be prepared to rely on the traditional British jurisprudence, which protects free expression if there is a strong tie between the religious practice and an ethnic group, and the religious practice is deemed a necessity for the ethnic group.¹⁹⁹

CONCLUSION

As the "child" from its parent The United Kingdom, America was, in some sense, an attempt to correct deficiencies which its founders saw in their parent country. The American desire to allow for free exercise of religion, instead of having a single national church, provided a framework wherein both the legislature and the Supreme Court articulated an understanding of religion as a personal matter and an individual right. Based upon this understanding of religion, disputes concerning free exercise claims are resolvable without having to examine the nature of the religious belief or practice at issue. Once a sincere profession of religious belief has been made, the only question before the court is whether the government has a right to regulate the disputed action.

In contrast, the British understanding of religion is that it serves as one component of a larger cultural and ethnic framework. Therefore under British case law, for cases where a plaintiff would receive protection for his or her ethnicity or race, protection will also be provided for acts of free exercise of religion. However, the person performing the action must be a member of a protected ethnic group, and the action must be deemed a necessary practice for the group's members. Should a plaintiff attempt to bring a case under the ECHR, he or she will eventually find themselves back within the British framework, as the European Court of Human Rights consistently refuses to establish its own position on free exercise claims, but instead defers to the national law under which the dispute arose.

In practice, the British system provides substantive support for smaller religions that maintain fairly consistent practices and are practiced by a subset of people who could fit the definition of an ethnic group. However,

199. See, e.g., *Eweida*, I.C.R. 890 (case brought under Art. 9 claim and fails); *Begum*, 1 A.C. 100 (case brought under Art. 9 claim and fails); *JFS*, 2 A.C. 728 (case brought under Race Relations Act and succeeds).

because the standards for establishing that the disputed action is a necessary practice are so high, plaintiffs who are members of larger and more diverse religious communities risk either receiving an adverse judgment or receiving a judgment which strains the British court's jurisprudence in order to support the plaintiff. In contrast, the American view benefits a broader array of plaintiffs, because it narrows the scope of the court's inquiry to focus on the action at issue and not the belief behind it. While both nations uphold free exercise of religion as protected right, the difference in the way each country characterizes religion has led to the creation of different types of protection.