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WITCHES, ODIN, AND THE ENGLISH STATE: THE LEGAL RECEPTION OF A COUNTER-CULTURAL MINORITY RELIGIOUS MOVEMENT

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ABSTRACT

This article looks at the ways in which the legal system of a modern European jurisdiction has engaged with a counter-cultural minority religious movement. The jurisdiction in question is England and Wales, and the religious movement is revived modern Paganism. The article seeks to cast light on the question of what a post-Christian secular state does in practice when its commitment to pluralistic values encounters a group whose self-understanding challenges the norms of both Christianity and secularity. In more general terms, it allows us to look at how the law of England and Wales has attempted to move beyond its historic confessional Protestant premises; and how this attempt has not been without its anomalies and shortcomings.

KEYWORDS: England, paganism, new religious movements, minority religions, human rights

RELIGION IN MODERN ENGLISH LAW

England and Wales is one of the three legal jurisdictions that make up the United Kingdom of Great Britain and Northern Ireland, the other two being Scotland and Northern Ireland. Before the advent of the Enlightenment and the Industrial Revolution, it was an avowedly Christian state with the Church of England as its established religion. This arrangement broke down during the nineteenth century, as the English governing class admitted into its ranks first non-Anglican Protestants and Roman Catholics, then Jews, and finally people of any faith and none.[1] In the courts, the traditional doctrine that Christianity was an integral part of the ordinary law of the land was first wounded and then, in 1917, killed off for good.[2]

In modern times, English judges have spoken baldly of the "divide between Church and State;"[3] and a series of well-publicized decisions relating to homosexual relationships has emphasized the

1 The major steps along this path were the Sacramental Test Act 1828, 9 Geo. IV, c. 17; the Roman Catholic Relief Act 1829, 10 Geo. IV, c. 7; the Jewish Municipal Relief Act 1845, 8 & 9 Vict. c. 52; the Jews Relief Act 1858, 21 & 22 Vict. c. 49; and the Oaths Act 1888, 51 & 52 Vict. c. 46.

2 The leading cases were R v. Ramsay and Foote (1883) 15 Cox CC 231 (Eng.) and Bowman v. Secular Society Ltd [1917] AC 406 (Eng.).

3 Starting with Mr. Justice Simon Brown in R (Wachmann) v. Chief Rabbi [1993] 2 All ER 249 at 255 (Eng.), as subsequently endorsed at Supreme Court level by Lord Hope in R (E) v. Governing Body of JFS [2009] UKSC 15 [157] (Eng.).

formally areligious character of contemporary English law.[4] This position is consistent with the United Kingdom's international obligations, as state neutrality between different religions is required by the European Convention on Human Rights.[5] The Church of England has "little more than a ceremonial presence in the public sphere."[6] Its remaining status in England—it has not been the established church in Wales since 1920—may be regarded as a residual survival rather than as a defining feature of the contemporary legal landscape.[7] Its legal regimen forms a special category of "ecclesiastical law" that exists within well-demarcated boundaries and is largely enforced in separate ecclesiastical courts. England and Wales is formally no longer a Christian jurisdiction.

The basis of the law's present-day approach to religion was explained by Lord Nicholls in a 2005 case in the House of Lords (which was at that time the country's highest court):

> Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society.[8]

This principle of pluralism serves to deter the courts from inscribing religious value judgements into the law. The courts will enter such territory only if "a Claimant asks the court to enforce private rights and obligations which depend on religious issues"; for example, if a claimant's rights under a contract or trust are expressed to turn on some element of religious doctrine.[9] This reluctance to adjudicate on religious matters was highlighted in 2014, when the court dismissed an attempt by former members of the Church of Jesus Christ of Latter-day Saints (Mormons) to prosecute the president of that church for fraud.[10]

Against this background, Paganism should in principle be able to take its place as one of the many different religious traditions followed by members of contemporary English society. But the legal system's formal commitment to benign neutrality only gets us so far; it is sometimes imperfectly realized in practice. This need not be because of a confessional bias toward Christianity on the part of lawmakers, lawyers, and judges. The challenges are just as likely—indeed, more likely—to be attributable to a secular perspective that struggles to come to terms with beliefs

4 See esp. McFarlane v. Relate Avon [2010] EWCA (Civ) 880 (Eng.); R (Johns) v. Derby City Council [2011] EWHC 375 (Admin); Hall v. Bull [2012] EWCA (Civ) 83 (Eng.).

5 See esp. Manoussakis v. Greece [1996] ECHR 41 and Şahin v. Turkey, App. No. 44774/98, 44 Eur. H.R. Rep. 99 (2005).

6 Michael Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account* (Cambridge: Cambridge University Press, 2011), 156.

7 The status of the Church of England has well been described as an "anomaly." See Samantha Knights, *Freedom of Religion, Minorities, and the Law* (Oxford: Oxford University Press, 2007), 1.42; see also Samantha Knights, "Approaches to Diversity in the Domestic Courts: Article 9 of the European Convention on Human Rights," in *Legal Practice and Cultural Diversity*, ed. Ralph Grillo et al. (Farnham: Ashgate, 2009), 283–98, at 288. On the present legal relationship between the church and the English state, see further Mark Hill, *Ecclesiastical Law*, 3rd ed. (Oxford: Oxford University Press, 2007), chap. 1.

8 R (Williamson and Ors) v. Sec'y of State for Educ. and Employ [2005] UKHL 15 [15].

9 Shergill v. Khaira [2014] UKSC 33 [45]. See also the earlier case of Gilmour v. Coates [1949] AC 426.

10 Phillips v. Monson, March 20, 2014, https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/thomas-phillips-v-thomas-monson.pdf. Judge Howard Riddle stated, "To convict, a jury would need to be sure that the religious teachings of the Mormon Church are untrue or misleading. … No judge in a secular court in England and Wales would allow that issue to be put to a jury."

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that do not fit well with rationalist precepts. It is also relevant that the general background noise of English culture is still very perceptibly Christian. As two legal writers have noted in this context,

> there can be no doubt that the Christian religion provides the root of many of the social constructs that in the United Kingdom we take readily for granted. The working week has developed around the religious requirements of Christians. Most firms provide annual holidays at Christmas. Bank holidays such as Good Friday, and Whit Monday are directly linked to Christian holy days. The date is measured in reckoning the purported length of time since the birth of Jesus. School terms are arranged around Easter, Pentecost and Christmas.[11]

So it is that, as one of the leading scholars of contemporary religion in England has noted, "[r]elative to the religious majority, minority religions have to struggle for recognition and privileges."[12]

At this point, it will be useful to review briefly the ways in which Pagans and Paganism might seek to claim the protection of English law. There are broadly five means by which minority religious rights may come to be litigated in the English courts.

First, there is the *right to freedom of religion* set out in Article 9 of the European Convention on Human Rights. Article 9 confers an absolute right to "freedom of thought, conscience and religion," together with a qualified right to "manifest one's religion or beliefs." The qualified right may be abridged in certain specified circumstances.[13] The European Convention on Human Rights, as interpreted by the European Court of Human Rights in Strasbourg, is binding on the United Kingdom in international law. The "Convention rights" set out in the European Convention on Human Rights are also directly enforceable in the domestic courts under the Human Rights Act 1998. This Act requires public authorities (but not private entities) to act compatibly with the Convention rights; and it mandates that other legislation must be read compatibly with the Convention rights if at all possible.[14] A litigant who has exhausted her options in the

11 Gay Moon and Robin Allen, "Substantive Rights and Equal Treatment in Respect of Religion and Belief: Towards a Better Understanding of the Rights, and their Implications," *European Human Rights Law Review*, no. 6 (2000): 580–602, at 585.

12 Linda Woodhead, introduction to "Judaism, Sikhism, Islam, Hinduism and Buddhism: Post-war Settlements," by Robert Bluck et al., in *Religion and Change in Modern Britain*, ed. Linda Woodhead and Rebecca Catto (Abingdon: Routledge, 2012), 86–88, at 86.

13 The full text of Article 9 reads as follows:

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

European Convention on Human Rights, art, 9, Nov. 4, 1950, E.T.S. no. 5.

14 Human Rights Act 1998, §§ 3, 6. The Act appears to give a degree of emphasis to the Article 9 right. Section 13(1) provides, "If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right." Yet this provision has proven relatively insignificant in practice. See further Christopher McCrudden, "Religion, Human Rights, Equality and the Public Sphere," *Ecclesiastical Law Journal* 13, no. 1 (2011): 36–37; James Dingemans et al., *The Protections for Religious Rights: Law and Practice* (Oxford: Oxford University Press, 2013), 1.49.

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domestic courts may bring a case against the United Kingdom in the European Court of Human Rights, although this is a notoriously lengthy process.

Second, England has robust *anti-discrimination laws*. These intersect with the European Convention on Human Rights, as Article 14 of the Convention outlaws "discrimination on any ground such as … religion." Article 14 applies only, however, where a person's enjoyment of the Convention rights themselves is being impeded through discrimination. In English domestic law, discrimination on the grounds of religion or philosophical belief is unlawful in other contexts, too, including most notably those of employment and access to goods and services. The relevant provisions are contained in the Equality Act 2010.[15]

Third, religious *premises may be registered* with the Registrar General under the Places of Worship Registration Act 1855. Registration under the Act confers certain privileges, most notably tax relief and the potential ability to use the premises in question for marriages.

Fourth, a religion may be able to claim the financial and other benefits of charitable status. In order to be registered as a charity, a body must satisfy certain criteria. Traditionally, a body that existed for the "advancement of religion" would automatically be entitled to charitable status. This position has been preserved under modern legislation, with the modification that a religious charity must now show specifically that it serves the public benefit (religious charities were previously presumed to be of public benefit). Since the enactment of the Charities Act 2006, the law has expressly recognized "religion" as including polytheistic and nontheistic religions.[16]

Fifth, public order laws make it an offence to engage in *incitement to religious hatred*.[17] This controversial legislation was introduced through the Racial and Religious Hatred Act 2006. Its principal aim was to protect the Muslim community, and it still has yet to generate a useable body of case law. The terms of the legislation are drawn narrowly, and it has been suggested by commentators that the provisions in question are essentially symbolic in nature.[18] This area of law will therefore not be considered further in this article.

PAGANISM IN MODERN ENGLISH SOCIETY

Historical indigenous Paganism died out in England and Wales in the early Middle Ages.[19] The modern Pagan revival can be traced to the eighteenth century; it was heavily influenced by the romantic movement in the arts and literature.[20] It is not entirely clear who the first modern English or Welsh Pagan was, but candidates would include Iolo Morganwg (1747–1826), a

15 The first relevant English legislation in this area was the Employment Equality (Religion or Belief) Regulations 2003. These Regulations were introduced pursuant to a European Union Directive (2000/78/EC). They were superseded by the Equality Act 2006, which was in turn replaced by the Equality Act 2010.

16 The relevant provisions are now found in the Charities Act 2011, § 2(a). See also §§ 2–4 on the criteria for charitable status generally.

17 See Part IIIA of the Public Order Act 1986.

18 See Anthony Jeremy, "Practical Implications of the Enactment of the Racial and Religious Hatred Act 2006," *Ecclesiastical Law Journal* 9, no. 2 (2007): 187–201, at 200. See also Russell Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011), 144.

19 See generally Ronald Hutton, *Pagan Britain* (New Haven: Yale University Press, 2013).

20 Useful histories of the movement include Ronald Hutton, *The Triumph of the Moon* (Oxford: Oxford University Press, 1999), the standard work on the subject; Philip G. Davis, *Goddess Unmasked* (Dallas: Spence, 1998), a factual but adversarial treatment; and Chas S. Clifton, *Her Hidden Children* (Lanham: Altamira, 2006), from an American perspective.

founding figure of modern Druidism, and the Platonist philosopher Thomas Taylor (1758–1835). The rebirth of Paganism was essentially a reaction against, on the one hand, the perceived rigidity and authoritarianism of orthodox Christianity; and, on the other hand, the perceived spiritual emptiness of scientistic Enlightenment rationalism. For this reason, as I have already intimated, Paganism is doubly countercultural. Individual Pagans with conservative political and social views can certainly be found, but the movement as a whole is culturally transgressive. Rejecting both Christianity and secularity at the same time is an uncommon position in modern England.

As to its internal composition, Paganism is strikingly and self-consciously diverse. Practitioners may identify with any one or more of a range of "paths," from reconstructed ancient varieties of Paganism (Celtic, Germanic, Greek, and so on) to goddess worship, forms of witchcraft, and shamanic practices. Marion Bowman of the Open University has written,

> For some the prototype is a polytheistic, sacrificial, hierarchical, warrior-based, hunting, hard-drinking and carnivorous lifestyle with rather a patriarchal (indeed "laddish") bent; others look back to a Goddess infused, feminine oriented, peaceful, egalitarian and ecologically aware paradigm.[21]

Such a complex phenomenon defies simple definitions. In broad terms, however, Paganism tends to be characterized by the following features: a theology that rejects Abrahamic monotheism in favor of a conception of the divine based on plurality (polytheism) or the immanence of divinity in the natural world (pantheism, panentheism); an attachment to indigenous Pagan cultures, whether from the ancient world or from modern non-Western societies; an ethic that values personal responsibility over rule-based prescriptions; and the use of practical supernatural techniques such as divination and magic. This last characteristic highlights the overlap between modern Paganism and witchcraft. Indeed, Paganism is often conflated in the popular mind with the tradition of revived witchcraft known as Wicca. While Wicca is certainly a form of Paganism, the Pagan community is considerably broader than Wicca.[22]

Pagans are evidently a religious minority, but how small a minority? Unfortunately, Pagans are difficult to count. In the late 1990s, several estimates converged on a figure of approximately 107,000–140,000 Pagans in Britain.[23] The 2001 and 2011 national censuses recorded around 41,000 and 76,000 Pagans respectively in England and Wales. These numbers are likely to be undercounts, as there are a number of reasons why a person of Pagan leanings might not identify as such on the census form.[24] The English and Welsh Pagan population, defined broadly, is likely to be in the order of magnitude of hundreds of thousands in a population of 56 million.

Paganism is therefore very definitely a minority religion, although it has rather greater visibility than other minority faiths due to its presence in popular cultural products such as the novels of Terry Pratchett and TV series like *Charmed* and *Buffy the Vampire Slayer*. It has obtained a

21 Marion Bowman, "Nature, the Natural and Pagan Identity," in "Pagan Identities," special issue, *Diskus*, no. 6 (2000), http://jbasr.com/basr/diskus/diskus1-6/bowman6.txt.

22 For more information on Paganism generally, see Chas S. Clifton and Graham Harvey, *The Paganism Reader* (New York: Routledge, 2004); Michael York, *Pagan Theology* (New York: New York University Press, 2005); Margot Adler, *Drawing Down the Moon*, 4th ed. (New York: Penguin, 2006); Barbara J. Davy, *Introduction to Pagan Studies* (Lanham: Altamira, 2007); and Christine Hoff Kraemer, *Seeking the Mystery* (Englewood: Patheos, 2012).

23 Hutton, *Triumph of the Moon*, 400–1. Note that this figure included Scotland, as well as England and Wales.

24 The number that one comes up with also depends on which responses one counts under the "Pagan" umbrella. See generally David Voas, "Census 2011—Any Other Religion?," British Religion in Numbers, December 16, 2012, http://www.brin.ac.uk/2012/census-2011-any-other-religion.

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measure of "official" status through participation in the Inter Faith Network and the Religious Education Council. In all, we may say that the Pagan community in England and Wales has a sufficient degree of size and recognition to be a presence on the peripheries of the national conversation; but it is too small and socially diffuse to wield significant political influence.

This state of affairs can have unfortunate consequences. An academic research project that was conducted from 2010 to 2012 found that Pagans were exposed to an elevated risk of discrimination. The researchers noted specifically that negative sentiment against Pagans "echoed historical prejudices," although they also reported that "Pagan organizations ... have cited human rights law as having opened up the possibility of more equitable participation in aspects of public life."[25] It was apparent that the position of Pagans had in fact improved over the preceding decade. Comparable research published in 2001 had found "open hostility and discrimination" against Pagans, including allegations of child molestation stemming from the "Satanic Ritual Abuse" panic of the 1990s.[26] In any event, Pagans are precisely the kind of nonstandard minority that might be thought to need both the protection of the law and the social legitimacy that legal recognition can help to bring.

PAGANISM IN ENGLISH LAW: HISTORICAL PERSPECTIVE

Historically, the category of "Pagan" coexisted and overlapped in the vocabulary of English law with other terms in the Christian lexicon of religious deviance, such as "infidel," "Jew," "Turk," and "Mohammedan." In some cases, the term was used to define a catchall religious outgroup: a Pagan was anyone who was not a Christian.[27] On other occasions, and especially as time wore on, it was used in a more accurate way to refer specifically to people who were not members of the monotheistic Abrahamic faiths.[28] It usually seems to have included Hindus,[29] and it could also include Cree Indians.[30]

People who were identified by the law as Pagans could expect to be treated in more or less the same way as other unpopular minorities in premodern societies. They were liable to be regarded as "enemies" who were not under the king's protection and could not sue for justice in his courts.[31]

25 Paul Weller et al., *Religion or Belief, Discrimination and Equality: Britain in Global Contexts* (London: Bloomsbury, 2013), 127, 208. The book contains useful quantitative information on discrimination against different religious groups, although the utility of the information is limited by the fact that the figures for Paganism have been rolled together with those for other new religious movements. See also Paul Weller et al., *Religion and Belief Discrimination and Equality in England and Wales: A Decade of Continuity and Change*, University of Derby, June 2013, http://www.fbrn.org.uk/sites/default/files/finalises_religion_and_belief_policy_brief_for_website_0.pdf.

26 Paul Weller, Alice Feldman, and Kingsley Purdam, *Religious Discrimination in England and Wales* (Home Office Research Study 220, February 2001), http://www.religionlaw.co.uk/reportad.pdf.

27 See, for example, Nurse v. Yerworth (1674) 36 ER 993; Nightingale v. Bridges (1689) 89 ER 496; *Of the Sufficiency and Disability of a Witness* (1744) 22 ER 337; Swann v. Broome (1764) 96 ER 305.

28 See, for example, Freeman v. Fairlie (1828) 18 ER 117; Williams v. Bryant (1839) 151 ER 189; Miller v. Salomons (1852) 155 ER 1036.

29 Omychund v. Barker (1745) 26 ER 15; Freeman v. Fairlie (1828) 18 ER 117; but see Miller v. Salomons (1852) 155 ER 1036.

30 Bethell v. Hildyard (1888) LR 38 ChD 220.

31 Yearbook 12 H 8, fol. 4, as cited in Calvin's Case (1608) 77 ER 377; East India Company v. Sands (1695) 89 ER 988; Sir William Hawkins, *Pleas of the Crown*, 1.126; Sir William Blackstone, *Commentaries on the Laws of England*, 4.18.2.

It was not decided until as late as 1745 (in a case concerning a Hindu) that a Pagan could even be a witness in court proceedings.[32] It was never illegal to *be* a Pagan, but the Blasphemy Act 1697 did made it illegal for a Christian to cease to be a Christian, and hence for a Christian to convert to a Pagan form of religion. (No known prosecutions were brought under the Act, and it was eventually repealed by the Criminal Law Act 1967.) Interestingly, the only Pagans who could be spoken well of in an English courtroom were those who were safely dead: the Greeks, Romans, and other ancient peoples. These Pagans were sometimes referred to with approval, or at least neutrally, but not always.[33]

It should also come as no surprise that Pagans received rough handling from the Anglican ecclesiastical courts. In one important nineteenth-century case, the distinguished judge Lord Penzance found that it was contrary to the doctrine of the Church of England to display devotional statues and images in the Roman Catholic fashion, even if there was no question of people worshipping the objects themselves, as Pagans supposedly did.[34] This conception of Pagan beliefs as amounting to mere image worship comes straight from the anti-idolatry polemic of the Hebrew Bible. It is neither sophisticated nor accurate, whether ancient or modern Pagans are in view. Nevertheless, the words of Lord Penzance were quoted and re-quoted repeatedly in a succession of later ecclesiastical cases, extending as far as the early twenty-first century.[35]

It is also worth saying a word about witches.[36] Until 1951, the governing statute in this area was the Witchcraft Act 1736, which made it illegal to *claim* to be a witch. The Act of 1736 was a product of Enlightenment rationalism, and it superseded earlier legislation that had actually criminalized witchcraft itself, going back to the Witchcraft Act 1542. In 1951, the Act of 1736 was replaced by the Fraudulent Mediums Act, in the wake of pressure from the Spiritualist movement. It was said, tongue-in-cheek, that the Act of 1951 implicitly recognized the existence of *non*-fraudulent mediums. The Act of 1951 was not regularly enforced, but it was not a dead letter either. It accounted for six prosecutions and five convictions between 1984 and the date of its repeal in 1993. Its current successor is the Consumer Protection from Unfair Trading Regulations 2008.

Casually negative attitudes toward Paganism persisted in legal circles well into the twentieth century. In 1903, a case arose concerning an archaeological find made in Ireland. Applying the law as it stood at the time, the High Court found that the items discovered fell within the doctrine of "treasure trove" and hence were the property of the Crown. This required the court to dispose of the possibility that the items were votive offerings that their original owners had been intending to dedicate to the gods. The items included a necklace and a chain that had been placed inside a hollow collar. Mr. Justice Farwell took the view that this indicated that the items were not religious offerings:

32 Omychund v. Barker (1745) 26 ER 15.

33 For cases referring to Pagans with approval, see Nurse v. Yerworth (1674) 36 ER 993; Hill v. Good (1674) 89 ER 111. For cases referring to Pagans neutrally, see *Of the Sufficiency and Disability of a Witness* (1744) 22 ER 337; R v. Millis (1844) 8 ER 844. For cases referring to Pagans with disapproval, see Swann v. Broome (1764) 96 ER 305; Attorney General, at the Relation of the University of Cambridge v. Lady Downing (1767) 97 ER 1.

34 Clifton v. Ridsdale (1875–76) LR 1 PD 316.

35 See, for example, In re St Lawrence, Pittington (1879–80) LR 5 PD 131; Vicar and Churchwardens of Great Bardfield v. All Having Interest [1897] P 185; Markham v. Shirebrook Overseers [1906] P 239; In re St Peter, St Helier, Morden [1951] P 303; In re St Mary the Virgin, West Moors [1963] P 390; In re St Augustine's, Brinksway [1963] P 364; In re Christ Church, Waltham Cross [2002] Fam 51.

36 For a historical overview of the legal position in this area, see Caroline Harris, "Witchcraft: From Crime to Civil Liberty," *Law and Justice* 167, no. 1 (2011): 55–68.

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> Votive offerings to a pagan deity would be offered in such a way as to make the most display; no one seeking to propitiate an anthropomorphic deity, who like Baal might be engaged in hunting or sleeping, would be likely to conceal two of his gifts in the hollow of a third.[37]

This simplistic view of Pagan beliefs—Pagans think that a god is just like a big man—is a direct legacy of the Abrahamic rejection of polytheism. The giveaway is the reference to the deity Ba'al, who appears in the Hebrew Bible as the principal representative of Canaanite idolatry. Mr. Justice Farwell's comments were of a piece with Lord Penzance's decision referred to above. Yet some other cases from the later part of the nineteenth century and the earlier part of the twentieth century bear witness to an interesting shift in emphasis.

First, there was the prosecution of William Price (1800–1893), a Welsh physician and Druid. Dr. Price had attempted to cremate the body of his infant child. He was indicted for this act, as well as for the related offense of preventing the holding of an inquest. The trial judge, who happened to be the great criminal jurist Mr. Justice Stephen, ruled that incinerating a corpse was not in itself illegal. The pagan overtones of cremation were acknowledged (the practice "prevailed to a considerable extent under the Romans as it does to this day amongst the Hindoos"[38]); and so was the fact that opposition to it was bound up with Christian belief in the resurrection of the body. Yet Dr. Price's behavior was treated not as an affront to God but as a "novelty," a "singular" eccentricity that was to be met with a rational application of legal principles. Mr. Justice Stephen told the jury,

> It is not my place to offer any opinion on the comparative merits of burning and burying corpses. . . . There are, no doubt, religious convictions and feelings connected with the subject which every one would wish to treat with respect and tenderness, and I suppose there is no doubt that as a matter of historical fact the disuse of burning bodies was due to the force of those sentiments. I do not think, however, that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanor at common law.[39]

Dr. Price was duly acquitted.

Next, there was a 1911 case on the arcane technicalities of traditional English real property law. Mr. Justice Hamilton let fall the following comment:

> The view of Colonel Roberts, which appears to me to be somewhat superstitious and to attach an almost pagan importance to a hearth, was not pressed.[40]

This comment linked Paganism (accurately) with the sacredness of the hearth and (less accurately) with superstition. There is a rationalist air to it. The pejorative force of "pagan" is based not on biblical injunctions against Ba'al, but on the notion that the whole business is silly nonsense.

A more explicit version of this position was put forward in 1929 by the Court of Appeal. The case involved a lady named Miss Hoskins-Abrahall who was seeking to assert, against the local council, her right of access to a vault in which her mother was buried. She had been having unusual rites performed in and around the vault. These included burning candles and incense, as well as

37 Attorney-General v. Trustees of the British Museum [1903] 2 Ch 598 at 611.
38 R v. Price (1884) 12 QBD 247 at 249.
39 Ibid., 247, 255.
40 Attorney-General v. Reynolds [1911] 2 KB 888 at 908.

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leaving food, drink, and flowers for the deceased. Miss Hoskins-Abrahall claimed that these were early Christian practices. The judgment contained this revealing passage:

> I can only suppose that this mention of repairs and ventilation is an excuse to enter the vault for the purpose of using it as a place of private habitation where she can perform what she calls acts of piety which, whatever she may think, were at least as common among savage races as among the early Christians whose habits she thinks she is following. The Assyrian kings surrounded themselves in burial with their dead wives, concubines, horses, slaves and food for the time when they should awake in the other world; the Red Indians do the same, and the lady must not delude herself with the idea that she is following merely the practices of the early Christians; she is following the practices ... of a very large number of pagan tribes, and cemetery authorities are justified in a cemetery of the year 1928 in stopping the lady from following those extraordinary practices which are quite out of touch with the habits of modern civilization.[41]

In this view, which drew upon the developing field of comparative religion, the problem was not that Paganism was objectionable from the point of view of traditional biblical doctrine. The issue was rather that it was outmoded and absurd from a modern, 20th century point of view. One set of background premises was giving way to another. Interestingly, the judgment also recalls a more recent case from an ecclesiastical court in which the judge noted that the custom had developed of bereaved Christians leaving bottles of beer by the graves of their loved ones, "although this is an entirely pagan practice."[42]

These cases are revealing. In them, we can see that the law was evidently moving on from the premodern Christian world in which Pagans were simply religious enemies. By the first half of the twentieth century, it would seem that at least some judges could find it natural to think of Paganism as "superstitious" and "quite out of touch with the habits of modern civilization." This is an essentially modern, secular orientation. It came to accompany, but not altogether to replace, the traditional Christian prejudice against Paganism.

THE LAW TODAY: DIFFICULTIES OF DEFINITION

Before proceeding to test whether understandings of Paganism in the legal system have become more sympathetic in recent times, I must first deal with a key issue of principle. The era of religious pluralism has brought to the fore a fundamental question that the court must address when it is faced with an unfamiliar or stigmatized belief system: What *is* a religion?

This is always a difficult and sensitive question. It is accepted among both lawyers and social scientists that religion is a "constructed and politically laden category," that attempts to define it "are always normative and often ethnocentric," and any purported definition "can be used for the very political act of exclusion."[43] An American writer has argued that attempts by legal professionals to pin down what religion really is "often make a poor fit with religion as it is lived," and that the very exercise "asks the government to be the arbiter of religious orthodoxy."[44]

41 Hoskins-Abrahall v. Paignton Urban District Council [1929] 1 Ch 375 at 381.

42 See In re St Mary the Virgin Churchyard, Burghfield [2012] PTSR 593.

43 Linda Woodhead and Rebecca Catto, *Religion or Belief": Identifying Issues and Priorities*, Equality and Human Rights Commission Research Report 48, 2009, https://www.equalityhumanrights.com/en/publication-download/research-report-48-religion-or-belief-identifying-issues-and-priorities; Sandberg, *Law and Religion*, 46.

44 Winnifred F. Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005), 10.

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One might say that such difficulties should not deter those of us in the legal world from at least trying to grasp the definitional nettle. One commentator, for example, has cautioned that "the absence of a definition might equally be used to exclude groups who would, under a properly developed definition, be entitled to consideration as a religious grouping."[45] But do we need the category of "religion" at all? Some Pagans would say that we do not:

> [E]specially since the 1960s, "religion" has increasingly come to be seen as that which is institutionalized: involving prescribed rituals; established ways of believing; the "official," as regulated and transmitted by religious authorities; that which is enshrined in tradition; the ethical commandments of sacred texts; the voice of the authority of the transcendent. For many, it has also come to be associated with the formal, dogmatic and hierarchical, if not the impersonal or patriarchal.[46]

This is not just a matter of semantics. If claiming the status of a "religion" is the key to accessing important legal rights and protections, is the law forcing Pagans to submit to a conservative or Christianizing category that does not fit well with their worldview? Admittedly, "the law" is not a monolithic whole in this regard. The European Convention on Human Rights does not present a problem, as it protects both religions and "beliefs." The anti-discrimination legislation also protects "beliefs" alongside religions, but seemingly only "philosophical" beliefs; and it is not clear how far Paganism can be described as a philosophy, nor how far Pagans would accept that label.[47] In charity law, the "advancement of religion" rubric extends only to religion. Words are important, and there is much to be said in favor of aligning the wording of the charity and anti-discrimination legislation with that of the European Convention on Human Rights.

Nevertheless, let us proceed on the assumption that "religion" is an appropriate category in this context. How is the court to determine whether or not Paganism, or a particular form of it, is truly a religion? This is a question that has puzzled courts in a number of common-law jurisdictions, as evidenced by the fact that the English courts have referred to overseas case law in this context on more than one occasion.[48] The choices that the English courts themselves have ended up making are worth looking at in some detail.

To begin with, there may be a threshold test. This is about testing the adherent rather than the religion. The court may need to be satisfied that the (putative) religion in question really is professed by the person concerned. It appears that the court will decide this as a straightforward question of fact. This will not entail it making a value judgement on the person's convictions, whether against an external objective standard or against a standard of orthodoxy internal to the relevant religion. The law protects subjective beliefs, and it is candidly accepted that these need not be rational or consistent.[49]

45 Peter W. Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law International, 2002), 7.

46 Paul Heelas, "The Spiritual Revolution: From 'Religion' to 'Spirituality'," in *Religions in the Modern World*, ed. Linda Woodhead et al. (Abingdon: Taylor & Francis, 2005), 412–35, at 413–14.

47 Equality Act 2010, § 10(2). On the evolving usage of these terms in the law, see further Sandberg, *Law and Religion*, 53–56; Dingemans et al., *The Protections for Religious Rights*, 6.16–19; Mark Hill, Russell Sandberg, and Norman Doe, *Religion and Law in the United Kingdom*, 2nd ed. (Alphen aan den Rijn: Wolters Kluwer, 2011), 142–44.

48 In R (Williamson) v. Sec'y of State for Educ. and Employ [2005] UKHL 15, the judges referred to Syndicat Northcrest v. Amselem [2004] 241 DLR (4th) 1 (Can.). and Employment Division v. Smith, 494 U.S. 872 (1990). In R (Hodkin) v. Registrar General of Births, Deaths and Marriages [2013] UKSC 77, Lord Toulson discussed the cases of Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) and Church of the New Faith v. Comr of Pay-Roll Tax (Victoria) (1983) 57 CLR 785 (Austl.).

49 See R (Williamson) v. Sec'y of State for Educ. and Employ [2005] UKHL 15 [22].

When the sincerity of the individual's beliefs has been established, what then? How may it be determined that the beliefs at issue amount to a religion? Perhaps surprisingly, there is no one answer to this question in English law. The way in which the court will address the matter depends on the nature of the case that it finds before it. Modern English jurisprudence offers three distinct modes of answering the question of whether or not something is a religion. Perhaps surprisingly, these turn out on examination to encode fundamentally different approaches to the question.

The first relevant body of case law comes from litigation concerning the European Convention on Human Rights. In cases of this sort, the court will adopt a test that derives ultimately from a 1982 European Court of Human Rights decision known as *Campbell*. As it happens, *Campbell* related to a nonreligious belief, namely the wrongfulness of using corporal punishment in schools. In the judgment, reference was made to "views that attain a certain level of cogency, seriousness, cohesion and importance."[50] These four criteria have since been refined (by merging "seriousness" and "importance") into what amounts to a three-part test. First, the alleged religion must be consistent with basic standards of human dignity and integrity. This excludes, for example, beliefs entailing "torture or inhuman punishment." Second, the belief system must relate to matters that are not merely trivial: it must "possess an adequate degree of seriousness and importance." Third, it must be "coherent in the sense of being intelligible and capable of being understood," although it is recognized that religion "is not always susceptible to lucid exposition or, still less, rational justification."[51]

It would seem that this test sets the bar very low. It carves out of the protection of the European Convention on Human Rights anyone with a belief system that is degrading, trivial or unintelligible; everyone else is included. There should certainly be no argument that Paganism passes the test. It would also seem that the same test applies outside the relatively limited field of the European Convention on Human Rights. It may be argued, based on authority from the Employment Appeal Tribunal, that it also applies in cases under domestic anti-discrimination law.[52] This was certainly the intention that was expressed in the parliamentary debates over the Equality Act 2006, the predecessor of the current legislation.[53] Nevertheless, the Employment Appeal Tribunal does not rank especially high in the English judicial hierarchy; and parliamentary debates are not necessarily admissible as evidence for the meaning of statutory provisions. There is some judicial authority in the other direction, and legal commentators are divided on the issue.[54] For now, the question remains open. It is to be hoped that a generous approach will be taken when the matter comes to be considered by the higher appellate courts.

The second distinct approach to defining religion comes from a separate line of case law that relates to the Places of Worship Registration Act. The two key cases were generated by the

50 Campbell v. United Kingdom [1982] ECHR 7511/76 at 36. As it happens, *Campbell* did not relate to either Article 9 or Article 14 of the European Convention on Human Rights. It turned on Article 2 of the First Protocol to the convention, which deals with educational rights.

51 R (Williamson) v. Sec'y of State for Educ. and Employ [2005] UKHL 15, at 23.

52 See Nicholson v. Grainger plc [2010] 2 All ER 253; Greater Manchester Police Authority v. Power [2009] EAT 0434/09/DA.

53 See the speech of Paul Goggins MP in Parliamentary Debates (Hansard), House of Commons, December 6, 2005, col. 145.

54 For differing approaches, see Knights, *Freedom of Religion, Minorities and the Law*, 5.09; Sandberg, *Law and Religion*, 56, 103; Brian Napier et al., *Harvey on Industrial Relations and Employment Law* (London: LexisNexis, 1991), L.207–8. The judicial authority consists of a minority speech by Lord Walker in R (Williamson) v. Sec'y of State for Educ. and Employ [2005] UKHL 15, on which see further Dingemans et al., *The Protections for Religious Rights*, 6.28.

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Church of Scientology. The first was *Segerdal*, which was decided in 1970 by the Court of Appeal, the second-highest court in the English system. The leading judgment was given by the legendary jurist Lord Denning. His Lordship had this to say about the phrase "place of meeting for religious worship" that appears in the Places of Worship Registration Act:

> It connotes to my mind a place of which the principal use is as a place where people come together as a congregation or assembly to do reverence to God. It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity. There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship. But, apart from exceptional cases of that kind, it seems to me the governing idea behind the words "place of meeting for religious worship" is that it should be a place for the worship of God.[55]

This is an unapologetically theistic—indeed, monotheistic—conception of religion. It is perhaps no coincidence that Lord Denning himself was a practicing Christian, albeit one of relatively liberal theological views. His Lordship's definition does advert to "exceptional cases" like Buddhism, but there is no attempt to specify what would count as an exceptional case or why. Moreover, the approach of accepting certain religions as exceptions to a monotheistic norm poses an obvious problem in the context of a multi-faith society.

The interpretation of the Places of Worship Registration Act was revisited over a generation later by the Supreme Court in the 2013 case of *Hodkin*, which concerned a couple who wished to get married in a Scientologist church. Speaking for the majority, Lord Toulson expressly rejected Lord Denning's premise that a religion needs to recognize a God or "supreme deity." Referring to case law from the High Court of Australia, he adopted the less prescriptive approach of asking whether a belief system has certain "indicia" that are broadly characteristic of religions across human cultures:

> I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. … Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.[56]

This approach clearly marked a major step forward. It abandoned the explicit theism of *Segerdal* in favor of a cross-cultural approach that eschewed the notion that a "definitive formula" could be crafted to meet the purpose at hand. The court's stance was value-neutral and pluralistic; and the test that it arrived at would seem to include Pagan religious traditions.

Pausing there, it is an arresting fact that the European Convention on Human Rights and Places of Worship Registration Act lines of case law differ on a very fundamental level. The European Convention on Human Rights test appears to start with the implicit presumption that something *is* a religion, and then measures it against three rather undemanding criteria. The *Hodkin* approach, by contrast, is to approach the "something" with an open mind and then to ask whether it bears certain typical indicia shared across world religions. This divergence of approaches is probably not

55 R v. Registrar General, ex parte Segerdal [1970] 2 QB 697 at 707.

56 R (Hodkin) v. Registrar General of Births, Deaths and Marriages [2013] UKSC 77, at 57. The Australian case was Church of the New Faith v. Comm'r of Pay-Roll Tax (Victoria) (1983) 57 CLR 785 (Austl.).

material from the point of view of Paganism, but nevertheless it is far from obvious that it serves any principled purpose. It is, rather, an example of the anomalies that are thrown up by a society in transition from Christian hegemony to secularism. It may be that the Supreme Court will one day consider it appropriate to revisit this inconsistency.

The third attempt at a legal definition of religion comes from the domain of charity law. It will come as no surprise by now that the jurisprudence in this area has historically been tilted toward Christianity and the Abrahamic faiths. Furthermore, the jurisprudence is not in a very elegant or satisfactory condition. As one writer put it, "Commentators on the law through the years have been consistent in their criticism of the bias and incoherence of the law."[57]

The origins of English charity law lie in a 1601 statute known as the Charitable Uses Act or the Statute of Elizabeth. Writing in 1946, one academic lawyer had this to say in relation to the religious aspect of the law:

> For two centuries after the Statute of Elizabeth a trust, which to-day would be regarded as charitable without a doubt, might fail on the preliminary point that it was against public policy as furthering the schisms of nonconformity, the errors of Rome, or the infidelity of Judaism or heathenism. In the last hundred years in which religious equality has been established the judges have had to speak the language of tolerance, but an unconscious bias against heterodoxy is often apparent in their approach to these problems.[58]

Accordingly, in the 1917 case of *Bowman v Secular Society Ltd*., it was held that "a trust for the purpose of any kind of monotheistic theism would be a good charitable trust."[59] This conservative monotheistic approach was still being treated as good law as late as 1980. In a case involving the charitable status of an ethical society, Mr. Justice Dillon drew on the Places of Worship Registration Act decision in *Segerdal* to arrive at this conclusion:

> It seems to me that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god.[60]

Faith, worship and a singular god: this was the conceptual language of an earlier era. The coming of the age of pluralism and human rights meant that something would have to give. That something came with the enactment of the Charities Act 2006, which (as previously noted) made it clear that a religion could be polytheistic or nontheistic in nature for the purposes of charity law. The story, however, does not end there. There is still a residue of confusion in the law in this area that may benefit from future consideration by Parliament.

The statutory regulator of charities in England and Wales is the Charity Commission. The Charity Commission's guidance on the law in this area neatly summarizes the outstanding difficulties (it should be noted that the guidance is currently under review). The commission identifies the characteristics of a religion in the following way:

- the belief system involves belief in a god (or gods) or goddess (or goddesses), or supreme being, or divine or transcendental being or entity or spiritual principle, which is the object or focus of the religion (referred to in this guidance as "supreme being or entity");

57 Anthony Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 131.
58 Francis H. Newark, "Public Benefit and Religious Trusts," *Law Quarterly Review*, no. 62 (1946): 234–47, at 235.
59 Bowman v. Secular Society Ltd [1917] AC 406 at 449, per Lord Parker.
60 Barralet v. Attorney General [1980] 3 All ER 918 at 924.

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- the belief system involves a relationship between the believer and the supreme being or entity by showing worship of, reverence for or veneration of the supreme being or entity;
- the belief system has a degree of cogency, cohesion, seriousness and importance;
- the belief system promotes an identifiable positive, beneficial, moral or ethical framework.[61]

The first point is effectively a modern version of the traditional requirement for monotheism, adapted in the light of the changes in the Charities Act 2006 that I have referred to. It implicitly takes God as the point of departure and then adds alternatives such as "goddesses" and a "spiritual principle." The second point is also Abrahamic in origin and comes from the decision in the Places of Worship Registration Act case of *Segerdal*. The third point is taken from the European Convention on Human Rights case law; it is a near-verbatim quotation from *Campbell*. The final point is unique to the field of charity law, and makes sense within that context. It incorporates a morality test drawing on the historic case law,[62] along with the concept of public benefit that is specific to charity law.

The Charity Commission's guidance, then, adopts an eclectic approach. No criticism of the commission is intended here: the commission is simply trying to arrive at the best interpretation of some dated and inconsistent case law. As noted, the Charity Commission is currently revising its published material, and it may be that changes will be made in the light of the Supreme Court's decision in *Hodkin*. Until then, the evolution of the law on religious charities may stand as a reminder of the incremental and piecemeal nature of the transition that the English legal system has made to the conditions of a diverse modern society.

THE LAW TODAY: PAGANISM IN COURT

I now proceed to look at the recent case law on Paganism. How far in practice have the English courts been prepared to place Paganism on the same level as other, more established religions?

I take the European Convention on Human Rights as the point of departure. The case law in this area has undergone something of a shift over the years. The view has been expressed that, under the European Convention on Human Rights system, unfamiliar religious traditions "have been treated with caution and their manifestation only over time acknowledged as entitled to legal protection . . . if at all."[63] This view seems to be borne out by the way in which the European Convention on Human Rights institutions have engaged with Paganism.

The first formal engagement came in 1977 with the *X* case. A prisoner had brought a complaint before the European Commission of Human Rights with a view to, among other things, registering

61 Charity Commission, *The Advancement of Religion for the Public Benefit*, December 2008, amended December 2011, 23, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358531/advancement-of-religion-for-the-public-benefit.pdf). See also *Analysis of the Law Underpinning the Advancement of Religion for the Public Benefit*, December 2008, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358534/lawrel1208.pdf; and, most recently, Charity Commission, *Charitable Purposes*, September 16, 2013, https://www.gov.uk/government/publications/charitable-purposes/charitable-purposes.

62 See Thornton v. Howe (1862) 31 Beavan 14 and *Re Watson* [1973] 1 WLR 1472. For a critique of this test, see Bradney, *Religions, Rights and Laws*, 121–24.

63 Pamela Slotte, "International Law and Freedom of Religion and Belief: Origins, Presuppositions and Structure of the Protection Framework," in *Routledge Handbook of Law and Religion*, ed. Silvio Ferrari (Abingdon: Routledge, 2015), 103–17, at 106.

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his religion with the prison authorities as Wicca. The commission, a now-defunct body that was subordinate to the European Court of Human Rights, stated that "the applicant has not mentioned any facts making it possible to establish the existence of the Wicca religion."[64] The case therefore failed at the first hurdle. It has been commented that this outcome "raised some interesting questions, not least being what evidence of the Wicca belief the Commission would have found satisfactory."[65]

The *X* case signaled a doctrine in which "followers of non-traditional religions and beliefs … bore the burden of proving the existence of the religion (or belief) in question."[66] But it is only fair to say that this approach seems to have given way over time to "more generous acknowledgement of non-mainstream religions."[67] Some years have passed since the *X* case was decided, and it preceded the development of the current test for identifying a religion under the European Convention on Human Rights (based on the *Campbell* case), to which I refer above. The significantly increased public profile of Wicca and other forms of Paganism would probably mean that a different outcome from that in *X* would be reached if the European Court of Human Rights considered a similar case today. Nevertheless, the decision has never formally been overruled. It was quoted with approval in a House of Lords case in 2005,[68] and it is treated as authoritative by the standard encyclopedia of English law and by a major textbook on the law of religion.[69]

The European Commission on Human Rights subsequently became drawn into a long-running dispute over access to the ancient Pagan monument of Stonehenge, which contains a famous stone circle dating from 2500 BCE.[70] The stones are aligned with the position of the sunrise on the morning of the summer solstice; and, from the late nineteenth century, Druid revivalists began to use the site to celebrate this festival. From the mid-1970s in particular, Stonehenge at solstice time became a gathering place for people of alternative lifestyles, both Pagan and secular.

In 1985, the official tone changed. Attitudes hardened and restrictions were imposed on access to the site. The prime minister, Margaret Thatcher, took a personal interest in the case, which ended up influencing wider public order legislation. A legal challenge to the decision to seal off the site to Druids at the 1986 solstice found its way to Strasbourg and came to be considered by the European Commission on Human Rights.[71] Unlike its action in the *X* case, the commission did not dismiss the challenge out of hand. It did, however, decline to take the plunge and make a clear ruling that Druidism counted as a religion. It opted to decide the case on other grounds.

Attitudes at the commission continued to soften over the following decade, during which time the European Convention on Human Rights case law on religion underwent a broader maturation process. Another Stonehenge case, arising out of very similar facts from the first case, reached Strasbourg

64 X v. UK (1977) 11 DR 55 at 56.

65 Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001), 58.

66 Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge: Cambridge University Press, 2006), 208.

67 Ibid.

68 R (Williamson) v. Sec'y of State for Educ. and Employ [2005] UKHL 15 [57].

69 Martha Spurrier and Jonathan Cooper, *Halsbury's Laws of England*, 5th ed., vol. 88A, *Rights and Freedoms* (London: LexisNexis, 2013), para. 372; Neil Addison, *Religious Discrimination and Hatred Law* (London: Routledge-Cavendish, 2007), 8. Interestingly, Addison uses quotation marks when describing Wicca as a "religion."

70 On this acrimonious dispute, see generally Penny English, "Disputing Stonehenge: Law and Access to a National Symbol," *Entertainment Law* 1, no. 2 (2002): 1–22; Edge, *Legal Responses to Religious Difference*, 370–77; and Julian Rivers, *The Law of Organized Religions* (Oxford: Oxford University Press, 2010), 202–4.

71 Chappell v. UK (1988) 10 EHRR 503.

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in 1998. On that occasion, the European Commission on Human Rights appeared to accept implicitly that Druidism was a religion, although again it shied away from being definitive on the point.[72] In any event, a more tolerant official response to celebrations of the summer solstice at Stonehenge has come to be adopted since 1999–2000. Interestingly, as discussed below, explicit official recognition of Druidism under the law has ended up coming from another, quite different source.

While the Stonehenge litigation was making its way through the system, Pagan groups were taking their first tentative steps toward obtaining legally recognized status in England and Wales. In the vanguard were two organizations dedicated to Odinism, a form of Paganism that draws its inspiration from Odin and the Norse pantheon. The Odinic Rite, which is known today as the Odinist Fellowship, succeeded in registering with the Charity Commission in February 1988. Another Odinic body, the Odinshof, followed suit in June 1989. These two Pagan charities were joined on the register in July 1995 by the Pagan Hospice and Funeral Trust, which had been seeking charitable status for the previous decade.[73]

At this point, difficulties arose with the Charity Commission. In March 1996, the Pagan Federation, an umbrella group for English Pagans, applied for registration. The application failed; and this seemed to signal a hardening of the Charity Commission's stance. In April 1996, the Pagan Hospice and Funeral Trust was informed that it was being deregistered, a step that was accomplished in January 1998. The Charity Commission also challenged the status of the Odinshof, with the result that the organization reconstituted itself and re-registered under the name of the Olgar Trust. Another Pagan body, the Pagania Trust, was denied registration in 2000.

The Charity Commission's reasons for adopting this stance were interesting. It was clearly influenced by some of the conservative case law that I have referred to. It stated that English law required a religious charity to have, among other things, a "belief in a supreme or supernatural being (ie a personal creator deity standing outside the world)."[74] It also claimed that "Paganism" is not a clearly defined concept: it could simply mean "non-Christian," a notion that echoes the premodern case law mentioned above. At best, the Charity Commission took the view that Paganism amounted to "an indistinct form of loosely related nature spiritualities."[75] A commission employee added,

> [E]ven a casual inquiry about paganism and witchcraft generally will uncover the existence of bodies peddling spells, hexes and curses. . . . I have no doubt that a more determined search would reveal the existence of more sinister bodies dealing with even less salubrious aspects of the occult.[76]

72 Pendragon v. UK (1998) HUDOC 19 October (ECHR).

73 On the engagement of English Paganism with the Charity Commission, see Michael York, "Paganism and the British Charity Commission: A Question of Restricting Boundaries," (paper presented at the Society for the Scientific Study of Religion Annual Meeting, San Diego, CA, November 7–9, 1997), http://www.michaelyork.co.uk/Domus/CV/confpapers/cp-40.html; Michael York, "Religion and Transnationalism: Challenges of the 21st Century," (paper presented at Society for the Scientific Study of Religion Annual Meeting, Houston, TX, October 18–22, 2000), http://www.michaelyork.co.uk/Domus/CV/confpapers/cp-27.html; Edge, *Legal Responses to Religious Difference*, esp. 358–61; Suzanne Owen and Taira Teemu, "The Category of 'Religion' in Public Classification: Charity Registration of the Druid Network in England and Wales," in *Religion as a Category of Governance and Sovereignty*, ed. Trevor Stack, Naomi R. Goldenberg, and Timothy Fitzgerald (Leiden: Brill, 2015), 90–114; Suzanne Owen, "Defining Pagan Religions through Charity Law," (paper presented at the American Academy of Religion Annual Meeting, Atlanta, GA, November 21–24, 2015), https://www.academia.edu/20212005/Defining_Pagan_Religions_through_Charity_Law_conference_paper_?auto=download.

74 York, "Religion and Transnationalism."

75 Ibid.

76 Ibid.

The point that the Pagan community is diverse and embraces a collection of "loosely related" traditions is not without truth. One researcher has described the Pagan movement as belonging to a category of "diffuse faiths" that encounter corresponding difficulties in obtaining legal recognition.[77] Yet it is not at all clear that we need place Paganism in a discrete category of this sort. A better response to the argument based on the movement's diversity is that it cuts with equal force against most mainstream religious traditions. The "loosely related" description could also be applied to the different forms of, say, Buddhism, or, indeed, to the established Church of England, which serves as a striking reminder that a single Christian denomination can embrace adherents ranging across the spectrum from biblical fundamentalists to postmodern nontheists. This perspective has been recognized in academic writing since at least the 1980s, when it became fashionable to speak of "Christianities," "Judaisms," and so on. Moreover, the notion that "less salubrious" elements can taint the whole of a religion may be met with a similar response. It would be interesting to speculate on the results if this principle were to be applied consistently across the board.

There was a definite shift in the stance of the Charity Commission following the passage of the Charities Act 2006, with its modification of the legal criteria for a religion to include non-monotheistic faiths. This shift was illustrated by the case of the Druid Network. The Druid Network initially applied for registration as a charity in 2006. The application failed, but the organization reapplied and obtained success the second time around: in September 2010, it was granted recognition. The Charity Commission continued to apply the principle that a religion required a supreme being or entity (singular or plural), but it accepted that Nature fulfilled this role within the Druidic belief system. It expressly took note of the need to avoid discriminating against new or minority religions and the "importance of looking at each application on a case by case basis."[78]

This decision of the Charity Commission aroused some media interest. Melanie Philips, a well-known tabloid journalist of Jewish faith, declared that it was "an attack upon the very concept of religion itself," as a religion requires "a belief in a supernatural deity (or more than one) that governs the universe."[79] This was an explicit call for the law to return to the days of Lord Denning and *Segerdal*, and it provided a reminder that the law sometimes moves faster than public opinion (or at least tabloid opinion). It has been said that the mixed reaction to the Charity Commission's decision amounts to "one instance of how alternative spiritualities are rapidly becoming 'mainstreamed' *at the same time* that they continue to be marginalized by some."[80] Courts and governmental bodies are not neutral observers of this process; they are participants in it.

The ambivalent nature of the mainstreaming process was soon highlighted again. In October 2012, the Charity Commission declined a renewed application from the Pagan Federation for registration. As had been the case previously, the acknowledged diversity of beliefs within the Pagan community was the sticking point (and, interestingly, the Charity Commission recognized the counterargument that the same observation could be made about better established world religions). The commission's correspondence with the Pagan Federation also pointed up the problem of the

77 Peter W. Edge, "The Legal Challenges of Paganisms and Other Diffuse Faiths," *Journal of Civil Liberties* 1, no. 3 (1996): 216–29.

78 Charity Commission for England and Wales, *Application for Registration of the Druid Network*, September 21, 2010, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324236/druiddec.pdf.

79 Melanie Philips, "Druids as an Official Religion? Stones of Praise Here We Come," *Daily Mail*, October 4, 2010, http://www.dailymail.co.uk/debate/article-1317490/Druids-official-religion-Stones-Praise-come.html.

80 Graham Harvey and Giselle Vincett, "Alternative Spiritualities," in Woodhead and Catto, *Religion and Change in Modern Britain*, 156–72, at 157 (emphasis original).

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inherently conservative connotations of "religion" as a category, as well as the uncertain relationship between religions, philosophies, and other committed ways of life:

> It is not absolutely clear that Paganism in the broadest sense ... involves belief in a supreme being which is the object or focus of the beliefs. ... It suggests that there is some scope for followers to simply view Paganism as a philosophy or way of life.[81]

At the time of writing, it is understood that the Pagan Federation is intending to make a further application to the Charity Commission. It appears, however, that any such application will be based on the organization's "secular" activities, such as providing education, rather than on the "advancement of religion" criterion.

To return to the courts, the first legal case in England and Wales in which a Pagan tradition was formally recognized as a religion did not come along until 2006.[82] The case arose out of an employment dispute in which a former employee of the Royal Mail, Donald Holden, was claiming unfair dismissal. Mr. Holden was a member of the Odinist Fellowship, the Pagan group discussed above, which sought to register as a charity. Tensions had arisen between Mr. Holden and some Muslim fellow employees over the use of a workplace prayer room. A muddy footprint allegedly appeared in the room, and this set off a chain of events that led to Mr. Holden's dismissal. In the course of the dismissal process, the company treated Mr. Holden's religious commitment with suspicion. One of its managers proceeded on the basis that "it is not likely that a democratic society would accept Odinism as a religion."[83] This view—declining to accept that a Pagan religion is a religion at all—is reminiscent of the *X* case. If officially adopted, it would have returned English law to the 1970s.

By the time that the case reached the Employment Tribunal, the Royal Mail's counsel was adopting a neutral stance on whether or not Odinism counted as a religion. The Employment Tribunal went some distance further, finding unequivocally in Mr. Holden's favor. The relevant section of the judgment is worth quoting at length:

> The Tribunal has considered the literature about Odinism in the Bundle of Documents ... and also the evidence given by Mr Harrison, the Director of the Odinist Fellowship. The Tribunal finds Odinism to be a belief system based on the pre-Christian heathen religion of the British Isles. It is polytheistic and honours the Odinic pantheon of deities with particular regard being paid to the deity of Odin or Woden. It has a concept of the secular and the spiritual worlds and the relationship between them. It has a broad code of ethics based on what are called the Nine Noble Virtues. It has rituals and ceremonies including the Cup of Remembrance, Naming, Pledge of Faith, Wedding and Laying to Rest. It does not have any sacred texts as such but it pays special heed to works known as the Prose Edda and the Poetic Edda which it regards as sources of information about the heathen religion.[84]

The Tribunal held that Mr. Holden had been unfairly dismissed and ordered the Royal Mail to pay compensation. The decision was naturally hailed as a victory by the Odinist community, and understandably so. The passage quoted above shows an impressive willingness to read the claimant's material carefully and to digest its contents. Nevertheless, the decision had its shortcomings. In particular, it did not set a legal precedent: the decision of an Employment Tribunal has no binding force in relation to future cases.

81 Owen, "Defining Pagan Religions through Charity Law," 5.
82 Holden v. Royal Mail Group PLC (2006) ET/2403904/05 (Employment Tribunal).
83 Ibid., 17.
84 Ibid., 15.

Other cases involving Pagans also continued to trickle through the judicial system. One case from 2007 involved a claimant who refused to open a bank account on the grounds of his Pagan beliefs. The court noted this aspect of his case in carefully neutral language:

> He claims to follow the tenets of classical Greece; in Christian language, pagan beliefs. He claims to believe in the 12 Olympian gods in which Greeks in classical times believed.[85]

The claimant was pointing to his religion as a reason why the local council should not require him to receive welfare payments in the form of checks. The court did not mount an inquiry into the legitimacy of Hellenic Pagan beliefs; in any event, the claim failed. In another case, from 2011, the claimant was a prisoner who had registered with the prison authorities as a Pagan. His case related to the sanitation facilities that were available to him. The judgment records the prisoner's Pagan affiliation without comment: for the purposes of the case, the judge was more concerned with assessing the sincerity of his previous registered religious affiliation, which had been Muslim.[86]

A more or less positively accepting approach was taken by the court in the 2013 case of *Pendragon*. The Ministry of Justice had granted a license permitting archaeologists to exhume cremation burials at Stonehenge. The license was a legal requirement under the Burial Act 1857, a statute that predated the era of modern archaeological digs. The license required that the remains in question be reinterred within two years, and the archaeologists successfully applied to the Ministry of Justice for an extension of this time. The claimant in the case was a campaigner named King Arthur Pendragon who had also been involved in the earlier Stonehenge litigation. He sought to challenge the extension. He claimed that the Ministry was guilty of duplicity, and that the extension was in fact the first step toward removing the reburial condition altogether so that the remains could be consigned to museums. Mr. Justice Ouseley found that no duplicity was involved; but, more interestingly for our purposes, he seemed to take for granted the existence and legitimacy of Pagan and Druidic beliefs.[87]

It was also in 2013 that the English justice system first recognized Wicca as a religion. As with *Holden*, the recognition came in an Employment Tribunal claim for unfair dismissal. The claimant, Ms. Holland, had been employed as a shop worker. She recounted that a Sikh superior, Mr. Singh, had been "seemingly revolted" to learn that she was a Wiccan who celebrated Hallowe'en: "What … you are not a Christian! You have got to be a Christian surely." Ms. Holland was subsequently dismissed. Mr. Singh claimed that her dismissal had been for dishonesty. On a previous occasion (which she did not rely on for the purposes of the claim) Ms. Holland reported being on the receiving end of "jokes poking fun at a stereotypical view of witches" from other individuals at work.

The Tribunal found that Ms. Holland had suffered religious discrimination (as well as sex discrimination, which formed another plank of her case). It noted that Mr. Singh had "betrayed some antipathy toward the claimant because she was not an adherent of one of the more well-known world religions."[88] The Tribunal did not undertake an inquiry into the existence or status of Wicca as a religion, perhaps because the issue seems not to have been raised by the employer. As with *Holden*, this was only an Employment Tribunal decision, and it has no binding precedential force.

85 R (Spiropoulos) v. Brighton and Hove City Council [2007] EWHC 342 (Admin), 8.
86 Grant v. Ministry of Justice [2011] EWHC 3379 (QB).
87 R (Pendragon) v. Ministry of Justice [2013] EWHC 2586 (Admin).
88 Holland v. Angel Supermarket Ltd ET/3301005/13 (Employment Tribunal).

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The most recent cases have failed to change the picture greatly. In 2014, one of the claimants in a harassment case was an employee of the Independent Police Complaints Commission named Kathryn Lawcock. A website operator by the name of Mr. Wilby had published attacks on Ms. Lawcock that included flippant references to her Pagan religious beliefs ("coven," "broomstick," "evil spell"). The judge was sympathetic to her case, but he merely reported her claim that she was a "practising pagan" without pursuing the point further.[89] Most recently, in a case relating to the pay of prison chaplains, the court referred to "pagan" chaplains, in quotation marks, alongside those of other faith traditions whose names were not marked out in this way.[90] (As a matter of interest, Pagan prison chaplains have been functioning in England and Wales since 2005.)

THE LAW TODAY: A HOPEFUL OUTLOOK?

In a number of ways, Paganism today seems finally to have arrived as a recognized minority religion in the English legal system. Forms of Paganism were successfully accepted as religions in the cases of *Holden* and *Holland*. Paganism features in the official guide to equality and diversity published by the Judicial College, known as the *Equal Treatment Bench Book*.[91] Since 2006, there has been a special form of the courtroom oath for use by Pagans. The Pagan Federation has been included by the Law Commission in discussions on law reform.

Accordingly, the president of the Pagan Federation, Mike Stygal, has stated that judges and court staff are usually "very professional" and willing to recognize Paganism as a legitimate religion. Moreover, litigation can sometimes be an educational process, an opportunity for Pagans to give the court an understanding of their beliefs and practices that it may not previously have had. Mr. Stygal recounts the following case:

> We supported a mother in challenging a local council who were suggesting going to a menarche rite of passage in the land of their family origin during [school] term time was not a religious observance, but an unauthorised holiday, despite communication from the family to the contrary. We presented the case, describing the entire week in detail and pointing out the spiritual significance at each step of the way, also indicating the importance of rites of passage for a number of other religious traditions. The magistrates found entirely in favour of the family.[92]

Perhaps inevitably, however, Mr. Stygal did enter a caveat:

> [T]he law is always, to a certain extent subject to the interpretation of the individuals applying and adjudicating on it. Sometimes those applying or adjudicating may have prejudices that find ways of expressing themselves.[93]

89 Coulson v. Wilby [2014] EWHC 3404 (QB).

90 Naeem v. Secretary of State for Justice [2015] EWCA (Civ) 1264.

91 Judicial College, *Equal Treatment Bench Book* (2013), https://www.judiciary.gov.uk/wp-content/uploads/2013/11/equal-treatment-bench-book-2013-with-2015-amendment.pdf.

92 Mike Stygal, personal communication (August 2016). In the English system, "magistrates" are lay judges who sit in Magistrates' Courts, local first-tier courts of mostly criminal jurisdiction.

93 Ibid.

It is particularly noteworthy that the legitimacy of Pagan religious traditions seems to have become fairly well established in the field of employment law. The *Holden* and *Holland* cases both arose out of employment disputes. A guide published by the Advisory, Conciliation and Arbitration Service, or ACAS, the state-run employment conciliation service, mentions Pagan religions in an appendix, under "Other Ancient Religions." The guide states that examples of such religions are "Druidry, Paganism, Wicca, Astaru, Odinism and Shamanism"; and it provides a list of applicable festivals, dietary requirements, clothing, and bereavement practices.[94]

On the other side of the ledger, the Pagan community still awaits formal recognition from the higher appellate courts and the European Court of Human Rights. There is also the fact that the case law defining religion—and, indeed, the category of religion itself—continues to harbor inconsistencies and to bear the marks of having emerged untidily from a confessional Christian polity. Moreover, Paganism is not always well understood in the legal community. One of the standard encyclopedias of employment law still states baldly, in its section on protection against religious discrimination, "Witchcraft, voodoo and the like, it is to be presumed, will not qualify."[95]

Pagans have come a long way in the English legal system over the last few decades—and an even longer way if we look back to the start of the Pagan revival in the 1700s. It is not, however, a story of unambiguous progress, and some tensions and anomalies remain. As to whether these difficulties will end up being fully resolved, for Paganism and for minority religions generally, that is a question for the future. Nevertheless, there are grounds for hope.

94 ACAS [Advisory, Conciliation and Arbitration Service], *Religion or Belief and the Workplace* (March 2014), 31, http://www.acas.org.uk/media/pdf/d/n/Religion-or-Belief-and-the_workplace-guide.pdf. As a minor point of fact, "Astaru" is properly spelled "Ásatrú." It is a form of revived Nordic religion.

95 Napier, *Harvey on Industrial Relations*, L.210.