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# **Using Section 26 Equality Act to Combat Institutional Antisemitism: A Critical Race Perspective on *Fraser v University and College Union***

*Lesley Klaff*

## **Introduction**

On the 25 August 2011, a mathematics lecturer named Ronnie Fraser, through his lawyer Anthony Julius, filed a claim in the Central London Employment Tribunal against the University and College Union (UCU) under sections 57 and 26 Equality Act 2010. The act's aim is to protect individuals in the public sector from unfair treatment, including harassment and other forms of direct discrimination. Fraser alleged that the union had harassed him as a Jewish member ("Jewish" being a "protected characteristic" in terms of both a race and a religion under section 26 Equality Act) by engaging in "unwanted" antisemitic "conduct" which manifested itself in acts and omissions informed by hostility to Israel and the Zionist project. These were as follows:<sup>1</sup>

- annual boycott resolutions against Israel and no other country in the world
- conduct of the debates at the annual UCU Congress
- moderating of the activists' lists and the penalising of anti-boycott activists
- failure to engage with people who raised concerns about antisemitism
- failure to address members' resignations on the grounds of antisemitism
- refusal to meet the OSCE's special representative on antisemitism
- hosting of South African trade unionist Bongani Masuku after he had been found guilty of antisemitic hate speech by South Africa's Human Rights Commission, and

- repudiation of the EUMC Working Definition of Antisemitism which addresses Israel-related antisemitism.

These acts and omissions, alleged Fraser, constituted a “course of conduct” by the union which amounted to institutional antisemitism. On 22 March 2013, the Tribunal delivered a lengthy judgment dismissing all ten grounds of Fraser’s complaint as unfounded and mostly out-of-time.<sup>2</sup>

There is a widely held belief in Britain that Jews benefit from the protection of equality legislation. For example, the authors of an online essay, “In These Times: A Statement on Contemporary European Anti-Semitism,” state that “the statutes against discrimination offer sufficient legal guarantees of equality [for Jews].”<sup>3</sup> While this is true in theory, this does not appear to be the case in practice. To date, every Jewish claimant in a reported discrimination case in England has failed in their claim against a Christian or post-Christian secular defendant.<sup>4</sup> This finding supports the work of critical-race theorists who claim that anti-discrimination legislation does not effectively combat racism because it fails to understand the nature of racism, because it is interpreted by judges who fail to understand the experience of racism, and because the racism that pervades our society also pervades our legal system and may, in fact, be uncovered in allegedly neutral concepts, procedures, analytical approaches and judicial decisions.

This chapter will consider a specific critical-race theory claim in relation to the judgement in *Fraser v UCU*, namely, that courts adhere to legal formalism in cases where the claimant is a member of a racial minority, resulting in the law’s failure to address the nature and experience of racism. My concern is not so much with the construction of the legislation, but with the institutional and ideological context in which it is supposed to function.

## **1. The Courts' Adherence to Legal Formalism Results in the Law's Failure to Address the Experience and Nature of Racism**

In her book, *An Unfortunate Coincidence: Jews, Jewishness and English Law*,<sup>5</sup> Didi Herman notes the practice of English courts to adhere to legal formalism in a variety of cases involving Jewish litigants and Jewish issues. She believes that legal formalism is a judicial route that is consciously chosen “in order to marginalise extrinsic political factors,” that is, to deem certain facts irrelevant to the legal issue before the court.<sup>6</sup> This can be illustrated by the 1947 case of *R v Sec of State for Foreign Affairs, ex parte Greenberg*.<sup>7</sup> The case involved an application for a writ of habeas corpus with respect to 4,500 Jewish European passengers on three ships, on the grounds that they were being unlawfully detained by the British Government off the coast of British Mandate Palestine. The judge denied the writ without any reference to the Holocaust, or indeed, without any reference to any of the difficulties that led to the passengers' flight to Palestine.<sup>8</sup> Nor did he once mention the fact that the three ships' passengers were Jewish, despite their lawyer referring to them throughout the case as “displaced Jews.”<sup>9</sup> The judge defined the legal issue before him narrowly so as to make these facts irrelevant to the case's determination.

Instead, he concentrated on the fact that Jewish immigration to Palestine had been acutely controversial for many years, such that the British Government and the Government of Palestine found it necessary to impose restrictions on it, and he referred to the ships' Jewish passengers throughout as “illegal immigrants.” Noting that they were intercepted by His Majesty's ships off the Palestinian coast and returned to the South of France where they were informed that, unless they landed by a certain time, they would be redirected to Hamburg, the judge concluded that the passengers' refusal to disembark meant that they had remained on the ships voluntarily and, therefore, had not been illegally restrained. He denied the writ of

habeas corpus on this narrow ground, ignoring the passengers' situation at any point prior to their arrival in France.

Herman argues that judicial blindness to certain facts serves to impose Christian norms and values, which have become synonymous with English secular norms and values, on the law.<sup>10</sup> Norms are the standards of proper or acceptable behaviour, and values are the ideals or beliefs shared by a culture about what is good or bad, desirable or undesirable. As illustrated by the *Greenberg* case, legal formalism's imposition of Christian norms and values renders the Jewish experience irrelevant. This results in the claims of Jewish litigants being denied justice and their lived experiences marginalised.

Herman claims that legal formalism is ideologically driven and is informed by "extrinsic projects of racialisation."<sup>11</sup> She defines "racialisation" broadly as the portrayal of Jews as inferior or different. Here, she draws on the work of critical-race theorist Peter Fitzpatrick who has written about the privileging of legal formalism in cases involving anti-black racism.<sup>12</sup> Herman's work makes a welcome contribution to critical race theory because, despite being an expanding and diverse field, there has been very little scholarship on the law's relationship with antisemitism until the publication of her book in 2010.

## **2. The Privileging of Legal Formalism in *Fraser v UCU***

Legal formalism may be described as the liberal position that says that law can be separated from the social world in which it is embedded. It draws a distinction between pure law and its social, economic and political contexts, denying the importance of context in understanding the law. The privileging of legal formalism in cases involving race prevents the law from addressing racism because race or ethnicity is an account of social being; it is the lived experience.

A good illustration of the privileging of legal formalism resulting in the law's failure to address the experience and nature of antisemitism may be found at several points in the judgment of *Fraser v UCU*. First, we shall consider the Tribunal's interpretation of the statutory test for "harassment" in section 26 Equality Act. The section defines "harassment" as "unwanted conduct related to a relevant protected characteristic." To qualify as "harassment," the conduct must "violate the victim's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment." In deciding whether the conduct has had that effect, the tribunal must take into account the victim's perception under section 26 (1) (b). This is a subjective test. It must also take into account the case's other circumstances and whether it is *reasonable* for the conduct to have that effect under section 26 (4) (c). This is an objective test.

To interpret the subjective component of section 26, the Tribunal was required to focus on Fraser's *realm of experience* in the UCU. This it obtained from his written account in his witness statement and his oral evidence during examination and cross-examination. The Tribunal then had to decide whether account satisfied the statutory language of section 26 (1) (b) so as to amount to unlawful harassment. The Tribunal decided to give the statutory language a strict, narrow construction so as to deny Fraser's experiences of antisemitism in the union. Stressing that it "must not cheapen the significance of [the] words [used]"<sup>13</sup> in the statute, it declared that an effect amounting to "harassment" had not been made out by Fraser who had used words such as "upsetting," "disappointment," "troubled," "hurt" and "saddened and amazed" to describe the effect the union's conduct had on him.<sup>14</sup> The Tribunal thought that these words indicated "minor upsets" caused by "trivial acts" rather than antisemitic harassment.<sup>15</sup> It said, "[N]o doubt [Mr Fraser] found some of the [anti-Israel] motions and some things said in the course of the debates upsetting, but to say that they violated his dignity or created an adverse environment . . . is to overstate his case hugely."<sup>16</sup> This was

despite the fact that Fraser impressed the Tribunal as a “sincere witness” whose “displays of emotion” during his evidence had not been synthetic.<sup>17</sup> The Tribunal attributed Fraser’s emotion to the fact that the outcome of the litigation was important to his “passionate belief” in the pro-Israel political campaign within the union,<sup>18</sup> rather than to his reliving his experiences of antisemitism while giving evidence.

In this way, the Tribunal denied Fraser’s experiences of antisemitism within the UCU because he did not relay his experiences using the correct language. This constitutes the privileging of legal formalism. By denying that Fraser’s subjective account satisfied the statutory language, the Tribunal imposed Christian or secular norms and values on the law and this served to marginalise the Jewish experience. The lack of recognition or misrecognition of Fraser’s suffering within the union is deeply problematic. Indeed, it has been observed by critical legal philosophers that the “law’s abstraction and formalism is a type of disrespect that calls for greater sensitivity to social context and to individual need and desire.”<sup>19</sup>

The question is, why did the Tribunal construe the statutory language so narrowly? It did, after all, have a choice. It is generally acknowledged by legal scholars that, while the meaning of legal text appears to be determinate, judges are free to interpret it as they choose. This is particularly the case with statutory wording, where even the literal interpretation of a word can yield several different meanings. Is it the case that the Tribunal wanted to deny Fraser’s claim because it really did believe that his professed experiences of antisemitism did not amount to anything more than “minor upsets” caused by “trivial acts”? If so, then this might suggest that the Tribunal could not grasp Fraser’s subjective experience of antisemitism in the union because his reality was outside their realm of experience. Critical race theorists have observed that judges cannot understand racial discrimination because it is positional, that is, it requires an understanding of the lived reality of race. In the case of people of colour,

judges are said to be blind to the reality of the structured disadvantages that cause their marginalisation and exploitation, and instead individualise and atomise discrimination into a series of disputes. In the case of Jewish litigants, the tendency of judges and other decision makers appears to be to individualise and atomise the Jewish experience of antisemitism into a series of incidents that are insignificant and do not rise to the level of antisemitism. For example, not only did the Tribunal in Fraser's case characterise his experiences of antisemitism within the UCU as a series of "minor upsets" caused by "trivial acts," but the Shami Chakrabarti Report concluded that the antisemitism in the Labour Party that led to the suspension of many members – including Naz Shah, MP for Bradford West, and Ken Livingstone, former Mayor of London – was merely a "series of unhappy incidents."<sup>20</sup> Similarly, in a recent antisemitism complaint brought by a Jewish student against Sheffield Hallam University, the university administrator who decided the outcome categorised a student society's antisemitic social media output as merely "controversial and provocative," despite its replication of blood libels.<sup>21</sup> In this trivialisation process, practices of antisemitism are denied, along with their political importance, and the Jewish complainant is constructed as overly sensitive, not as a victim of harassment.

In fact, the Tribunal should have been more sensitive to Fraser's subjective experiences of antisemitism within the Union because his fear, distress and panic were evident during his cross-examination, just as it had been evident during his speech to Congress in May 2011.<sup>22</sup> This was the Congress at which members debated a motion to formally disassociate the UCU from the EUMC Definition on the grounds that it was a tool "to silence debate about Israel and Palestine on campus."<sup>23</sup> During the debate, Fraser made an impassioned plea to Congress, and this was made available in evidence to the Tribunal. He said:

I, a Jewish member of this union, am telling you, that I feel an antisemitic mood in this union and even in this room. I would feel your refusal to engage with the EUMC definition of antisemitism, if you pass this motion, a racist act.... You may disagree with me. You may disagree with all the other Jewish members who have said similar things. You may think we are mistaken. But you have a duty to listen seriously. Instead of being listened to, I am repeatedly told that anyone who raises the issue of antisemitism is doing so in bad faith.<sup>24</sup>

Given the fact that Fraser demonstrated fear, distress, and panic which ought to have been apparent to the Tribunal, other possible reasons for its failure to accept that his subjective account of his experiences within the UCU constituted antisemitic harassment will be considered.

### **3 The Tribunal's Failure to Address the Nature and Experience of Antisemitism**

One possible reason could be that the Tribunal's denial of Fraser's subjective experiences of antisemitism lay in the statutory wording of section 26 Equality Act. Legal theorist Clare Dalton has noted that the law shapes all stories into particular patterns of telling, that it favours certain kinds of stories, disfavors others, and even makes it impossible to tell certain types of stories.<sup>25</sup> It may be, on this view, that antisemitism is one story that is impossible to tell because it is not considered to be a serious problem (as in this case). In fact, most people in Britain associate antisemitism with the Holocaust and regard it as a symptom of fascism, an outdated ideology. These people tend to think that all criticism of Israel is legitimate and do not understand the correlation between hostility to Israel and antisemitism. To make matters worse, the telling of the complainant's story by means of examination in the courtroom is an "impoverishing exercise" because "the infinitely rich potential that we call reality is stripped

of detail, of all but a few of its aspects.”<sup>26</sup> Not only is reality misrepresented in the courtroom but antisemitism in any event is not as readily recognisable as, say, anti-black racism, sexism, or homophobia. This is especially true of contemporary Israel-related antisemitism, also known as “the new antisemitism,” which is frequently disguised in an anti-Zionist narrative and the language of human rights. As Robert Fine helpfully explains:

Antisemitism may or may not be openly expressed. It may linger in discursive nooks and crannies of well-honed antisemitic motifs: conspiracy, secret power, blood lust, etc. As in the case in the presentation of self in everyday life, the forms of appearance of the new antisemitism may not immediately reveal what lies behind the scenes.<sup>27</sup>

Antisemitism is a complex phenomenon. Its interpretation demands a subtle and nuanced approach that resists easy conclusions. Its objective manifestation cannot, therefore, be easily observed from the subjective narration of personal experience.

A more plausible explanation, however, is that the Tribunal chose to construe the statutory wording in section 26 Equality Act to deny Fraser’s subjective experience of antisemitism because it disliked the allegation of contemporary antisemitism, preferring to regard the UCU’s irrational hostility to Israel in terms of free political speech. This preferred explanation has wide support within the judgment.

First, the Tribunal refused to rule on a meaning or definition of antisemitism on the grounds that there were legitimately held differences on what constitutes antisemitism, concluding that the range of views presented to the Tribunal, including where the line should be drawn in relation to when criticism of Israel becomes antisemitic, is the “stuff of political debate.”<sup>28</sup> The Tribunal stated that “the obvious difficulty confronting anyone seeking to grapple with this controversy is that the arguments cannot meet each other head on unless and until participants agree on what is meant by ‘anti-Semitism’ . . . We cannot escape the gloomy

thought that a definition acceptable to all interested parties may never be achieved and count ourselves fortunate that it does not fall on us to attempt to devise one.”<sup>29</sup> This refusal to settle on a definition of antisemitism was curious given the fact that Fraser’s claim was for unlawful antisemitic harassment. As the House of Commons Home Affairs Select Committee on *Antisemitism in the UK* reported in 2016, it is “extremely difficult to examine the issue of antisemitism without considering what sorts of actions, language and discourse are captured by the term” and “defining the parameters of antisemitism [is] central to the question of what should be done to address this form of hate.”<sup>30</sup> A similar refusal to define antisemitism was a feature of the Shami Chakrabarti Inquiry. Chakrabarti reported that she saw “no need to pursue an age-old and ultimately fruitless debate about the precise parameters of race hate,” despite the fact that her brief was to examine antisemitism in the Labour Party.<sup>31</sup> Further, in the case of the student antisemitism complaint against Sheffield Hallam University, the university was unable to provide a definition of antisemitism and explicitly rejected the EUMC Working Definition which the student and his legal representatives had asked it to adopt in order to decide the outcome of the complaint.<sup>32</sup> It is noteworthy that a definition of antisemitism was considered impossible, unnecessary or ill-advised in cases whose very purpose was formally to decide antisemitism’s presence or absence. It may be logically assumed that the rejection of a definition of antisemitism in each case was part of a strategic approach to denying antisemitism.

Second, the Tribunal discarded all the evidence of antisemitism as inauthentic or irrelevant. It did this by discrediting as inauthentic the evidence given by many of Fraser’s witnesses as “the mere ventilation of opinions” and by describing some of his witnesses as “playing to the gallery,” as “scoring points,” as “behaving in a tactical manner” and as being “untruthful.”<sup>33</sup> On the grounds that there was no agreement on the meaning of antisemitism, it wholly discarded as irrelevant Julius’ cross-examination of UCU witnesses about the issue of

antisemitism, for “without such common ground, questions put to witnesses for the Respondents seeking to elicit a view on whether such-and-such a comment ‘was’ or ‘was not’ anti-Semitic lacked any meaning.”<sup>34</sup> It dismissed all the evidence of antisemitism in the union with the words, “[...] we had to remind ourselves frequently that despite appearances, we were not conducting a public inquiry into anti-Semitism but considering a legal claim for unlawful harassment.”<sup>35</sup> It was a claim for unlawful *antisemitic* harassment but this did not prevent the Tribunal from ignoring all evidence of antisemitism. This amounts to a denial of antisemitism. Moreover, the idea that the parties to a claim for antisemitic harassment have to agree on the meaning of antisemitism before the claim can be considered by the Tribunal, makes the protection afforded to Jews by section 26 Equality Act redundant.

Despite its denial of antisemitism, the Tribunal did manage to portray itself as sympathetic to Jewish persecution and suffering. It did this by making references to the Holocaust. At the beginning of its judgment, the Tribunal introduced Fraser as “the child of Jewish refugees who fled Nazi Germany in 1939” and advised that “members of his family died in the Holocaust.”<sup>36</sup> Later, the Tribunal made an oblique reference to the Holocaust and other atrocities with the words, “so long and terrible has been the persecution of the Jewish people through history.”<sup>37</sup> Paradoxically, the Tribunal’s acknowledgement of antisemitism via the Holocaust and other historical persecution only serves to legitimise its denial of Fraser’s claim of contemporary antisemitism against the UCU. The references associate antisemitism with state-sponsored genocide and consign it to history, making it seem like a relic of the past and a symptom of a defunct ideology.<sup>38</sup> In this way, antisemitism is removed from contemporary discourse about Israel and Zionism. Herman notes that English judges frequently use the Holocaust in cases involving Jews as a “mnemonic device” to achieve certain purposes.<sup>39</sup> And there is little doubt that this achieves a dual purpose: the portrayal of

judicial sympathy for past Jewish persecution, while denying the reality of contemporary Israel-related antisemitism.

To return to the privileging of legal formalism, critical race theorists claim that formalists use abstract concepts like "reasonableness" to mask choices and value judgments. This can be illustrated in the Tribunal's interpretation of the objective component of section 26 Equality Act. The Tribunal said that, even if it was satisfied that Fraser's subjective perception satisfied the statutory test for harassment under section 26 (1) (b), it would not be *reasonable* for it to have that effect under section 26 (4) (c). This was because Fraser was a willing participant in the political arena. The Tribunal stated:<sup>40</sup>

[Mr Fraser] is a campaigner. He chooses to engage in the politics of the union in support of Israel and in opposition to activists for the Palestinian cause. When a rugby player takes the field he must accept his fair share of minor injuries. Similarly, a political activist accepts the risk of being offended or hurt on occasions by things said or done by his opponents (who themselves take on a corresponding risk). These activities are not for everyone. Given his election to engage in, and persist with, a political debate which by its nature is bound to excite strong emotions, it would, we think, require special circumstances to justify a finding that such involvement had resulted in harassment.

The Tribunal interpreted the statutory requirement of "reasonableness" from the perspective of a political activist rather than from the perspective of a Jewish union member with a connection to Israel or, indeed, from the perspective of a victim of antisemitism. The Tribunal had a choice as to *whose* reasonableness to adopt. Its choice wrongly assumes that minorities who are politically active in the fight against racism have greater thresholds of fortitude than those who are not. This shows a marked failure to address the experience and nature of racism. Moreover, David Hirsh has noted that "this reasoning results in the position that since

Fraser took on the responsibility of defending Israel, he should accept some antisemitism as part of the game.”<sup>41</sup> In other words, Fraser brought the trouble on his own head; he was responsible for his own experiences of antisemitism – except that the Tribunal denied that it was antisemitism that he experienced.

The idea that the Jewish claimant brought the trouble on his own head by his own behaviour is not new to the English judiciary. In the 1980 case of *Seide v Gillette Industries Ltd.*, a Jewish employee who complained under the Race Relations Act 1976 that he had been transferred by his employer to a lower position at a lower wage because of antisemitism, was told by the Industrial Tribunal and the Employment Appeal Tribunal that his transfer had been caused by his own inappropriate behaviour and that “race” was not an “activating cause.”<sup>42</sup> This was despite the fact that he had been on the receiving end of antisemitic remarks by one of his colleagues which, in the words of both Tribunals, were “clearly to be deplored.”<sup>43</sup> Similarly, a Jewish claimant’s behaviour was declared to be the cause of the problem in another employment case in the early 1980s. In *Garnel v Brighton Branch of the Musicians’ Union*, the claimant, a Jewish member of the Musicians’ Union, was told by the Industrial Tribunal and the Employment Appeal Tribunal that the failure of the Brighton Branch to nominate him to sit on a committee, and his resulting suspension from the Union when he complained about it, was not racially motivated. Rather, “if there was discrimination . . . it was not because the applicant was a Jew but because of his own personal behaviour.”<sup>44</sup> The Jewish claimant’s behaviour took the form of his “engendering a feeling of anti-Semitism which did not yet exist.”<sup>45</sup> In other words, the Jewish claimant in *Garnel* got what he deserved, just as the Jewish claimant in *Seide* got what he deserved, just as the Jewish Ronnie Fraser got what he deserved. According to Herman, the finding that the harm experienced by the Jewish claimant is self-induced shows the presence of racist thinking in judicial discourse.<sup>46</sup> What is interesting is that contemporary English judges do not appear to think of

Jews any differently from earlier English judges,<sup>47</sup> for the formalist interpretation of the concept of “reasonableness” by the Fraser Tribunal was a vehicle to blame Fraser for his own suffering within the union.

In fact, a move away from formalism is required by section 26 Equality Act as it protects the claimant from environmental harassment. As the Fraser Tribunal notes, “legislation that protects from harassment is meant to create an important jurisdiction.”<sup>48</sup> The claimant’s experiences and knowledge are important in this jurisdiction and this is why the subjective element of section 26 enables the claimant to speak about his perception and relay his experiences to the law, for these must be taken into account by the Tribunal. The jurisdiction is also constitutive of environment. Indeed, emphasis on environment was considered by Parliament to be an apt approach for identifying and remedying the amorphous nature of sexism, racism, and antisemitism. This involves adopting a *contextualised* approach to judgment, which formalism rejects. The Tribunal is expected to consider the utterances, attitudes and acts that are usually cast outside of the law’s jurisdiction. The Tribunal did seem to do this in some parts of its judgment. It took note of the “emotional energy” that the conflict had generated<sup>49</sup> and said it could find no evidence of the “atmosphere of intimidation” alleged by Fraser.<sup>50</sup> It acknowledged the whispers and half-heard comments that a microphone would not pick up during a debate<sup>51</sup> and, as we have seen, noted with disdain the witnesses for Fraser who “played to the gallery.”<sup>52</sup> It appears that the Tribunal was only prepared to move away from formalism and adopt a contextualised approach to judgment when it permitted a finding that went against Fraser.

The Tribunal also adopted legal formalism to interpret the principle of third-party responsibility. The principle of third-party responsibility was crucial to the case because section 57 Equality Act provides that a trade union must not harass a member. To satisfy section 57, therefore, a central question in Fraser’s case was “what acts and omissions that

Fraser complains of are properly to be regarded as the responsibility of the trade union, the UCU?” In other words, who was the UCU for the purposes of section 57 Equality Act? Fraser argued that the UCU was the union, Congress, officials, and officers who act or omit to act with the authority of the union. That authority was expressed by policies of the union, assurances given to members on behalf of the union, the union’s rules, and the internal “life of the union” over which the union exercises control. In support of this argument, Julius cited the High Court case of *Vowles v Evans & Others* which ruled that when an unincorporated corporation makes promises to its members, it can be held to those promises.<sup>53</sup> Julius argued that this legal principle mattered because the UCU wanted to be regarded as a union with zero tolerance for antisemitism and wished to promote an environment in which members flourished. It was the gap, therefore, between what was promised by the UCU and what was delivered, as experienced by its members, that was at the heart of Fraser’s case.<sup>54</sup> For example, there was an institutional incapacity on the union’s part to recognise resignations due to antisemitism. When cross-examined on this point during the Tribunal hearing, the union official in charge of membership matters explained that the reason why a particular member’s resignation was put in the “Israel/Palestine” pigeonhole was because the union did not have a category for resignations when the reason given was “antisemitism.” Also, whenever a Jew in the union wanted to speak about antisemitism, it was as if he was speaking an unintelligible language because there was a structural incapacity to hear what was being said, and this was part of the harassment. Accordingly, for the purposes of section 57 Equality Act, the perpetrator of the harassment includes the department that cannot recognise antisemitism<sup>55</sup>.

However, the Tribunal did not agree that the perpetrator of the harassment for the purposes of section 57 Equality Act included Congress, officials and officers. It adopted legal formalism to interpret the principle of third-party responsibility in order to rule that any

“unwanted conduct” for the purposes of section 26 Equality Act was not properly to be regarded as that of the UCU. Rather, it was the “unwanted conduct” of the union’s Congress and members, separate from the UCU. The UCU could therefore not be liable for its members’ conduct or for motions passed at Congress because “the concept of institutional responsibility . . . is not known to our law.”<sup>56</sup> This conclusion effectively disposed of Fraser’s case in its entirety.

The Tribunal was able to support this conclusion by distinguishing the *Vowles* case on its cause of action: *Vowles* was a personal injury case involving the principle of vicarious liability, rather than a claim against a trade union for harassment. This is arguably a narrow technical point that is immaterial to the general principle of institutional responsibility that *Vowles* promulgated. The practice of distinguishing a precedent case on a narrow technical point, such as the cause of action, in order to avoid its application was noted by the eminent legal realist, Karl Llewellyn, as one of sixty-four “impeccable judicial techniques” for avoiding an awkward precedent, that is, a precedent that the court does not want to follow and apply in the case before it.<sup>57</sup> The Tribunal could just as easily have applied the *Vowles* principle of institutional responsibility to Fraser’s case in order to rule that, for the purposes of section 57, the UCU also included Congress, officials and officers who act or omit to act with UCU’s authority. This is because of the indeterminacy of legal doctrine which allows any legal principle to be used to yield competing and contradictory results. Moreover, the principle of institutional responsibility ought to have been applied in Fraser’s case as a policy matter. No claim against a trade union for environmental harassment under sections 26 and 57 Equality Act will succeed without its application. Rejecting the principle of institutional responsibility in Fraser’s case meant that the Tribunal could ignore as irrelevant all evidence of “unwanted conduct” on the part of the officers, officials and Congress, thus disposing of Fraser’s case. This was an exercise in legal formalism insofar as it ignored context and

thereby permitted a strategic blindness to the facts presented by the claimant. It was, moreover, ideologically driven because it was a route that facilitated the denial of Fraser's antisemitism claim.

Legal formalism was also evident in the Tribunal's decision to treat the ten grounds of Fraser's complaint as ten separate complaints and to declare nine of them out-of-time. A complaint must be presented to an Employment Tribunal within three months of the conduct complained of and only the last ground of Fraser's complaint, the UCU's disavowal of the EUMC Definition of Antisemitism at Congress in May 2011, met that requirement. Fraser argued that the ten grounds of his complaint should be treated as a *single course of conduct* and that their *cumulative effect* amounted to institutional antisemitism. The Tribunal, however, rejected this argument. Noting that harassment can take the form of a series of minor acts and omissions, the Tribunal left Fraser's "cumulative effect" argument until after it had disposed of each ground of his complaint for substantive reasons, saying that "the difficulty [with this cumulative effect argument] is that the Claimant has failed to show a succession of events (or non-events) about which any complaint against the Respondents can sensibly be made."<sup>58</sup> By treating each ground of Fraser's complaint as a separate complaint, the Tribunal was denying the overall context of Fraser's experience which is essential for an environmental harassment claim under section 26 Equality Act. This supports the critical-race theory view that the privileging of legal formalism in anti-discrimination cases fails to address the experience and nature of racism, for the latter cannot be atomised into a series of individualised incidents and often presents itself as institutional racism.

## **Conclusion**

This chapter has addressed several examples of the Tribunal's adoption of legal formalism in *Fraser v UCU* in order to justify its denial of Fraser's claim for institutional antisemitism

against the UCU. A common thread in the analysis has been the exclusion of the “political,” albeit with “political” as a dangerously free-floating factor. Thus, Fraser’s passion was merely “political,” hostility to Israel was merely “political,” Fraser was merely a “political campaigner.” We have seen the “political” excluded at the general level of the law with, for example, a strict, narrow interpretation of section 26 (1) (b) Equality Act, which insulated it against policy and thereby prevented different forms of linguistic expression from satisfying the subjective test for “harassment.” We have seen the “political” excluded at the level of legal principle with the strict, narrow application of the principle of “institutional responsibility,” confining it to personal injury cases and the issue of vicarious liability, thereby preventing its application to Fraser’s case on important policy grounds. We have also seen the exclusion of the “political” at the specific level of evidence, with evidence of antisemitism treated as inauthentic or irrelevant. It is the exclusion of the political at the specific level of evidence that is central to the critique offered by critical-race theory because it is a strategic blindness to facts on ideological grounds. The mixture of the general and specific exclusion of the political in *Fraser v UCU* sensitises us to the different ways in which the judicial application of dominant Christian or post-Christian secular norms is exclusionary, harmful and ultimately racist.

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## Endnotes

<sup>1</sup> For further details, see David Hirsh, "Fraser v UCU: Tribunal Finds No Antisemitism At All," Engage website, 18 April 2013, <https://engageonline.wordpress.com/2013/04/18/fraser-v-ucu-tribunal-finds-no-antisemitism-at-all>.

<sup>2</sup> For the full judgment of *Fraser v University and College Union*, see <https://www.judiciary.gov.uk/judgments/fraser-uni-college-union/>.

<sup>3</sup> Shalom Lappin *et al.*, "In These Times: A Statement on Contemporary European Anti-Semitism," Summer 2015, [www.fathomjournal.org/in-these-times-a-statement-on-contemporary-european-anti-semitism](http://www.fathomjournal.org/in-these-times-a-statement-on-contemporary-european-anti-semitism).

<sup>4</sup> Didi Herman, *An Unfortunate Coincidence: Jews, Jewishness & English Law* (Oxford: Oxford University Press, 2011), 126-157.

<sup>5</sup> *Ibid.*

<sup>6</sup> Ibid., 106.

<sup>7</sup> *R v Sec of State for Foreign Affairs ex parte Greenberg* [1947] 2 All ER 550.

<sup>8</sup> Herman, *Unfortunate Coincidence*, 104-106. One of the ships was renamed *The Exodus* by its Jewish crew.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., 106.

<sup>11</sup> Ibid., 107.

<sup>12</sup> Peter Fitzpatrick, *Nationalism, Racism, and the Rule of Law* (Aldershot; Brookfield, USA: Dartmouth, 1995).

<sup>13</sup> *Fraser v University and College Union*, para. 38.

<sup>14</sup> Ibid., para. 158.

<sup>15</sup> Ibid., para. 38.

<sup>16</sup> Ibid., para. 155.

<sup>17</sup> Ibid., para. 147.

<sup>18</sup> Ibid.

<sup>19</sup> Costas Douzinas and Adam Geary, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart Publishing, 2005), 186.

<sup>20</sup> Shami Chakrabarti Inquiry, June 30 2016, 27; see [www.labour.org.uk/page/-/party-documents/ChakrabartiInquiry.pdf](http://www.labour.org.uk/page/-/party-documents/ChakrabartiInquiry.pdf).

<sup>21</sup> Office of the Independent Adjudicator for Higher Education, Complaint Outcome, 5 October 2016, para. 18, reference number OIA/611513/16.

<sup>22</sup> Julius's Closing Speech for the Claimant, 16 November 2012.

<sup>23</sup> David Hirsh, “Defining Antisemitism Down,” Winter 2013, 9; see

[www.fathomjournal.org/defining-antisemitism-down](http://www.fathomjournal.org/defining-antisemitism-down).

<sup>24</sup> Ronnie Fraser, Speech to UCU Congress, reprinted as David Hirsh, “Ronnie Fraser’s (Academic Friends of Israel) Speech to UCU Congress,” *Engage website*, 31 May 2011,

<http://engageonline.wordpress.com/2011/05/31/ronnie-frasers-speech-to-ucu-congress/>.

<sup>25</sup> Clare Dalton, “An Essay in the Deconstruction of Contract Doctrine,” *Yale Law Journal* 94 (1985), 997.

<sup>26</sup> *Ibid.*, 1007.

<sup>27</sup> Robert Fine, “Fighting with Phantoms: A Contribution to the Debate on Antisemitism in Europe”, *Patterns of Prejudice*, 43 (2009), 476.

<sup>28</sup> *Fraser v University and College Union*, para. 53.

<sup>29</sup> *Ibid.*, para. 52.

<sup>30</sup> House of Commons Home Affairs Committee, “Antisemitism in the UK,” Tenth Report of Session 2016-17, para. 12,

<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/136/136/pdf>.

<sup>31</sup> Report of the Shami Chakrabarti Inquiry, 7.

<sup>32</sup> Office of the Independent Adjudicator Complaint Outcome, para. 41.

<sup>33</sup> *Fraser v University and College Union*, para. 148.

<sup>34</sup> *Ibid.*, para. 52.

<sup>35</sup> *Ibid.*, para. 180.

<sup>36</sup> *Ibid.*, para. 2.

<sup>37</sup> *Ibid.*, para. 51.

<sup>38</sup> Anthony Julius, *Trials of the Diaspora: A History of Anti-Semitism in England* (Oxford: Oxford University Press, 2010), 517.

<sup>39</sup> Herman, *Unfortunate Coincidence*, 101.

<sup>40</sup> *Fraser v University and College Union*, para. 156.

<sup>41</sup> Hirsh, “Fraser v UCU.”

<sup>42</sup> *Seide v Gillette Industries Ltd* [1980] IRLR 427.

<sup>43</sup> *Ibid.*, 428.

<sup>44</sup> *Garnel v Brighton Branch of the Musicians’ Union* (13 June 1983).

<sup>45</sup> *Ibid.*

<sup>46</sup> Herman, *Unfortunate Coincidence*, 43-45

<sup>47</sup> *Ibid.* There are many other examples of racist thinking about Jews in *Fraser v University and College Union* beyond this chapter’s scope.

<sup>48</sup> *Fraser v University and College Union*, para. 38.

<sup>49</sup> *Ibid.*, para. 50.

<sup>50</sup> *Ibid.*, para. 132.

<sup>51</sup> *Ibid.*, para. 133.

<sup>52</sup> *Ibid.*, para. 148.

<sup>53</sup> *Vowles v Evans & Others* [2002] EWCA 2612 (QB).

<sup>54</sup> Para. 12 of the Grounds of Complaint stated: “This course of discriminatory conduct against most Jewish members, comprising a series of acts, omissions, and events as supported by a culture and attitude which is indifferent to, or intolerant of, the complaints of its victims.”

<sup>55</sup> Julius's Closing Speech for the Claimant.

<sup>56</sup> *Fraser v University and College Union*, para. 22.

<sup>57</sup> Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown and Company, 1960).

<sup>58</sup> *Fraser v University and College Union*, para. 168.