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ARTICLE

Law and the construction of Jewish difference

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Abstract

Despite the significance of the figure of 'the Jew' as Other in the Western imagination and the persistence of prejudice against Jews, there have been few studies of contemporary Jews as subjects of prejudice in liberal secular law and legal discourse. This article draws attention to continuing Jewish vulnerability and argues that a focus on colonial encounters and phenotype in understanding processes of legal exclusion based on religion and race cannot fully account for the persistence of anti-Jewish prejudice and its resonance in law and legal discourse. Through an analysis of contemporary case law from three different countries, I show how narratives of Christian superiority, veiled behind commitments to secular neutrality, and racializing discourse resonate in legal encounters with Jewishness. I highlight parallels with other minority groups, in particular Muslims, and consider the usefulness of antisemitism as an analytical lens to capture the ambivalent dynamics of Jewish inclusion and exclusion.

1 | INTRODUCTION

Socio-legal scholarship has yielded many important and nuanced insights about the role of law in maintaining and perpetuating social stratification along various axes of difference, such as gender, religion, and race. Seen from this vantage point, Western liberal law is not as fully objective as it purports to be, but is instead deeply involved in privileging certain identities and traits as the norm. Despite the significance of the figure of 'the Jew' as Other in the Western imagination and the persistence of antisemitism, there have been few critical studies on how secular liberal law

is implicated in constructing and regulating Jewish identity and difference – with work by Didi Herman and Stephen Feldman being notable exceptions.[1]

Outside the discipline of law, particularly in the humanities, there is a wealth of literature on both the past and present of Jewish questions – that is, questions of Jewish belonging and its conditions, as well as discourses about Jews and Judaism and what David Nirenberg describes as their 'labour in the workshops of Western thought'.[2] This work underscores the relevance of the Jewish experience for histories of oppression as well as the importance of the encounter with 'the Jew' for the formation of collective identities in the Christian West.[3] However, as yet, there has been little conversation between this rich body of work and critical legal scholarship. The question is, as Jessica Greenebaum once asked in relation to a similar lacuna in feminist theory: 'Why is this oppression different from all others (or not)? … Why is this occurring when much of the "difference of Jews" is similar to that of other marginalized groups?'[4]

The reasons for the relative absence of contemporary Jewish questions in critical legal analyses are complex, involving disciplinary and conceptual as well as political concerns, but among them seems to be the perception of Jews as successfully integrated into a 'white and Judeo-Christian mainstream' – to the extent that it obscures their continuing vulnerability.[5] In this article, I aim to draw attention to this continuing vulnerability and to discuss the Jewish position in light of critical legal scholarship on the intersections of law, religion, and race as well as insights from Jewish studies. The Jewish position today, I suggest, oscillates between inclusion and exclusion and thereby troubles conceptual and theoretical preferences that still underpin parts of critical analyses of law, religion, and race, making it difficult to acknowledge how contemporary law continues to participate in the marginalization, domination, and exclusion of Jews.

Speaking about Jewish vulnerability inevitably raises the question of antisemitism. My focus in this article, however, is not on antisemitism in its violent or overt manifestations, such as attacks on Jewish life and property or hate speech in the online and offline worlds. I also do not engage with the so-called 'new antisemitism', a much debated concept that seeks to account for hostility towards Jews expressed through hostility towards Israel.[6] Rather, I am interested in the growing number of legal conflicts over Jewish practices such as infant male circumcision, religious slaughter practices, or the construction of eruvin (demarcated religious spaces in public for the observance of Shabbat) and what such cases tell us about the conditions and limits of Jewish inclusion in the dominant cultures of 'the West' that revolve around notions of secularized Christianity

[1] D. Herman, *An Unfortunate Coincidence: Jews, Jewishness, and English Law* (2011); S. Feldman, *Please Don't Wish Me a Merry Christmas* (1998). See also B. Cossmann and M. Kline, '"And If Not Now, When?": Feminism and Anti-Semitism beyond Clara Brett Martin' (1992) 5 *Cdn J. of Women and the Law* 298. For a discussion of the conceptual figure of 'the Jew' in critical theory, see D. Seymour, *Law, Antisemitism and the Holocaust* (2007).

[2] D. Nirenberg, *Anti-Judaism: The Western Tradition* (2013) 2. The term 'Jewish question' carries multiple meanings: see M. Minow, 'The Constitution and the Subgroup Question' (1995) 71 *Indiana Law J.* 1.

[3] See for example B. Cheyette, *Constructions of 'the Jew' in English Literature and Society: Racial Representations 1875–1945* (1995); J. Shapiro, *Shakespeare and the Jews* (2016).

[4] J. Greenebaum, 'Placing Jewish Women into the Intersectionality of Race, Class and Gender' (1999) 6 *Race, Gender & Class* 41, at 42–43.

[5] For a discussion of some of these reasons in the context of multicultural theory in the US, see D. I. Rubin, 'Navigating the "Space Between" the Black/White Binary: A Call for Jewish Multicultural Inclusion' (2019) 20 *Culture and Religion* 192. See also D. Schraub, 'White Jews: An Intersectional Approach' (2019) 43 *AJS Rev.* 379.

[6] See for example B. Klug, 'The Collective Jew: Israel and the New Antisemitism' (2003) 37 *Patterns of Prejudice* 117.

and whiteness.[7] In these legal encounters, as I will show, there is still both Christian ambivalence towards Jews and a racializing dynamic at play, reflecting the construction of the figure of 'the Jew' across categories of religion and race in the Western Christian imagination.[8] Whether to use the term 'antisemitism' to describe these legal dynamics is a question to which I will turn in my concluding discussion.

The article begins with a brief review of critical legal approaches to religion and race in order to identify and critically examine some of the conceptual assumptions that seem to have pushed Jews, Jewishness, and Judaism as subjects of prejudice beyond the scholarly gaze. I argue here that a focus on colonial encounters and phenotype in understanding processes of legal exclusion based on religion and race cannot fully account for and acknowledge the persistence of anti-Jewish prejudice and its resonance in law and legal discourse.

In order to trace the resonance of this prejudice, the second section examines three cases in which Jewish practices became matters of legal contention. The first case that I discuss is the JFS ruling of the United Kingdom (UK) Supreme Court, which provides a judicial take on the age-old question of 'Who is a Jew?' I then turn to the legal and political controversy over religious infant male circumcision in Germany. Finally, I discuss the legal encounter with Jewishness through the Australian planning regime in the context of the construction of an eruv in a suburb of Sydney. These cases cover a wide array of jurisdictions and legal constellations, allowing me to investigate different forms of interaction between law and the cultural repertoire that perceives of 'the Jew' as Other. In reading these cases, my aim is not to engage in a doctrinal debate about the proper place of religion in the secular state or the scope of minority rights but instead to follow a set of discourses and narratives that shed light on the place of Jews, Judaism, and Jewishness in relation to the dominant cultures.

Of course, particular legal responses to Jewishness emerge out of particular socio-cultural contexts and local histories of religion and race as well as legal culture. There is, as Ariella Gross argues with regard to comparative work on law and race, the risk that 'superficial resemblances among phenomena will lead us to declare that racial categorization or racism transcend time and place, and even, perhaps, that they are inevitable'.[9] The same is true for studies of secular law and conceptions of secularism more broadly, where scholars increasingly seek to localize and pluralize secularism and its particular legal articulations.[10] The goal of this article is therefore not to declare these cases as paradigmatic for the liberal legal response to Jewishness. Rather, my aim is more modest and limited. I seek to uncover some recurrent themes and narratives in order to

[7] Two caveats are necessary here. First, by speaking of Christianity, I do not wish to reduce it to a homogeneous tradition. The history of Christianity is of course also rife with internal conflicts that continue to play out today. Following Didi Herman, I instead understand it as 'ways of knowing and being that are articulated, in legal as well as in political and popular culture, as non-religious or secular, and, in mainstream forms, associated with reason, civility, and progress': Herman, op. cit., n. 1, p. 18. Second, 'whiteness' as a site of material and symbolic privilege carries different meanings in different societies. For Australia, see for example G. Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (2000). For Britain, see for example S. Garner, 'Empirical Research into White Racialized Identities in Britain' (2009) 3 *Sociology Compass* 789. For Germany, see for example U. A. Müller, 'Far Away So Close: Race, Whiteness, and German Identity' (2011) 18 *Identities* 620. This article is not meant to contribute to the critical study of whiteness. Rather, I use whiteness here only to refer to an implicit hegemonic and mainly invisible racial norm from which Jewishness is constructed as deviating.

[8] Jewish identity blurs and transgresses the boundaries of many liberal categories of identity and difference: see S. A. Glenn and N. B. Sokoloff, *Boundaries of Jewish Identity* (2011).

[9] A. Gross, 'Race, Law, and Comparative History' (2011) 29 *Law and History Rev.* 549, at 551.

[10] J. R. Jakobsen and A. Pellegrini, *Secularisms* (2008).

highlight both the need for and the benefits of taking account of the role of secular liberal law in constructing and regulating Jewish identity and difference in relation to the dominant culture.

The third section considers these findings within the broader debate about the relationship between law, religion, and race, highlighting the importance of further exploring the intersections of religion and race in law and their relevance for legal responses to Jews and other minority groups, in particular Muslims. Moreover, drawing on work in Jewish studies, I consider the usefulness and limitations of antisemitism as an analytical lens to describe the legal dynamics at play in the cases analysed.

2 | LAW, RELIGION, RACE, AND 'THE JEW'

2.1 | Secular law, Christianity, and Judaism

The legal regulation of religion in the secular liberal state has animated much public and scholarly debate, with headscarves, minarets, turbans, kirpans, and religious family law making headlines and filling academic libraries. While much of this debate has been concerned with finding a liberal framework for accommodating religious difference and securing minority rights, a more critical strand of this debate interrogates the often unarticulated cultural and religious assumptions of secular law in Western liberal democracies.[11] This research shows that Western secular law's normative disposition is often still geared towards the culture of the majority with its Christian roots.[12] Non-Christian symbols, on the other hand, are frequently perceived as a threat to liberal values and their implicit links to Christianity.[13] These dynamics have become particularly salient in debates about Islam, with the headscarf at the centre of many political and legal tensions.[14] Countless laws and policies target this piece of fabric in the name of state neutrality, public security, *vivre ensemble*, or women's rights, turning the body of the woman into a 'battleground' over the definition of what differentiates 'us' from 'them'.[15] The headscarf cases appear to be not so much about balancing rights anymore but about indicating how Islam is increasingly constructed and treated as the patriarchal, illiberal, pre-modern Other through an orientalizing paradigm.

Parallels have been drawn between such responses to Muslims in the West and the historical discourse on Jewish emancipation, yet with little investigation of how Jews continue to be affected

[11] E. Darian-Smith, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law* (2010); Feldman, op. cit., n. 1; S. Jivraj, *The Religion of Law: Race, Citizenship and Children's Belonging* (2013); S. Mancini, 'The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism' in *Constitutional Secularism in an Age of Religious Revival*, eds S. Mancini and M. Rosenfeld (2014) 111.

[12] W. Brown, 'Civilizational Delusions: Secularism, Tolerance, Equality' (2012) 15 *Theory & Event*, at <https://muse.jhu.edu/article/478356>; S. Jivraj and D. Herman, '"It Is Difficult for a White Judge to Understand": Orientalism, Racialisation, and Christianity in English Child Welfare Cases' (2009) 21 *Child and Family Law Q.* 283.

[13] See for example B. Bhandar, 'The Ties that Bind: Multiculturalism and Secularism Reconsidered' (2009) 36 *J. of Law and Society* 301.

[14] M. Malik, 'Feminism and Its Other: Female Autonomy in an Age of Difference' (2008) 30 *Cardozo Law Rev.* 2613; S. Mancini, 'Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism' (2012) 10 *International J. of Constitutional Law* 411. See also S. H. Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (2008).

[15] S. Benhabib, 'The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey' (2010) 36 *Philosophy & Social Criticism* 451.

by today's politics of identity and difference.[16] Instead, Jews are sometimes identified within the oppressive Judeo-Christian majority.[17] Anthropologist Saba Mahmood, for example, argues in her otherwise insightful analysis that the legal accommodation of Islam in Europe requires a 'transformation of the cultural and ethical sensibilities of the majority Judeo-Christian population that undergird the law'.[18] Similarly, Talal Asad suggests that the emergence of the discourse of the Judeo-Christian tradition signals the new status of Jews in Europe after the Second World War, elevating them from their previously marginal position.[19] It is certainly correct, as Mahmood argues, that the legal accommodation of Islam in the West may require a fundamental questioning of the underlying assumptions of liberal secular law in order to avoid replicating structures of cultural dominance and orientalizing discourse. Moreover, as Asad rightly observes, after 1945, most Western countries have attempted to embrace Jewish history and Jewish communities in an effort to distance themselves from the Holocaust and many of these countries have, at least formally, committed to opposing antisemitism.

However, the term 'Judeo-Christianity', which presupposes the inclusion of Jews as equals in Christian societies, distorts the Jewish past and present. It masks a long history of Christian antagonism towards Judaism in which Christianity repeatedly tried to come to terms with its Jewish Other through a colonialist theological relationship, annexing, subjugating, and controlling Jewish religious ideas while simultaneously rejecting Judaism.[20] From the early days of Christendom, Jews constituted an oddity – neither heathens who could be converted, nor heretics who had fallen from grace.[21] As Zygmunt Bauman argues, this made Jews a particularly disturbing presence in the Christian world, which constituted 'a permanent challenge to the certainty of Christian evidence'.[22] An ambivalent antagonism to Judaism became a central component of Christianity's identity – an antagonism that also shaped the formation of secular thought. Jewish studies scholarship has drawn attention to this genealogy, pointing out how several of the 'key dichotomies' of secularism developed out of the juxtaposition of Christianity and Judaism in Christian thought, including the idea that a progressive Christianity had overcome an 'archaic Judaism'.[23] For many

[16] In these scholarly comparisons, the Jewish question is often discussed as a historical predecessor of the Muslim question: see for example S. R. Farris, 'From the Jewish Question to the Muslim Question: Republican Rigorism, Culturalist Differentialism and Antinomies of Enforced Emancipation' (2014) 21 *Constellations* 296. For an elaboration of the idea of Muslims as 'the new Jews', see M. Bunzl, *Anti-Semitism and Islamophobia: Hatreds Old and New in Europe* (2007).

[17] For a critique of this thinking in parts of the post-colonial scholarship, see also B. Cheyette, 'Against Supersessionist Thinking: Old and New, Jews and Postcolonialism, the Ghetto and Diaspora' (2017) 4 *Cambridge J. of Postcolonial Literary Inquiry* 424.

[18] S. Mahmood, 'Religious Reason and Secular Affect: An Incommensurable Divide?' (2009) 35 *Critical Inquiry* 836, at 860.

[19] T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (2003) 168. Asad acknowledges the persistence of antisemitism but does not problematize the term 'Judeo-Christianity'.

[20] S. Heschel, 'Revolt of the Colonized: Abraham Geiger's *Wissenschaft des Judentums* as a Challenge to Christian Hegemony in the Academy' (1999) 77 *New German Critique* 61. See also D. Boyarin, *Border Lines: The Partition of Judaeo-Christianity* (2004).

[21] J. C. Lopez, 'Beyond Eurocentrism and Orientalism: Revisiting the Othering of Jews and Muslims through Medieval Canon Law' (2016) 42 *Rev. of International Studies* 450, at 455–456.

[22] Z. Bauman, *Modernity and the Holocaust* (1989) 37.

[23] A. Joskowicz and E. B. Katz, 'Introduction: Rethinking Jews and Secularism' in *Secularism in Question: Jews and Judaism in Modern Times*, eds A. Joskowicz and E. B. Katz (2015) 1, at 2. See also the other contributions in the edited volume.

scholars of Jewish history, secular rule and thought cannot be separated from Christian attitudes towards Judaism – which now extend to other non-Christians too.[24]

Stephen Feldman has examined how this intimate link between Christian ambivalence towards Judaism and secularism has shaped contemporary secular law.[25] In his critical reading of the history of state–church separation in the United States (US), he shows how this historical antagonism resonates in contemporary religious freedom jurisprudence, impacting not only on Jews but other non-Christian minorities too. Given the deep affinity of the US with Christianity, Feldman argues that the constitutional rhetoric of non-establishment and individual religious freedom produces and maintains Christian cultural domination in US society and law. Through an extensive discussion of contemporary Supreme Court decisions, he shows how Christianity is consistently privileged through judicial discourses of neutrality and secularity, while Jewish claims are frequently dismissed.[26] Feldman's work is significant as it constitutes one of the first accounts to study the legal dimensions of Christian ambivalence towards Jews and Judaism – which he terms 'antisemitism' – and its contemporary implications for the religious equality of Jews alongside other non-Christian groups.

2.2 | Law, race, and Jewishness

Although Feldman draws inspiration from critical race approaches to law, race remains curiously absent from his analysis of antisemitism despite its centrality in the history and present of antisemitism. Overall, antisemitism and Jews as a racialized group have received little attention in the critical study of law and race, even though critical race theorists acknowledge the historical racialization of Jews. Critical race approaches to law have long exposed the role of law in perpetuating racial hierarchies. This literature aims, as Kimberlé Crenshaw and others describe it, at 'uncovering how law was a constitutive element of race itself: in other words, how law constructed race'.[27] A number of insights are central to the theory's approach to race, such as that race is the product of social construction, with law as one of its 'key architects'.[28] This means that races are categories invented and manipulated by society and not the result of some inherent biological difference. Critical race theory regards racism not as the abhorrent behaviour of particular individuals but as a structural feature of discourses and institutions. 'Racism', writes Angela P. Harris, 'is an inescapable feature of western culture, and race is always already inscribed in the most innocent and neutral-seeming concepts.'[29]

The absence of antisemitism from critical race approaches to law is not unique to the legal literature but reflects more generally how contemporary theorizing of race/racism and antisemitism has not always occurred in tandem.[30] While there have been accusations of critical race legal the-

[24] A. Raz-Krakotzkin, 'Secularism, the Christian Ambivalence toward the Jews and the Notion of Exile' in *Secularism in Question: Jews and Judaism in Modern Times*, eds A. Joskowicz and E. B. Katz (2015) 276, at 279.

[25] Feldman, op. cit., n. 1.

[26] Id., chs 9 and 10.

[27] K. Crenshaw et al., 'Introduction' in *Critical Race Theory: The Key Writings that Formed the Movement*, eds K. Crenshaw et al. (1995), xiii, at xxv.

[28] K. Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law* (2016, 2nd edn) 185.

[29] A. P. Harris, 'The Jurisprudence of Reconstruction' (1994) 82 *California Law Rev.* 741, at 743.

[30] L. Back and J. Solomos, 'Racism and Anti-Semitism' in *Theories of Race and Racism: A Reader*, eds L. Back and J. Solomos (2009) 191, at 192. See, however, P. Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (1993) ch. 6.

ory having an implicit anti-Jewish bias,[31] the reasons for this lacuna seem to have more to do with the theory's strong grounding in its North American context with its particular racial structure as well as the specific history of Jews in the US and their socio-economic position there. In the US, Jews encountered a society where the colour line proved more significant than religious difference in Europe, a situation from which many Jews benefitted legally by virtue of their skin colour despite the social and cultural persistence of antisemitism.[32] Moreover, political conditions after the Second World War enabled Jews to enjoy more fully white privilege and to improve their socio-economic situation relative to other minorities.[33] This history is quite similar to the experience of Jews in Australia, where many Jews, especially those arriving from Britain and many parts of Europe, benefitted from the colonial logic that perceived of Indigenous Australians and Chinese as primary Others, which allowed Jews to enjoy the privileges of whiteness in exchange for assimilation.[34]

Today, many (white) Jews – that is, most Ashkenazim, Jews hailing from Western and Central Europe – can usually claim whiteness as opposed to other 'model minorities' – that is, minorities that have enjoyed upward mobility – such as Asian Americans in the US.[35] However, not all Jews are white either in terms of skin colour or origin, if we conflate white with Europeanness. The Mizrahim come from North Africa and the Middle East, the Beta Israel come from Ethiopia, and there is a sizeable number of Jews of colour.[36] The idea of Jews as white is a fairly recent one, and the process of Jewish whitening has been fraught with ambiguity. The reason for this ambiguity is not only the internal diversity of Jews but also, as Cynthia Levine-Rasky points out, historic and contemporary forms of racialization.[37] Historically, Jews have been among the first racialized people and have experienced discrimination, exclusion, segregation, persecution, and extermination based on the idea of their racial Otherness. Yet, even today, there can be ambiguity around Jewishness, with scholars using terms such as 'liminally white' or 'off-white' to capture the Jewish position – one that is always shaped by geographical and societal context.[38] The contemporary whitening of Jews in the US, particularly in the large urban centres, does not necessarily capture the experience of Jews in other locations, where Jews have become less securely white,[39] which indicates the need to attend to the particularities of the Jewish experience beyond those centres of Jewish success in North America.

[31] D. A. Farber and S. Sherry, 'Is the Radical Critique of Merit Anti-Semitic?' (1995) 83 *California Law Rev.* 853. For responses to this critique, see for example B. Horsburgh, 'The Myth of a Model Minority: The Transformation of Knowledge into Power' (1999) 10 *UCLA Women's Law J.* 165; E. L. Rubin, 'Jews, Truth, and Critical Race Theory' (1999) 93 *Northwestern University Law Rev.* 525.

[32] L. Dinnerstein, *Antisemitism in America* (1994).

[33] K. Brodkin, *How Jews Became White Folks and What That Says about Race in America* (1998). On the complicated history of Black–Jewish relations in the US, see for example C. Greenberg, *Troubling the Waters: Black–Jewish Relations in the American Century* (2010).

[34] J. Stratton, 'The Colour of Jews: Jews, Race and the White Australia Policy' (1996) 20 *J. of Aus. Studies* 51.

[35] J. Freedman, 'Transgressions of a Model Minority' (2005) 23 *Shofar: An Interdisciplinary J. of Jewish Studies* 69.

[36] B. D. Haynes, *The Soul of Judaism: Jews of African Descent in America* (2018).

[37] C. Levine-Rasky, 'White Privilege: Jewish Women's Writing and the Instability of Categories' (2008) 7 *J. of Modern Jewish Studies* 51.

[38] See for example J. Moshin and R. B. Crosby, 'Liminally White: Jews, Mormons, and Whiteness' (2018) 11 *Communication, Culture & Critique* 436.

[39] A. Lentin, *Why Race Still Matters* (2020) 16. See also M. Cutler, 'Minority Group, Majority Space: Negotiating Jewish Identity in a Southern Christian Context' (2006) 35 *J. of Contemporary Ethnography* 696.

The racialization of Jews persists – not only among white supremacists – and it can be observed in law itself, as Didi Herman has shown by analysing how English judicial discourse has participated, and continues to participate, in the racialization of Jews across a number of different legal fields, ranging from child welfare cases to trust law.[40] Studying English court decisions together with Davina Cooper, she argues that 'regardless of whether or not Jews are actually defined as a race, their depiction as a people joined by culture, ancestry and blood constructs them according to a racialized discourse of difference'.[41] Processes of racialization also permeate contemporary legal conflicts over Jewish religious practices, resembling what sociologists have described as the racialization of religion, particularly in relation to Islam. In order to account for Islamophobia as a form of racism and the emergence of 'Muslim' as a racial category, scholars have drawn attention to the role of cultural traits – that is, 'customs and costumes'[42] – in processes of racialization.[43] The racialization of religion refers to 'the process of assigning a racial meaning to a group that was previously defined in religious terms and associating it with a number of phenotypical and cultural characteristics that are deemed unchanging and hereditary'.[44] Moving beyond definitions of race that privilege skin colour, this research shows how cultural traits read as Muslim have been essentialized as inferior, barbaric, patriarchal, disloyal, terrorist, and foreign, while Islam has been racialized as a non-white and non-Western faith, ascriptions that also resonate in legal responses to Islam.[45] A focus on the racialization of religion makes it possible to capture how those who may be at times viewed and treated as nominally white in a society can nonetheless at other times experience racialization based on religious or cultural signifiers, such as dress, jewellery, hairstyle, or language.[46] A similar dynamic is at play in legal encounters with Jewish identity, as I will discuss in the next section.

The racialization of religion, including Judaism, is not a new phenomenon. While dominant accounts of the history of race often locate its origins in the Atlantic slave trade, colonialism, and the pseudo-science of race, historians have shown how both Jews and Muslims were already becoming increasingly racialized in the Middle Ages as not only culturally but also biologically inferior to Christians, indicating the co-constitution and interconnectedness of religion and race.[47] Christian theological discourse on Jews initially located their supposed inferiority in their religious practices but then slowly shifted to a racially inflected explanation of Jewish inferior-

[40] Herman, op. cit., n. 1.

[41] D. Cooper and D. Herman, 'Jews and Other Uncertainties: Race, Faith and English Law' (1999) 19 *Legal Studies* 339, at 340.

[42] J. Rana, *Terrifying Muslims: Race and Labor in the South Asian Diaspora* (2011) 28.

[43] A. Husain, 'Retrieving the Religion in Racialization: A Critical Review' (2017) 11 *Sociology Compass* 1; N. Meer, 'Racialization and Religion: Race, Culture and Difference in the Study of Antisemitism and Islamophobia' (2013) 36 *Ethnic and Racial Studies* 385; S. Selod and D. G. Embrick, 'Racialization and Muslims: Situating the Muslim Experience in Race Scholarship' (2013) 7 *Sociology Compass* 644.

[44] J. Galonnier, 'The Racialization of Muslims in France and the United States: Some Insights from White Converts to Islam' (2015) 62 *Social Compass* 570, at 571.

[45] Selod and Embrick, op. cit., n. 43, p. 649. For the racialization of Islam in law, see M. Chon and D. E. Arzt, 'Walking While Muslim' (2005) 68 *Law and Contemporary Problems* 215; Jivraj, op. cit., n. 11; Mancini, op. cit., n. 14; Razack, op. cit., n. 14.

[46] Research shows, for example, how white converts to Islam experience racialization based on their endorsement of a faith racialized as non-white: see for example Galonnier, op. cit., n. 44.

[47] D. Nirenberg, 'Was There Race Before Modernity? The Example of "Jewish Blood" in Late Medieval Spain' in *The Origins of Racism in the West*, eds M. Eliav-Feldon et al. (2009) 232; M. Westerduin, 'Questioning Religio/Secular Temporalities: Mediaeval Formations of Nation, Europe and Race' (2020) 54 *Patterns of Prejudice* 136. For an analysis of ethnic and racial

ity as rooted in their souls and manifested in their bodies, a process that predates the emergence of racial antisemitism during the nineteenth century.[48] Considering Jews as merely a religious group that experiences religious bigotry misses this subtle yet enduring racializing dimension of legal encounters with Jewish practices.[49] In what follows, I turn to contemporary case law to show how traces of such thinking – that is, the construction of 'the Jew' through a discourse of Christian superiority and the racialization of Jewish religious practice – resonate in legal encounters with Jews, Jewishness, and Judaism today.

3 | THE PERSISTENCE OF JEWISH QUESTIONS

Questions about Jewish belonging and its conditions continue to be raised in contemporary law and politics. For example, the practice of shechita, the slaughter of animals without prior stunning, has been the subject of numerous controversies, regulations, and bans over many decades. In 2017 and 2019, Belgium's regions Flanders and Wallonia joined countries such as Sweden and Switzerland in drafting a law banning shechita alongside Islamic practices of slaughter for the production of halal meat.[50] Supporters of such a ban claim the welfare of animals as their primary concern, calling these practices cruel and backward. Infant male circumcision, long an accepted and even promoted surgery in Western societies such as the US, is now discussed alongside female genital cutting as a violent and barbaric violation of a child's bodily integrity. In 2018, both Denmark and Iceland discussed draft bills criminalizing male circumcision.[51] In 2013, the Parliamentary Assembly of the Council of Europe called upon member states to consider restricting the practice,[52] and in 2012, a German court declared the practice a criminal assault. Similarly, the inconspicuous eruv, a public installation for facilitating the observance of Shabbat for Orthodox Jews, has turned into a thorny issue for neighbours in places such as Canada, the UK, Australia, South Africa, and the US. No matter what the legal framing is – the constitutional separation of state and religion, the human right to freedom from religion, or objections based on local planning concerns such as amenity – opponents insist that the eruv violates the law of the state and has no place in their neighbourhood.

In what follows, I analyse three examples of such cases to show how the legal encounter with Jewishness is shaped by Christian cultural hegemony and an ongoing racialization: the 2009 JFS decision of the UK Supreme Court concerning the admission policy of an Orthodox Jewish school,

reasoning in early Christianity, see D. K. Buell, *Why This New Race: Ethnic Reasoning in Early Christianity* (2008). Other scholars distinguish between medieval and modern notions of race: see for example S. C. Akbari, *Idols in the Past: European Representations of Islam and the Orient 1100–1450* (2009) 160.

[48] J. M. Thomas, 'The Racial Formation of Medieval Jews: A Challenge to the Field' (2010) 33 *Ethnic and Racial Studies* 1737.

[49] See for example Rubin, op. cit., n. 31, p. 531. This argument reflects how 'religious difference' has become a dominant way of describing Jewish identity: see for example L. Levitt, 'Impossible Assimilations, American Liberalism, and Jewish Difference: Revisiting Jewish Secularism' (2007) 59 *American Q*. 807.

[50] In December 2020, the European Court of Justice upheld the ban: C-336/19 *Centraal Israëlitisch Consistorie van België and Others* [2021] OJ C 53/7.

[51] M. S. Sorensen, 'Denmark Talks (Reluctantly) about a Ban on Circumcising Boys' *New York Times*, 2 June 2018, at <https://www.nytimes.com/2018/06/02/world/europe/denmark-circumcision.html>.

[52] Parliamentary Assembly of the Council of Europe, Res. 1952 (2013) at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20174&lang=en>.

the German controversy over the legality of religious infant male circumcision from 2012, and an Australian planning dispute about the construction of an eruv in a Sydney suburb between 2008 and 2016. These cases offer insights into different kinds of interactions between liberal law and questions of Jewishness: the judicial treatment of Jewish identity, a doctrinal debate, and submissions of ordinary residents to the local planning authority. My discussion of these cases is inevitably cursory and brief at the expense of broader historical, cultural, and legal context. Instead, I focus on certain themes, narratives, tropes, and patterns of thinking, and their manifestations and articulations in legal claims. This is of course not the only way in which these cases can be read. Legal disputes are always the result of a confluence of interests and concerns. Nonetheless, it is important to acknowledge the cultural and historical contexts of these cases and their underlying power relations.

3.1 | The JFS case in the UK Supreme Court

In *R (E)* v. *Governing Body of JFS*, the UK Supreme Court found that a state-funded Jewish school's admission policy discriminated on grounds of ethnic origin.[53] In brief, the school had refused admission to a boy because it did not consider him Jewish under the Orthodox Jewish criteria that it applied. According to Orthodox Judaism, someone is Jewish if born to a Jewish mother or following a conversion to Judaism according to Orthodox criteria. Since the mother had converted within the less strict Jewish Masorti movement,[54] the school did not acknowledge her conversion and hence she was not considered to be Jewish and neither was her son for Orthodox purposes.

In the end, the Court not only reached the problematic conclusion that the school had racially discriminated because of this matrilineal test,[55] it also forced the Orthodox Jewish school to adopt a new admission policy that effectively resulted in the 'Christianization'[56] of the school. The new admission policy is based on a 'Certificate of Religious Observance',[57] thereby replacing the genealogical story of Jewishness with a Jewishness as manifested through belief and its expression.[58] The idea of such a religious observance test is informed by a Christian understanding of religion, in which someone is understood to be religious if they participate in the observance of religious practice, echoing the remaking of Judaism during the period of emancipation that sought to turn Judaism into a religion in the Protestant sense.[59] This understanding does not sit easily with the way in which Judaism defines the Jewishness of a person. Despite the internal pluralism of Judaism, almost all Jewish denominations agree that a person is Jewish either

[53] *R (E) v. Governing Body of JFS* [2009] UKSC 15.

[54] Masorti describes itself as traditional Judaism. It is less strict in observance than Orthodox Judaism, for example with regard to the equal participation of women. Many Masorti synagogues are egalitarian. See Masorti Judaism, 'Frequently Asked Questions about Masorti Judaism' at <https://masorti.org.uk/about-masorti/faqs.html>.

[55] For a detailed critique of the case, see Herman, op. cit., n. 1, ch. 7; S. Mancini, 'To Be or Not to Be Jewish: The UK Supreme Court Answers the Question; Judgement of 16 September 2009, *R* v. *Governing Body of JFS* UKSC 2015' (2010) 6 *European Constitutional Law Rev.* 481.

[56] Herman, op. cit., n. 1, p. 168.

[57] The requirements can be found at <https://jfs.brent.sch.uk/wp-content/uploads/2018/09/11-CRP-2019.pdf>.

[58] On the role of genealogy and kinship in Judaism, see J. Boyarin, 'Circumscribing Constitutional Identities in Kiryas Joel' (1997) 106 *Yale Law J.* 1537, at 1547.

[59] L. Batnitzky, *How Judaism Became a Religion: An Introduction to Modern Jewish Thought* (2011).

by birth or by conversion, although they differ on the exact criteria. However, this emphasis on descent, on shared communality and genealogy, appears foreign in a world 'dominated by liberalism and cultural Christianity', Susanna Mancini points out.[60] If Christianity is the benchmark for what constitutes a legally protected religious identity, the resulting understanding of Judaism will be unable to accommodate the multi-layered nature of Jewish identity that cuts across modern understandings of ethnicity, religion, culture, and nationality.

In practice, the religious observance requirement also creates a less diverse body of students by excluding those who are Jewish by birth but non-observant. The decision thereby replicated the Christian narrative that it had overcome Judaism's exclusionary view of religious membership by defining such membership as a matter of belief, as Joseph Weiler observes. He argues that the decision was

> shaped by the fundamental Christian idea of the New Covenant in which the 'old' covenantal boundaries of Israelite peoplehood were dissolved, and a universal salvific message was extended to all individuals regardless of the people to whom they belonged.[61]

The unfavourable comparison of Judaism with Christianity was made even more explicit in Lady Hale's judgement, in which she remarked that '[t]he Christian church will admit children regardless of who their parents are'.[62] There was, as Didi Herman notes, an orientalizing gaze at play in Lady Hale's assertion that placed Christianity with its supposed commitment to equality and non-discrimination in a superior position vis-à-vis Judaism.[63]

However, the Court's reasoning was not only pervaded by Christian assumptions; racialization also made an appearance through the persistent distinction between 'English' and 'Italian' (the mother's origin) on the one hand and 'Jewish' on the other. This reasoning, Herman argues, contributes to a form of judicial racialization that analyses 'the blood of individuals'.[64] Lord Mance, for example, contrasted 'Cohen' – that is, a member of the Jewish priestly class – with an English woman, suggesting that a Cohen is someone different from an English person.[65] Lady Hale argued that

> M was rejected because of his mother's ethnic origins, which were Italian and Roman Catholic. The fact that the Office of the Chief Rabbi would have over-looked his mother's Italian origins, had she converted to Judaism in a procedure which they would recognise, makes no difference to this fundamental fact. M was rejected, not because of who he is, but because of who his mother is. … [I]t was because his mother was not descended in the matrilineal line from the original Jewish people that he was rejected.[66]

[60] Mancini, op. cit., n. 55, p. 490.

[61] J. H. H. Weiler, 'Discrimination and Identity in London: The Jewish Free School Case' (2010) Spring *Jewish Rev. of Books*, at <https://jewishreviewofbooks.com/articles/97/discrimination-and-identity-in-london-the-jewish-free-school-case/> (emphasis in original).

[62] Lady Hale, *R (E)* v. *Governing Body of JFS* [2009] UKSC 15, at para. 69.

[63] Herman, op. cit., n. 1, p. 163.

[64] Id., p. 16.

[65] Lord Mance, *R (E)* v. *Governing Body of JFS* [2009] UKSC 15, at para. 87.

[66] Lady Hale, op. cit., n. 62, para. 66.

Although Lady Hale acknowledged that a conversion according to Orthodox standards would have made M and his mother Jewish in the eyes of the Office of the Chief Rabbi, the mother's lack of descent from the 'original Jewish people' seemed to trump this fact in Lady Hale's analysis. Jewishness, it appeared, remains an identity transmitted by blood and the matrilineal test must therefore be racial – notwithstanding the fact that any person regardless of their ethnic background can convert to Judaism. Clearly, Lady Hale and the other judges struggled to make sense of Jewish identity within a liberal legal repertoire, seeking to categorize an identity that blurs the boundaries of religion and race/ethnicity and defies Christian-centric notions of religion. In the end, the judges used their legal power to make Jews fit, while maintaining subtle distinctions around 'the Jew' and 'the English'. For Herman, the JFS case is not an isolated incident but falls into a longer tradition of English judicial thinking about Jews in which '"the Jew" remains the not quite/not yet/not ever "Englishman"'.[67]

3.2 | The German circumcision controversy

In 2012, a German court made international headlines when it ruled that infant male circumcision for religious reasons constitutes a criminal assault that cannot be justified by the consent of the parents.[68] Although the initial decision concerned the circumcision of a young Muslim boy, the ensuing debate quickly turned to the Jewish practice, which is hardly surprising given German history and the still delicate relationship between Jewish and non-Jewish Germans. Although the German parliament restored legal security by drafting a clause in the Civil Code affirming the parental right to consent to the circumcision of their sons,[69] the surrounding debate about the practice's legality brought a troubling amount of resentment towards Jews to the surface – not only in the notorious online space, but also in scholarly legal commentary that continues to play an important role in the development of legal doctrine in Germany's civil law system.

As I have argued elsewhere, a particular Christian normativity about what constitutes the normal body was woven into arguments against the practice in the name of children's rights.[70] For example, many critics of circumcision suggested that only those who could legally consent should be allowed to be circumcised – that is, according to German law, at the age of 14 or 18 depending on

[67] D. Herman, '"An Unfortunate Coincidence": Jews and Jewishness in Twentieth-Century English Judicial Discourse' (2006) 33 *J. of Law and Society* 277, at 300.

[68] District Court of Cologne, 7 May 2012, Case 151 Ns 169/11. An unofficial English translation of the decision is available at <https://www.dur.ac.uk/ilm/news/?itemno=14984>. International media partly misrepresented the Cologne decision as introducing a ban on the practice. However, in Germany, decisions of lower courts do not create legal precedents, but other courts can follow the reasoning if they find it convincing. The result of the decision was therefore not a ban but rather legal insecurity. For a discussion of the decision in the context of the German legal system, see H. Pekárek, 'Circumcision Indecision in Germany' (2015) 4 *J. of Law, Religion and State* 1.

[69] For an analysis of the case focused on gender, see A. Barras and D. Dabby, 'Only Skin Deep' in *Globalized Religion and Sexual Identity: Contexts, Contestations, Voices*, ed. H. Shipley (2014) 86.

[70] M. Riedel, 'An Uneasy Encounter: Male Circumcision, Jewish Difference, and German Law' (2019) 79 *Studies in Law, Politics, and Society* 55. See also B. Fateh-Moghadam, 'Criminalizing Male Circumcision – Case Note: Landgericht Cologne, Judgment of 7 May 2012 – No. 151 Ns 169/11' (2012) 13 *German Law J.* 1131; S. R. Munzer, 'Secularization, Anti-Minority Sentiment, and Cultural Norms in the German Circumcision Controversy' (2015) 37 *University of Pennsylvania J. of International Law* 503.

the context.[71] In this line of reasoning, the uncircumcised body is set as the universal, neutral, and secular norm that leaves all possible future options open.[72] However, postponing or forgoing circumcision is not religiously neutral either. For both Jews and Muslims, being uncircumcised does not characterize the secular and neutral body. Instead, it corresponds with the Christian body[73] – at least in the German context and that of most of continental Europe, where circumcision has never been routinized and normalized as in the US and other English-speaking countries.[74] Forgoing circumcision therefore does not necessarily only mean protecting future bodily autonomy, but can also be understood as a way of orienting a child towards the bodily norms and values of the dominant culture and its Christian roots.[75]

While some have argued that the debate was mainly aimed at Muslims – a much larger religious minority in modern Germany – the prominence of references to Jews and Judaism spoke a different language. For example, one legal article by a scholar of constitutional law invoked the story of Judaism's supersession through Christianity in its doctrinal critique of the practice. The article argued that 'circumcision replaced human sacrifice', while on the 'next evolutionary step' the early Christian community exchanged the physical aspects of the ritual of circumcision for baptism, a 'gender-comprehensive' practice. In this way, circumcision lived on as 'circumcision of the heart in the spirit, and not the letter'.[76] The article concluded that the secular state could not enforce this transformation in religions such as Judaism.[77] The link between Christianity and secularism, often concealed through references to universalism and religious neutrality, is made explicit through this Christian narrative of supersession. In this doctrinal commentary, Christianity becomes, like the secular state, associated with gender equality through its gender-neutral ritual of baptism. This idea is not new and echoes, perhaps unconsciously, what Paul had to say about circumcision in comparison to baptism when he contrasted the Jewish circumcision of the flesh with the Christian circumcision of the heart. For Paul, as Shaye Cohen notes, 'circumcision discriminates, baptism does not'.[78]

In addition to implicit claims of Christian superiority, a language of violence, barbarism, and cruelty pervaded the legal critique of circumcision. Male circumcision was labelled as a form of 'genital mutilation',[79] placing the practice in the same semantic register as Western discourse on female genital cutting in which the term 'female genital mutilation' seeks to provoke a particular emotional response. Another legal commentary equated being circumcised with a 'brand

[71] In Judaism, circumcision occurs on the eighth day after birth. In Islam, the timing is more flexible, ranging from early childhood to early puberty.

[72] H. Tzuberi and S. Doughan, 'Säkularismus als Praxis und Herrschaft: Zur Kategorisierung von Juden und Muslimen im Kontext säkularer Wissensproduktion' in *Der inspizierte Muslim: Zur Politisierung der Islamforschung in Europa*, ed. S. Amir-Moazami (2018) 269, at 296.

[73] R. Y. Paz, 'The Cologne Circumcision Judgment: A Blow against Liberal Legal Pluralism' *Verfassungsblog* 24 July 2012, at <http://verfassungsblog.de/cologne-circumcision-judgment-blow-liberal-legal-pluralism/>.

[74] I briefly discuss this difference in n. 84. See also D. L. Gollaher, 'From Ritual to Science: The Medical Transformation of Circumcision in America' (1994) 28 *J. of Social History* (1994) 5.

[75] Herman, op. cit., n. 1, p. 83.

[76] J. Isensee, 'Grundrechtliche Konsequenz wider geheiligte Tradition' (2013) 68 *Juristenzeitung* 317, at 322 (my translation)

[77] Id.

[78] S. D. Cohen, *Why Aren't Jewish Women Circumcised?* (2005) 71. The passage in Galatians 3:28 is: 'There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus.'

[79] See for example T. Fischer, *Strafgesetzbuch mit Nebengesetzen* (2015, 62nd edn) section 223, at 43.

mark',[80] linking the practice to the branding of animals and objects and implying that Jewish and Muslim parents treat their children in dehumanizing ways. Sherene Razack has drawn attention to the link between certain articulations of secularism and processes of racialization. The secular/religious divide that is enacted in debates about Islam in the West, Razack argues, can function as a racial line that marks 'the difference between the white, modern, enlightened West, and people of colour, and in particular, Muslims'.[81] A similar racialization of Jews and Muslims can be observed in the German debate that established a binary between an enlightened, secular, modern, and rational 'us' and a pre-modern, illiberal, religious, violent 'them', positioning both Jews and Muslims as racialized Others. The racialization of circumcised bodies draws on a longer tradition of perceiving of this bodily mark as the sign of the racial difference of Jews and Muslims.[82] After the emancipation of Jews and their increasing assimilation, German race thinking turned to the marker of the Jewish male as a pathological sign of the Jew's diseased body and the deviant sexuality of the effeminate Jewish male.[83] This is not to argue that this is the only way in which this debate can be read; however, the echoes of this older thinking should not be dismissed as merely accidental given that the body of the male circumcised Jew, as anthropological scholarship notes, is an image that is 'crucial to the very understanding of the Western image of the Jew at least since the advent of Christianity'.[84]

3.3 | An eruv installation in Sydney

The third case concerns the construction of an eruv in the suburb of St Ives in north Sydney. In this predominantly white and predominantly Christian Australian suburb, residents vehemently opposed the construction of poles and wires that looked almost indistinguishable from existing telephone and electricity installations.[85] The conflict dragged on for almost ten years until the local council finally granted development consent after it had repeatedly refused planning per-

[80] G. Jerouschek, 'Beschneidung und das deutsche Recht: Historische, medizinische, psychologische und juristische Aspekte' (2008) 6 *Neue Zeitschrift für Strafrecht* 313, at 319.

[81] S. H. Razack, 'The "Sharia Law Debate" in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture' (2007) 15 *Feminist Legal Studies* 3, at 6.

[82] Westerduin, op. cit., n. 47, pp. 146–147.

[83] S. L. Gilman, *Freud, Race, and Gender* (1993) ch. 2.

[84] S. L. Gilman, *Making the Body Beautiful: A Cultural History of Aesthetic Surgery* (1999) 137. The case of circumcision is instructive because it shows the importance of history and geography for the racialization of (un)circumcised bodies. The US is one of the few Western societies (alongside historically the UK, Canada, and Australia) where infant male circumcision has been routinized and normalized regardless of religious background. Fuelled by anxieties over masturbation as a source of moral and physical degeneration, male circumcision became over the course of the late nineteenth and early twentieth centuries associated with white middle-class identity, thereby eradicating the bodily differences between white Jews and white Christians, which had for so long been seen as marking an unsurmountable theological and later racialized divide in the European-Christian imagination: see Gollaher, op. cit., n. 74. Since the 1980s, a so-called 'intactivist' movement has begun to challenge the normalization of circumcision in the US. Although framed primarily in terms of children's rights, the movement has occasionally tapped into antisemitic imagery, such as Monster Mohel: see L. Derrick, '*Foreskin Man* Comic Book Attacks Circumcision' *Huffington Post*, 6 June 2011, at <https://www.huffingtonpost.com/lisa-derrick/foreskin-man-comicbook-at_b_871262.html>. There is also a growing body of scholarly work challenging infant male circumcision: see for example M. Fox and M. Thomson, 'Foreskin Is a Feminist Issue' (2009) 24 *Aus. Feminist Studies* 195.

[85] For a detailed discussion of the case and the role of local law in governing diversity, see M. Riedel, 'The Difference a Wire Makes: Planning Law, Orthodox Judaism and Urban Space in Australia' (2020) 16 *International J. of Law in Context*

mission, stating the lack of 'community support'. A central theme in the opposition to the eruv was the vision of St Ives as a secular space in which religion had to remain in the private sphere – a common argument in many eruv controversies.[86] Residents argued in submissions to the council that 'streets should not be for religious purposes' and that 'public land should be secular'.[87] In order to prevent the eruv from violating the 'civil rights' of 'tolerant' Australians,[88] Jewish difference had to remain private. This was justified as a matter of religious equality. As one resident argued, 'in Australia all religions are equal and should respect and accept the rule of law in Australia'.[89]

Although eruv opponents emphasized their commitment to religious equality, they did not criticize Christian symbols in their suburb's public space. Each year, a large Christmas tree is placed in front of the local council chambers, which also gives annual subsidies to sponsor the Christian singing event 'Carols in the Park' in one of the suburb's public parks. This dynamic – in which Christianity is a natural background culture, whereas a non-Christian religious symbol, such as the eruv, is interpreted as a threat to secularity – is not unique to the Sydney eruv dispute. In her analysis of the Barnet eruv conflict in London, for example, Davina Cooper shows how eruv opponents tied British national identity to Christianity. In the eyes of those who objected to the eruv in Barnet, the Orthodox Jewish installation threatened the secular character of the national public space, while Christian hegemony in public spaces remained unquestioned.[90]

The responses to the Jewish eruv reflect a broader legal trend of treating non-Christian symbols differently to Christian symbols. While Christmas trees, crucifixes,[91] crosses,[92] and crèches[93] have been positioned as signs of a common culture in Europe, North America, and Australia, non-Christian symbols, such as the Jewish eruv or the Muslim headscarf,[94] have often been excluded from this shared culture and characterized as religious overreach. Silvio Ferrari argues that Western anxieties around religious difference and demographic change have created a tension between attempts to keep certain religions behind closed doors in order to exclude them from processes of national identity formation on the one hand and the 're-publicization' of the majority religion in order to strengthen national identity on the other.[95] Despite these contradictory normative impulses, the supposedly impartial 'wall of separation' continues to shape the legal and political

403; see also J. Connell and K. Iveson, 'An Eruv for St Ives? Religion, Identity, Place and Conflict on the Sydney North Shore' (2014) 45 *Aus. Geographer* 429.

[86] See for example S. Watson, 'Symbolic Spaces of Difference: Contesting the Eruv in Barnet, London and Tenafly, New Jersey' (2005) 23 *Environment and Planning D: Society and Space* 597; C. E. Fonrobert, 'Installations of Jewish Law in Public Urban Space: An American Eruv Controversy' (2015) 90 *Chicago-Kent Law Rev.* 63.

[87] All resident statements are taken from a survey conducted by Ku-ring-gai Council in 2016 unless indicated otherwise. Survey on file with author.

[88] 'Opinion/Letters' *North Shore Times*, 9 March 2011, at 21.

[89] 'Letters' *North Shore Times*, 16 September 2011, at 36.

[90] D. Cooper, 'Talmudic Territory? Space, Law, and Modernist Discourse' (1996) 23 *J. of Law and Society* 529, at 543.

[91] See for example *Lautsi and Others* v. *Italy*, European Court of Human Rights (Grand Chamber), 18 March 2011, Appl. No. 30814/06.

[92] See for example *American Legion* v. *American Humanist Association*, 139 S. Ct. 2067 [2019].

[93] See for example Conseil d'Etat, decision of 9 November 2016, no. 395122.

[94] On the headscarf, see for example *Dahlab* v. *Switzerland*, European Court of Human Rights, 15 February 2001, Appl. No 42393/98.

[95] See S. Ferrari, 'Religion in the European Public Spaces: A Legal Overview' in *Religion in Public Spaces: A European Perspective*, eds S. Ferrari and S. Pastorelli (2012) 139, at 144.

conversation over the place of religion in the public realm, while camouflaging the dominance of majoritarian, hence Christian symbols in public spaces and institutions.[96]

As in the other cases, alongside the privileging of Christian norms and values through discourses of secular neutrality, racialization was evident in St Ives too. Unfiltered by academic and judicial conventions, some residents at times openly invoked antisemitic tropes. In a number of submissions to the council, residents rejected the construction of an eruv as 'not the Australian way', reminding Jews that this was 'not Israel'. Others objected to the eruv as it would create a 'religious enclave' or a 'ghetto', and therefore the perception that 'this is a Jewish area'. Distinguishing St Ives from other localities with a significant Jewish population, one councillor stressed: 'This is not Bondi, this is not New York. This is St Ives and Ku-ring-gai and we value the amenity of our treescape.'[97] A leaflet circulated in 2016 took the moral panic about public Orthodox Judaism a step further by invoking a long-standing antisemitic narrative of a Jewish conspiracy to take over the suburb. Shabbat-observant Jews in St Ives were racialized as fundamentalist, religious fanatics who were using the eruv as a Trojan horse to seize control:

> The motivation to build an Eruv has very little to do with the stated purpose of enabling carrying on the Sabbath or mothers pushing a pram, as it is so often stated. It has much more to do with establishing a modern version of the ghetto under Rabbinical control.[98]

4 | ANTISEMITISM, PHILOSEMITISM, AND AMBIVALENCE

These cases offer a snapshot of the various ways in which law continues to play a central role in shaping and regulating the boundaries of acceptable Jewishness, particularly in relation to a dominant Christian norm that remains – at times only thinly – veiled behind a notional commitment to secular religious neutrality and universal human rights. Christianity operates in each of these cases as an unmarked, invisible position, quite similar to whiteness as the unmarked race. These cases thereby further underline the cultural force of Christianity and the way in which it sets the limits of liberal inclusion for non-Christians. The particular form that this dominant Christian norm takes is of course country specific. Racialization is less pronounced in each of these cases than narratives of Christian superiority, reflecting in its prominence certain discursive restraints that distinguish the judiciary from ordinary residents. This racialization often relies on implicit statements of national character, such as 'Englishness', 'Germanness', and 'Australianness,' in contrast to a 'Jewishness' that becomes associated with negative traits, such as 'exclusionary', 'violent', 'foreign', and 'subversive'. The cases thereby illustrate different forms of interaction between these narratives and liberal law as well as the willingness of legal actors to perpetuate or sanction such narratives.

The slippage between narratives of Christian superiority and racializing discourse in the legal encounter with Jewishness is not accidental, but instead reflects, as I argued above, the specific

[96] On Jewish support for a 'naked public space' in France and the US, see P. Birnbaum, 'On the Secularization of the Public Square: Jews in France and in the United States' (2009) 30 *Cardozo Law Rev.* 2431.

[97] Quoted in F. Brady, 'Four Years on, Still Eruv Uncertainty' *North Shore Times*, 26 August 2011, at 8.

[98] See J. Rapana, 'Anti-Eruv Flyer "One of the Worst Examples of Anti-Semitism" in Sydney' *Daily Telegraph*, 15 September 2016, at <https://www.dailytelegraph.com.au/newslocal/north-shore/antieruv-flyer-one-of-worst-examples-of-antisemitism-in-sydney/news-story/da7eeac9e11718449ca9f886c58d6716>.

construction of Jewish alterity where race and religion intersect. This contemporary form of cultural racism vis-à-vis Jews draws on this historical legacy, where discourses of culture and biology have intersected in shifting ways to construct 'the Jew', quite similar to 'the Muslim'. This construction takes place through a contradictory logic that involves both discourses of assimilation to an implicit white Christian norm and of essentialization that casts doubt on the possibility of this assimilation.[99] Discourses of secularism and racialization are deployed here as two intersecting technologies for constituting and managing Jewish difference in law and society. There is a need to further explore this intricate nexus of religion and race in secular liberal law in order to not only account for prejudice towards Jews but also to aid understanding of contemporary Islamophobia and its manifestations in law and politics.[100]

Similar discourses are indeed at play in the various debates about the headscarf, the accommodation of Sharia law, the building of mosques, and the slaughter of animals for the production of halal meat.[101] Moreover, legal and political questions about public Muslim difference can often implicate Jews too, as the example of male circumcision illustrates, where 'Semitic' difference was problematized.[102] These parallels and interconnections hint at the long and entangled history of Jews and Muslims in the 'Christo-secular imagination',[103] which has been veiled to some extent by the tensions in the Middle East and the discourse of Judeo-Christianity. Taking seriously these interconnections is not meant to suggest that Jews face the same amount of prejudice as Muslims in public institutions today. Yet it would require more than considering Jews merely as 'collateral damage' in attacks aimed at Muslims.[104] Jewish practices have been targeted independently of Muslims, such as in the case of JFS and the eruv, and there is often a distinct concern over Jewishness, even when the practice is shared with Muslims, as I have discussed in the case of infant male circumcision. It would therefore be valuable to explore how these historical interconnections play out in the law and politics of (Semitic) religious difference today, such as in fostering or thwarting alliances. Moreover, these linkages between responses to Jews and Muslims underscore the importance of further examining how the legal construction of Jewish alterity relates to other forms of religious and racial exclusion, including but not limited to Islamophobia.

As I noted in the introduction, analysing the exclusion and marginalization of Jews begs the question of whether such cases as those analysed here should be read as evidence that antisemitism finds its way into law and legal discourse. However, I would suggest that a focus on

[99] On whether Christian anti-Judaism should be distinguished from racial antisemitism, see for example S. Heschel, 'Historiography of Antisemitism versus Anti-Judaism: A Response to Robert Morgan' (2011) 33 *J. for the Study of the New Testament* 257.

[100] On the race–religion nexus and its significance for understanding different forms of racism, see A. Topolski, 'The Race–Religion Constellation: A European Contribution to the Critical Philosophy of Race' (2018) 6 *Critical Philosophy of Race* 58. On the intersections of religion and race in the US, see J. S. Kahn and V. W. Lloyd (eds), *Race and Secularism in America* (2016).

[101] See for example Razack, op. cit., n. 14; K. M. Dunn, 'Representations of Islam in the Politics of Mosque Development in Sydney' (2001) 92 *Tijdschrift voor Economische en Sociale Geografie* 291.

[102] See also E. B. Katz, 'Where Do the Hijab and the Kippah Belong? On Being Publicly Jewish or Muslim in Post-Hebdo France' (2018) 32 *Jewish History* 99.

[103] Y. Jansen and N. Meer, 'Genealogies of "Jews" and "Muslims": Social Imagineries in the Race–Religion Nexus' (2020) 54 *Patterns of Prejudice* 1, at 7; E. B. Katz, 'An Imperial Entanglement: Anti-Semitism, Islamophobia, and Colonialism' (2018) 123 *Am. Historical Rev.* 1190; I. D. Kalmar and D. J. Penslar (eds), *Orientalism and the Jews* (2005); G. Anidjar, *The Jew, the Arab: A History of the Enemy* (2003).

[104] See for example J. Sacks, 'The Europeans' Skewed View of Circumcision' *Jerusalem Post*, 5 July 2012, at <http://www.jpost.com/Opinion/Columnists/The-Europeans-skewed-view-of-circumcision>.

antisemitism is not necessarily illuminating. Reading these events as evidence of deep-seated antisemitism risks telling a story of a timeless and unchanging hostility towards Jews from the writings of Paul to the reasoning of a contemporary British court, German legal commentary, or the Australian planning regime. The perils of such an approach are evident in Stephen Feldman's study of constitutional law in the US, when he concludes that the most pervasive form of Christian imperialism is unconscious antisemitism, sanctioned by US law. Feldman understands antisemitism similar to racism as a product of acculturation and structural relations, which operates at an unconscious level and also informs legal reasoning.[105] The most common form that antisemitism takes nowadays is the denial of difference, which means that Jews have to acknowledge the supposed secularity and neutrality of Christian culture and acculturate to this norm.[106] Feldman's account of antisemitism has encountered criticism for neglecting the success of Jews in the US compared to other minority groups, such as Black Americans. Mark Graber, for example, argues that by centring oppression and prejudice Feldman's analysis fails to distinguish between 'the oppressive inequalities of the past and the insensitive inconveniences of the present'.[107]

Graber's critique speaks to problems around the definition of antisemitism,[108] but it also resonates with a broader debate on the historiography of antisemitism that David Feldman describes as a 'dispute between "eternalists" and "contextualists"'.[109] While 'eternalists' assume a continuity and structural similarity over time and space,[110] 'contextualists' seek to situate discourses about Jews in their specific contexts to understand their shifting forms and meanings as well as the cultural, social, political, and legal work that they perform for both Jews and non-Jews.[111] A more suitable lens to capture the Jewish position therefore seems to be the term 'ambivalence', as proposed by a number of Jewish studies scholars in the UK. Ambivalence, as Tony Kushner explains, allows us to better understand the complex and at times contradictory attitudes towards Jews, which can take the form 'of praising westernized, assimilated Jews and rejecting those who [are] deemed foreign'.[112] Ambivalence also resonates with Zygmunt Bauman's term 'allosemitism', which he defines as 'the practice of setting the Jews apart as people radically different from all the others'.[113] As an attitude, it contains the seeds for both philosemitism and antisemitism, both of which presume and accentuate the difference of 'the Jew'.[114] For Bauman, allosemitism places

[105] Feldman, op. cit., n. 1, p. 266.

[106] Id., p. 260.

[107] M. A. Graber, 'Jewish Voices and Religious Freedom: A Jewish Critique of Critical Jewish Thinking' in *Law and Religion: A Critical Anthology*, ed. S. M. Feldman (2000) 278, at 284.

[108] The definition of antisemitism, Jonathan Judaken notes, 'remains nebulous', covering 'everything from personal prejudice to genocide': J. Judaken, 'Introduction to AHR Roundtable: Rethinking Anti-Semitism' (2018) 123 *Am. Historical Rev.* 1122, at 1127–1128.

[109] D. Feldman, 'Toward a History of the Term Anti-Semitism' (2018) 123 *Am. Historical Rev.* 1139.

[110] See for example R. S. Wistrich, *Antisemitism: The Longest Hatred* (1991).

[111] See for example Shapiro, op. cit., n. 3; Cheyette, op. cit., n. 3.

[112] T. Kushner, 'Anti-Semitism in Britain: Continuity and the Absence of a Resurgence?' (2013) 36 *Ethnic and Racial Studies* 434.

[113] Z. Bauman, 'Allosemitism: Premodern, Modern, Postmodern' in *Modernity, Culture, and 'the Jew'*, eds B. Cheyette and L. Marcus (1998) 143, at 143.

[114] Much as in the case of antisemitism, the definition of philosemitism remains contested. While some perceive it as a benign and positive attitude, especially after 1945 (see for example W. D. Rubinstein and H. L. Rubinstein, *Philosemitism: Admiration and Support in the English-Speaking World for Jews, 1840–1939* (1999)), others, such as Bauman, understand the two as connected.

Jews in an ambivalent position, which has historically often wedged them as 'mediators between highly and lowly'.[115]

Bauman's argument is also an invitation to consider more critically the role of contemporary philosemitic inclusion within the wider politics of religion and race, to which I already alluded in my discussion of the narrative of Judeo-Christianity.[116] Using the frame of philosemitism allows us, for example, to critically assess the ultimate legal outcome in the German circumcision case that saw the parliament draft a new law affirming the parental right to circumcise boys. For some commentators, neither Jewish privilege nor a true commitment to both Jewish and Muslim equality had motivated the parliamentary intervention.[117] Rather, it was Holocaust guilt coupled with concerns about Germany's image abroad, in which philosemitism plays an important role in signalling the country's democratic credentials. Such an interpretation is reminiscent of what Derrick Bell described as 'interest convergence' in the context of racial justice, where he argues that rights gains for Black Americans often only occur if they align with the interests of the dominant white group.[118] While it is not always possible to discern the exact motivations behind a specific legal decision and often there will be multiple motivations that overlap, further research could analyse the conditions of Jewish gains in equality, such as whether and how they align with the interests of the dominant culture or whether they are perceived as ultimately non-threatening to the public dominance of (white) Christianity, such as the almost invisible eruv.[119]

A focus on ambivalence also sensitizes us to how the law is used to regulate the boundaries of acceptable Jewishness – a Jewishness that is not too visible, not 'too Jewish.' It thereby highlights how Jewish inclusion may be conditional and dependent on the terms of the dominant white Christian culture at a particular moment. This demand not to be 'too visible' is reminiscent of what Kenji Yoshino described as 'covering', a particular form of assimilation under liberal law.[120] Based on the work of Erwin Goffman, Yoshino distinguishes covering from other forms of legally and culturally enforced assimilation such as conversion (the change of identity) or passing (the hiding of identity) by describing it as a form of downplaying that makes it easy for others to ignore a trait perceived as deviant from a dominant norm. Although commonly interpreted as a linear story of progress, Yoshino warns against trivializing covering demands as a more benign form of assimilation because they still enforce, albeit more subtly, a certain identity as the norm, while continuing to marginalize those who deviate by denying them the full expression of their identity. Seen through Yoshino's lens of covering, the demands directed at Jews reveal the limitations of Jewish liberal inclusion. Even though, in contrast to non-white groups, assimilation may be possible for (white) Jews, this process comes at a price. Cynthia Levine-Rasky points out that assimilation 'deprives Jews of visibility', 'violates the difference within Jewish identity', and risks

[115] Bauman, op. cit., n. 113, p. 151. Pnina Werbner describes Jews as a 'middleman minority': see P. Werbner, 'Folk Devils and Racist Imaginaries in a Global Prism: Islamophobia and Anti-Semitism in the Twenty-First Century' (2013) 36 *Ethnic and Racial Studies* 450, at 455.

[116] For a discussion of the politics of philosemitism, see Lentin, op. cit., n. 39, ch. 4.

[117] See for example Tzuberi and Doughan, op. cit., n. 72, pp. 290–291.

[118] D. A. Bell, '*Brown* v. *Board of Education* and the Interest-Convergence Dilemma' (1980) 93 *Harvard Law Rev.* 518. For a discussion of the interest-convergence thesis in the context of religious equality in the US, see Feldman, op. cit., n. 1, pp. 273 et passim.

[119] Although neighbours often fiercely oppose an eruv because of its symbolic appropriation of space, courts have assessed the eruv's impact based on its publicly visible merits. So far, no secular court has refused an eruv: see for example *Tenafly Eruv Association, Inc.* v. *Borough of Tenafly*, 309 F. 3d 144 (3d Cir. 2002).

[120] K. Yoshino, 'Covering' (2002) 111 *Yale Law Rev*. 769.

alienation from other marginalized groups.[121] Moreover, covering does not offer protection from prejudice and suspicion – quite the opposite, as Pnina Werbner notes. She describes the enduring suspicion of highly assimilated, successful, wealthy, and culturally almost indistinguishable groups, such as Jews, as the fear of the witch who masquerades as a non-alien: 'The witch crystallizes fears of the hidden, disguised, malevolent stranger, of a general breakdown of trust, of a nation divided against itself.'[122] This fear often becomes more pronounced in times of crisis, such as when populism and nationalism fuel anxieties of religious and cultural difference, thereby potentially also challenging precarious regimes of Jewish inclusion.

5 | CONCLUSION

The legal critique of Jewish practices is of course not problematic per se. There are valid questions to be asked about how the dominance of Orthodox Judaism impacts on the educational possibilities of Jews from other branches of Judaism. There are also valid questions to be asked about infant male circumcision within a children's rights framework and possibly even about the eruv within a strictly secularist approach to all kinds of religion in the public space. In fact, these are questions asked by Jews themselves. In the JFS case, the applicant himself was Jewish; in eruv cases, non-religious and liberal Jews have been among the most vocal opponents.[123] Likewise, there have been questions about the centrality of circumcision in the Jewish tradition and the practice of brit shalom has been proposed as a non-invasive alternative.[124] However, there is a difference between challenges coming from within a minority group and a legal intervention that perpetuates problematic discourses about a minority group from a majoritarian perspective, even though the goals seem to align superficially. The aim of this article therefore has not been to mute criticism of certain practices but to highlight how the long history of thinking about 'the Jew' informs legal and political discourse and to critically examine the tropes and narratives that have shaped and continue to shape Jewish inclusion and exclusion in Western liberal democracies and their law. By analysing case law from three different countries, I have shown how this cultural repertoire comes to underpin legal claims. These cases illustrate the continuing vulnerability of Jews as a minority group in the legal arena as well as the limits and conditions of Jewish inclusion set and policed by the dominant white Christian culture that still relies on the exclusion of certain forms of Jewishness.

Christian narratives of superiority and subtle processes of racialization that come to the fore in legal conflict may not be the most severe forms of prejudice that Jews face today. Banning an eruv, regulating circumcision, or imposing a Christian-based admission policy onto an Orthodox Jewish school are obviously not in the same category as attacking a synagogue and killing the people inside. However, acknowledging prejudice towards Jews only in its most extreme and explicit form or locating prejudice towards Jews solely among extremist fringes risks ignoring how the law continues to provide an authoritative site and a seemingly objective vehicle for the exclusion and marginalization of Jews.

[121] Levine-Rasky, op. cit., n. 37, pp. 63–64. See also Greenebaum, op. cit., n. 4, p. 51.

[122] Werbner, op. cit., n. 115, pp. 455–456.

[123] For an analysis of these intra-Jewish tensions in the case of the Westhampton Beach eruv, see Fonrobert, op. cit., n. 86.

[124] N. Ahituv, 'Even in Israel, More and More Parents Choose Not to Circumcise Their Sons' *Ha'aretz*, 14 June 2012, at <http://www.haaretz.com/israel-news/even-in-israel-more-and-more-parents-choose-not-to-circumcise-their-sons-1.436421>.

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