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David M Seymour
City University London, UK

DIDI HERMAN, *An Unhappy Coincidence: Jews, Jewishness and English Law*. Oxford: Oxford University Press, 2011, 208 pp., ISBN 978019-9229765, £36.99 (hbk).

[Although he] was naturalised in 1947, he remains very much a foreigner, Harman J, *Loudon v Ryder (No. 2)* [1953] Ch. 423 at 425–426 (Herman, 2011: p. 39)

Introduction

The title of Didi Herman's book, 'An Unhappy Coincidence' is the phrase used by a trial judge to dismiss an allegation of racial prejudice on the grounds that the (Jewish) defendant's right to a fair trial had been prejudiced by the Crown counsel's 'racially and religiously offensive' remarks about him. The case involved the handling of stolen goods and the remarks complained of likened the defendant to the fictional (Jewish) character, Fagin. Herman explains,

[W]hile the judge said he thought Mr. Elias 'might be Jewish' any offence caused 'was because of an unfortunate coincidence' adding that 'references' to Fagin in the handling of cases occurred almost daily by way of analogy. (Herman, 2011: p. 46)

The Court of Appeal agreed with the trial judge and dismissed the claim of prejudice. More interesting for Herman than the result, though, are Potter, L.J.'s comments that,

[W]hile Fagin was an 'offensive racial stereotype' only Mr Elias could think that this could possibly be an intentional racial slur that would prejudice a jury. (Herman, 2011: p. 46)

Corresponding author:

David M Seymour, The City Law School, City University London, Northampton Square, London EC1V 0HB, UK.

Email: David.Seymour.1@city.ac.uk

Here, as in the book as a whole, Herman is less interested in legal decisions than she is in the comments of the judges. Her first observation is the trial judge's lack of concern of the everyday use of an 'offensive racial stereotype'. Her second point is the agreement by both first instance and appeal court judges that, 'the coincidence' of the literary reference with a Jewish defendant was merely 'unfortunate'. Herman pithily concludes her discussion of the 'coincidence' as follows:

That the prosecutor used the analogy intentionally, knowing Mr Elias was Jewish, is inconceivable, as is any possibility that jury members might be influenced by such a comparison – despite the fact that the judges (and the prosecutor? and the jury?) might 'suspect' Misha Chaim Baruch Elias was Jewish. (Herman, 2011: pp. 46–47)

Although they may be 'unfortunate', Herman shows how such negative references are far from 'coincidences' and rather ought to be understood as integral to English law. Somewhat surprisingly, *An Unfortunate Coincidence* is the first sustained work to bring this aspect of English law into the light. It shows the diverse ways in which modern English law continues to engage in the negative constructions and representations of Jews and Jewishness.

However, Herman's reference to Fagin in the opening passages of the book is also far from 'coincidental'. Legitimately bemoaning the lack of attention paid to judicially generated representations of Jews and Jewishness within legal and social scientific literature, Herman turns to the humanities for inspiration. She draws upon the work of a new generation of literary and cultural critics for the tools both to recognize the presence of such representations in law and to open them up to critical analysis. Yet in so doing, Herman is at pains to recognize the very real differences that separate law from literature. Unlike the texts of English literature,

Legal judgements, especially those that function as 'precedent', are authoritative statements of official state discourse. Judicial pronouncements have immediate and often long lasting material consequences. When the UK Supreme Court finds a Jewish school guilty of racial discrimination against Jews, the effects are far-reaching. (Herman, 2011: p. 9)

It is primarily with this thought in mind that I believe *An Unfortunate Coincidence* can be read not only as a contribution to English critical legal studies but also as a *cultural* history of England's engagement with Jews and Jewishness that continues to be mediated through that most English of institutions, the common law. Much of the work's strength lies in its evocation of a more or less intangible, but no less real, *cultural and social* as well as legal atmosphere. It brings to the fore the condescension and sense of difference, of alienness, in short the 'Otherness' that English Jews and other 'minorities' feel to be integral to the cultural environment that they inhabit.

Finally, I believe that Herman's focus on the decades following the granting of full Jewish emancipation in the last third of the nineteenth century, creating a background for her analysis of formal equality, allows her work also to be read as a contribution to the literature on assimilation. As Herman argues, the English society into which emancipated Jews were expected, if not demanded, to assimilate was not a secular one governed by

universal (Enlightenment) norms, but was instead an arena infused with specific racial and religious (Christian) meaning and value (Herman, 2011: pp. 13–22). Here, however, we see a dilemma. On the one hand, the demand to assimilate demands that Jews (and other groups) become ‘English’; yet, on the other hand, the very racialized and Christianized concept of England makes their assimilation impossible despite their best efforts.

An Unfortunate Coincidence is without doubt original, insightful and thought provoking as a history of England’s legal, social and cultural engagement with Jews, Jewishness and assimilation. As much as I admire its insight and clarity, however, it raises for me also a number of questions. They centre first on Herman’s representation of English law and the impact that that representation has on the law’s construction of Jews and Jewishness. I elaborate on this question in the next section before going on to discuss the role that extra-legal, historically generated contingencies might also play in determining that construction. Next I critically engage with Herman’s account of the place of the Holocaust within judicial thinking about Jews and Jewishness and I question the impact this thinking has had on the nature and trajectory of race relations legislation in general and the recent *JFS* case in particular, before I conclude with some brief comments concerning the dynamic nature of English–Jewish relations.

The Naturalization of England, its Law and its Jews

The presentation of English law in *An Unfortunate Coincidence* seems to accept that law’s self-image. Herman’s critique is of the law’s embodiment of specifically English values that, taken together, offer a coherent image of England and Englishness. However, in so doing, it accepts the common law’s narrative of insularity; it accepts the embodiment of the common law as an uniquely English ‘spirit of the people or nation’, which comes increasingly to be explained in hermetic and, ultimately, *naturalist* terms. Moreover, since it is precisely these values that Herman identifies as those against which Jews and others are measured and found wanting, England and English law’s attitude to Jews and other minorities comes to take on an equally natural and naturalist guise.

Herman identifies values within English law that, despite its claims to (modern) secularism and universality, coalesce around an image of English superiority and a corresponding image of Jewish inferiority. This unequal evaluative relationship (and its practical, material consequences) is for Herman the result of three distinct, but intimately related, elements of English law: Orientalism, racializing and Christianity.

‘Orientalism’ points to an already loaded evaluation of ‘characterising people and practices from the East, along with recurring statements of what is “English”’ (Herman, 2011: p. 14). This cultural evaluation of superiority and inferiority is naturalized through its ‘racialization’; through the belief that these cultural differences are inscribed in the properties of blood. As a consequence, the alleged differences of nature present in the common law between England and Englishness and its civilizational ‘other’, Jews and Jewishness, is entrenched further.

However, it is Herman’s third claim that is not only the most controversial, but also, at least from the perspective of remaining in thrall to the common law’s ways of thinking, the most problematic. She claims that underpinning these Orientalist and discursive practices is the presence of Christianity in general and Anglicanism in particular.

Herman points to this notion of the enduring presence of Christianity in her deeper critique of the liberal-era ideal of English law as secular and universal. She argues that the belief in contemporary law's transcendence of a previously dominant English-Christian worldview is deeply mistaken. Rather than law's domain being the realm of a theologically neutral space in which all religious criteria and differences are erased, it remains infused with a 'set of principles or constellations' (values, aesthetics, bodies of knowledge and ways of being) that are deeply Christian (Herman, 2011: p. 18). This enduring Christian underpinning of the law serves as the thread through which law's seemingly contradictory representations of Jews and Jewishness can be resolved.

In what Herman acknowledges is 'strong language' (Herman, 2011: p. 17) the underlying resolution provided by Christianity and its conversionary impulse is read back into what amounts to the very origins of England's common law:

[I]n relation to Jews, Jewishness and English law, the imposition of Christian norms can result in the courts sanctioning de facto 'conversions'. There is a de-Judification taking place as ties to Judaism and Jewish communities are broken, that could, if the rhetoric be permitted, be seen as a form of symbolic ethnic cleansing . . . And it is not as if processes of conversion have not been imposed on Jews and Christians for centuries in England so my claim to see them at work in contemporary judicial discourse is not outlandish. The 'conversion of the Jews' has been an integral aspect of English Christianity since at least the thirteenth century – I am simply arguing that these conversionary processes remain at work today, albeit more subtly, and we can see them at work in the courts. (Herman, 2011: pp. 17–18)

It is at this point in her argument that Herman comes closest to replicating traditional conceptions of English law. Like its own self-narrative, English law is presented here as if it were the historically unmediated natural embodiment of the English spirit, a spirit constructed specifically around the naturalized presence of the 'dominant value' of Christianity. As a consequence of this representation, the common law's image of itself as an expression of the spirit of the nation from time immemorial, regardless of historical contingencies, remains by and large unchallenged. Seemingly oblivious to the influence of political and social contingencies, the common law appears trapped in what amounts to the mindset of an earlier and supposedly homogenous pre-modern period (Goodrich, 1987; Sugarman, 2002).

In this view of the common law, a Christian-English 'community' is created that must also produce and exile an equally abstract Jewish 'Other', and these abstractions lie at the heart of traditional common law thinking. Lacking the theoretical terms through which to analyse the complexities present in the modern political and social world of which it is a mediated part, common law thought is stuck in a seemingly endless cycle of creating its own abstract and negative oppositions (Cotterrell, 2003: p. 32). It is a consequence of its own unsophistication that it replicates and projects onto what it perceives as 'others' a negative image of its own communal homogenous, English self. Law presents English and Jews alike as undifferentiated masses of individuals melded together by accident of birth into timeless and natural bodies.

As England and Englishness is understood and presented in terms of an 'exceptionalist' nation replete with equally exceptional 'national characteristics', its 'Other(s)', regardless

of the materiality of their actual reality, will be constructed in a mirror image. They will become perceived as inherently and naturally ‘unEnglish’ in character, in values and in belonging, regardless of the divisions and distinctions that exist within and between them.

This view of the common law thus ‘naturalizes’ and fixes itself and its Others and fails in my view to account for the presence of other legal and extra-legal historical contingencies. It is in questioning this self-image of the common law that appears also in *An Unfortunate Coincidence* that I bring to the fore the social, political and cultural changes that call into question that appearance and which question Herman’s emphasis on Christianity.

Critics of insularity – the idea that the common law is the embodiment of either an isolated English legal evolution or that it is the expression of a unique English ‘spirit of the people’ – have pointed repeatedly to the simultaneous presence and repression of European influences in shaping the nature of English law.¹ While the literature on this subject draws attention to the *inclusion* of such sources and influences, here I would like to stress the attempts by the common law to define itself expressly against such external developments. Or, to put the matter in different terms, I will explore in more detail David Sugarman’s comment that, ‘What made [the English] and their legal culture was their Europeaness’ (Sugarman, 2002: p. 220). It is this question that Hannah Arendt addresses in an important section of *Origins of Totalitarianism* (Arendt, 1951/2004).

Arendt argues that the self-image of England in general and the nature of its common law in particular emerged as a *reaction* to the French Revolution and the events brought about in its wake. It was at this time also that notions of Englishness came to be tainted with ‘race-thinking’ (Arendt, 1951/2004: p. 210) This racialization of the English nation and its law expressed itself through the opposition of ‘the Rights of the Englishman’ to that of the revolutionary, continental concept of the ‘Rights of Man’. Whereas the latter rested on no prior claim other than one’s humanity, the ‘rights of the Englishman’ came to be grounded, almost literally, in a national–racial amalgam of aristocratic and feudal notions of property, inheritance, land and liberty, an idea first proposed by the anti-revolutionary Edmund Burke in his highly influential, *Reflections of the Revolution*, published in 1790:

It has been the uniform policy of our constitution to claim and assert our liberties, as an *entailed inheritance* derived to us from our forefathers, and to be transmitted to our posterity; as an estate specially belonging to the people of this kingdom, without any reference whatever to any other more general or prior right. (Quoted in Arendt, 1951/2004: p. 232.)

In developing this point Arendt notes the manner in which the ‘privileges’ associated with land and title defined the concept of the feudal concept of ‘liberty’ (articulated by Burke through his use of legal terminology of ‘entail’ and ‘estate’). Liberty, once the preserve of the aristocracy, now became the preserve of the ‘nation’ as a whole, and ‘the principle of [these caste-bound] privileges [was enlarged] to include the whole English people, establishing them as a kind of nobility amongst nations’ (Arendt, 1951/2004: p. 232). Consequently, just as membership of the aristocracy was at this time coming to be understood in terms of caste and blood, so now Englishness and the values it was said to encompass became nothing more than a natural property amenable only to those of the ‘correct’ (that is, *English*) ‘stock’.

Likewise, by the late-nineteenth and early twentieth centuries, this Burkean notion of Englishness, although tainted by ‘race-thinking’ at its inception, had, through its engagement with imperialism (Arendt, 1951/2004: pp. 242–286), mutated into full-bloodied, so to speak, *racism* (Arendt, 1951/2004, pp. 242–286; Kushner, 2008; Stone, 2008; Schaffer, 2008). It was at this time, therefore, that the earlier differences inscribed in English ‘superiority’ and Jewish ‘inferiority’ petrified into categories of an unchanging nature. It is this emergence of race-thinking (and racism), both in its anti-Jewish and anti-Slavic manifestations, that may account for the law’s racialized representation of those Jews who arrived from the late 1880s onward, from which, at that time, the more Anglicanized and more established wealthy Jewish residents of England escaped, at least until the 1930s. While there are other possible reasons to explain this change (and these will be discussed in the following section), it is interesting to note the correspondence between the formulations of Jewishness and the emphasis not only on ‘Hebraic blood’ but also on the court’s attempts at ‘quantification’ and those of the then recent Nuremberg ‘race’ laws (see below). This point is not intended to infer that these judges were adherents of National Socialism, but merely to postulate that such thinking was far more influential in contemporary notions of the nation than would be credible today.

The legacy of these perceptions of Englishness are revealed in the series of trust cases Herman discusses in the chapter, ‘“If Only I Knew”: Race and Faith in the Law of Trusts’. With these cases, decided between the 1930s and the 1970s, Herman examines the effect of this perception of the common law’s Englishness on the Jews.

The trust cases Herman discusses turn on one central question, ‘how English courts have responded to attempts by Jewish testators, using specific terms in their wills, to prevent descendants from converting or marrying “out” [of the Jewish religion]’ (Herman, 2011: p. 50). Interestingly, the legal form of this question was not one of ‘policy’, but turned on the ‘doctrinal/conceptual basis’ of *certainty* (i.e. were the clauses used to ensure the transition of property ‘certain’ enough to allow the validity of the testator’s wishes?). The point to note here is that English law’s construction of Judaism is not confined to law’s periphery but enters into the very body of its doctrines and rules.

A common technique prior to the 1930s to ensure the ‘certainty’ of such clauses was the then unproblematic use of the terms ‘Jewish parentage’ and/or ‘Jewish faith’. It was at this time, however, as Herman notes, that the wealth of precedents was simply ignored. Having erased them from the record, the courts saw themselves free to examine the meaning of these phrases afresh. In doing so, the courts used the notion of ‘race’ to determine the meaning of Jewish parentage or Jewish faith. This view was not only novel in this area of law, but also eschewed reference to Jewish law which denies the importance of blood line in these (and most other) matters. Blood, nonetheless, became for the court the markers of Judaism, Jews and Jewishness.

In this judicial racializing of Judaism as a whole, one can see in the courts’ decisions the negative image of the Burkean racialized account of England and Englishness. Judaism, in other words, like Englishness, becomes interpreted by the law as a naturalized and racialized example of what Burke described as the glue of an ‘entailed inheritance’ that is simply ‘inherited’ through blood from ‘time immemorial’.

This mirroring of and imposition of Englishness onto the courts’ meaning of Judaism becomes apparent in their ‘insist[ence]’ on viewing Jewishness as a line of historical

descent from the ancient Israelites' (Herman, 2011: p. 59); and it is this 'mythical construction' (Herman, 2011: p. 166) itself – so much an aspect of Englishness – that forms a thread in the cases Herman discusses. However, despite this overall agreement, differences emerged between the judges as to whether a link of 'direct descent' between the testator and the 'Patriarch Jacob' was needed as evidence for such 'entail'. Against those who argued for such a connection, others were content with merely a finding of the presence of the 'purity' of 'Hebraic blood'. Overtly rejecting 'direct descent', Lord Romer, opined:

It seems far more probable that the testator means no more than that the husband be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess? Would it be sufficient if only one of his parents were of Hebraic blood? If not, would it be sufficient if both were? If not, would it be sufficient if in addition it were shown that one grandparent were of Hebraic blood or must it be shown that was true of all his grandparents? Or must the husband trace his Hebraic blood still further back? These are questions to which no answer has been furnished by the testator. (Herman, 2011: p. 56)

In the context of this racialization of Judaism, Herman identifies an inherent contradiction. On the one hand, such a representation is supposed to 'establish an authentic line of descent, yet, on the other hand, this assumption gives rise to 'racial ambiguity'. In the absence of evidence of the former (who can prove either 100% lineage from the 'Patriarch Jacob' or to have 100% 'Hebraic blood' flowing through their veins?), the latter immediately becomes the dominant finding. As a consequence of this contradiction, from the perspective of the common law, any *Jewish* claim that rests upon 'parentage' cannot but be voided for uncertainty. The paradox of this finding is that the moment the courts construct the figure of the 'true' or 'authentic' Jew is the same moment that that figure becomes an impossibility. Nowhere are the dilemmas of assimilation so clearly in evidence.

Herman is of course quite right in pointing to the 'conversionary impulse' in these trusts cases. However, other significant questions are not fully addressed. One turns on *why* this particular instance of racializing, not present prior to 1939, appears at that time and ends only in the 1970s. Herman's brief comments that 'it is not coincidental that this discourse about racial purity arises first in these cases in the late 1930's and that by the mid-1960's it was almost entirely replaced', or that the nature of the decisions is explained as a matter of 'class' (Herman, 2011: p. 60), whet the appetite more than satisfy it. The question of timing is all the more insistent in the context of Herman's discussion of the courts' overt negative racializing of recent East European Jewish immigrants/refugees in the late nineteenth early twentieth centuries. (Herman, 2011: pp. 29–49). Likewise, it leaves in abeyance the significant question of why, despite its fall into disuse some 40 years ago, the courts should return to similar ways of thinking in the early twenty-first century (Herman, 2011: pp. 168–170).

A second and related question turns on the significance of the racialized *form* of these decisions. Implicit in *An Unfortunate Coincidence* is the idea that the turn to *race* within judicial discourse concerning Jews and Judaism is a cosmetic shift in the 'timeless' trajectory of Christianity as the defining and durable characteristic of England and

Englishness. However, as discussed above, it is possible to identify not so much a rupture as a change in the content and meaning as well as the form of Englishness around the turn of the nineteenth century, as exemplified by Burke's reflections and, again, at the turn of the twentieth century, through the (scientific) language of 'race' and racism. This is not to say that the relevance and prevalence of Christianity disappeared, but rather that Christianity dissolved into broader categories of Englishness. In these new categories, notions of property and then of 'race' (rather than religion) provided the underlying premise of what amounts, historically speaking, to the birth and development of the modern (English) nation-state.

The point to be made is that Herman's thesis about the underlying primacy of Christianity (what has been termed here as its 'naturalization') within English law as a whole, may obscure consideration of English law's more specific historical contingencies. What can be treated as distinct moments within English law's engagements with Judaism, Jews and Jewishness, appear to Herman instead as a repetition of the same, not only throughout the period directly addressed in the book, but also through earlier times. In its implied timelessness, Herman's adoption of a racialized concept of 'Jews' and 'Jewishness' replicates the self-presentation of the English common law itself.

Assimilation and the Pathologies of Jewishness

In the cases discussed above, the Jews' uncertainty is posited against a 'natural' English certainty, such that 'Jewishness' becomes the site of ambivalence and indeterminate meaning. It becomes England's Other. 'Jewishness', in other words, become the marker of an uncertainty or, in the sense of a deviation from the norm, a pathology that is present but denied in the construction of the host nation and projected onto its (Jewish) Other (Bauman, 1987, 1991, 1993). It is this ambivalence, this being at one and the same time the subject and object of English law, that gives rise and constitutes the meaning of the pathology of 'Jewishness'.

This negative conception of Jews appears in a number of guises. It appears in the courts' racialized evaluation of the negative character traits of the then recent immigrants/refugees from Central and Eastern Europe as they are compared, implicitly at least, with those 'inherent' in the English 'race', values and common law. It appears in the post-national era of the 1990s and again in the post-Holocaust era (or, rather, as Herman rightly notes, in the era following judicial recognition of the Holocaust from the 1980s onward).

However, I wonder whether the concepts of Orientalism, racialization and especially Christianity are adequate to account for these legal conceptions of Jewishness. Here, I am not denying that these factors form a part of this pathologization, but I wonder whether they may be articulations of deeper and more contingent causes. These questions are particularly important in the context of assimilation.

While it is true that there are important continuities between a Christian and a secular moral evaluation of Judaism and their attribution of 'Jewishness' as present in the modern and post-modern eras, a shift in outlook appeared at the turn of the nineteenth century. At this time following heated debates on the issue, Jewish emancipation was finally achieved in England and other European countries (albeit not without a history of reversals). It was also in this period that the demands for and expectations of Jewish

conversion to Christianity that had dominated the past came, as part of the 'contract' of emancipation, to be substituted by calls for *assimilation*. Correspondingly, this shift in expectations was underpinned by the emergence and development of the modern nation-state into which Jews were called upon to assimilate. In this context, assimilation points to the adoption of values and ways of life of the 'host' nation which, in the case of England, entailed the adoption as one's own of those 'dominant values' of Englishness discussed by Herman.

In many, if not all, cases, Christianity remained a core component of the new modern nation-state. At the same time, however, while still an important factor, its place in national life came to be dissolved in other markers of nationhood and national belonging. In this context, in which the language and practice of *conversion* shifted to the language and practice of *assimilation*, there was also a corresponding change in meaning of the concept of *Jewishness*.²

In these changes there is also the shift from *theology* to the new human and social sciences that began to demonstrate reflections upon and understandings of the emerging modern nation-state (Bauman, 1987, 1991, 1993; Kushner, 2008; Stone, 2008; Schaffer, 2008). Put simply, in England and elsewhere, theology (and its successors, including moral philosophy) was replaced during the nineteenth century with, among other disciplines, sociology and psychology. This combination, set against the dilemmas of assimilation, also contributed to the production of an equally modern concept of 'Jewishness'.

Sociological and psychological ways of thinking underpinned 'identification' of Jewishness as a combination of negative traits. These traits – dishonesty, cheating, backwardness, immorality, lack of personal hygiene – were seen as having social causes, including the years of discrimination, oppression and prejudice Jews suffered at the hands of Christianity. Assimilation, it was argued, could only be expected of the Jews through the reform of such attitudes along with the ending of prior anti-Jewish political, social and legal restrictions. However, after an initial impetus for reform, responsibility for the inculcation of the relevant values came to rest on that class of assimilated Jews who, by the eve of this so-called 'mass immigration' of European Jews, had been considered (and considered themselves) to have met the demands expected of them (Arendt, 1951/2004: p. 77; Williams, 1985). Yet, even for this class, the demands included less the adoption of Christianity than the adoption of a requisite middle-class ethos of industriousness and its concurrent moral and political values.

However, as Ron Feldman notes (Arendt, 1978), it was precisely this ethos that gave rise to the dilemmas of assimilation and the concept of Jewishness to which they gave birth. Drawing on the work of Hannah Arendt, he notes how the rise of modern bourgeois society gave rise also to a contradiction that was especially difficult for Jews to negotiate. On the one hand, assimilation implied the demise of a (pre-modern) Jewish community by its members' dissolution into a society of rational autonomy. On the other hand, however, the 'cultural entrance-ticket' into society's higher echelons depended on their being seen and as presenting themselves as 'exceptions' to the vast majority of 'ordinary' Jews.³ The unsatisfactory resolution of this contradiction was that, '[w]hat was demanded of the Jews [was] that they behave in an exceptional and peculiar but nevertheless recognizable – and hence stereotypic – 'Jewish' way' (Arendt, 1978: p. 43). It was the paradox of this situation that came to be articulated in the maxim of the assimilated Jews' *modus operation* of

'being a man in the street and a Jew at home', a maxim which, as Arendt notes, gave rise to 'a feeling of being different from other men in the street *because* they were Jews, and a different from other Jews at home, because they were not like 'ordinary Jews' (Arendt, 1951: p. 88).

If this dilemma of assimilation had as its ultimate root, sociological causes, it was its internalization that gave rise to the psychological 'pathology' of 'Jewishness'. Arendt writes,

Instead of being defined by nationality or religion, Jews were being transformed into a social group whose members shared certain psychological attributes and reactions, the sum total of which was supposed to constitute 'Jewishness'. In other words, Judaism became a psychological quality and the Jewish question became an involved personal problem for every individual Jew. (Arendt, 1951/2004: p. 88)

Present from the early moments of Jewish emancipation and its correlate demands to assimilate, these sociological and psychological characteristics of 'Jewishness' shared the same fate as the trajectory of the modern nation-state itself. Just as the concept of the nation became correlated with nature and a naturalist positivism came to dominate the social sciences, so Englishness and Jewishness hardened into distinct – and opposing – categories of nature. Jewishness became a natural attribute not only of individual Jews, but also of 'the Jews' in general. (Adorno, 1951/2004; Seymour, 2007)

It is to this observation that I would like to return through a discussion of Herman's critique of English law's approach to Jewish ritual in general and the practice of male circumcision in particular. I argue that Herman is correct in noting the Christian and Orientalist influences on this issue. However, I argue also that other, more historically contingent factors are at play in the specific form of judicial reflections. I argue also that it is these contingencies that inform a novel, *post-national* conception of Jewishness. As the environment into which assimilation is demanded alters, so too does the perception of those to whom the demand is addressed.

In a sensitive but non-committal discussion of cases concerning male circumcision, Herman brings to the fore the underlying presence of the law's Orientalizing and Christian discourses. Herman sees the discourse of Orientalism as accounting for English law's perception of circumcision as a 'brutal' and/or an 'Eastern' practice that is constructed and contrasted negatively with Western, post-Enlightenment notions of reason and rationality. Yet, in keeping with a central tenet of her thesis, she identifies the claims to universalism inherent in such notions as a 'secular' articulation of Christian norms and values. Stating that it is around the question of circumcision that, 'conversions to Christianity are judicially facilitated' (Herman, 2011: p. 97), she argues further that it is here that Christianity's conversionary impulse appears most clearly.

Herman frames this part of her discussion of male circumcision in her findings that the judicial treatment of the religion of a newborn or child turns on the question of the child's cognitive abilities; that is, in considering the child's awareness and understanding of either Judaism or Islam. The consequence of this judicial test is that it results in the isolation (and insulation) of the child from the family's pre-existing religious identity. The child is deemed, religiously speaking, a *tabula rasa*. It is in this context of the baby

or child's autonomy that the religious practice of circumcision is recast in the language of (lack of) 'consent, harm and injury' and as a 'mutilatory assault on an infant' (Herman, 2011: p. 71).

In raising these issues, Herman draws attention to the fact that, as much as circumcision orients a child to Judaism or Islam, its denial can equally, 'orient a child towards the majority Christian culture' (Herman, 2011: p. 84). Moreover, by presenting the argument against circumcision in medical and culturally 'neutral' terms, the 'context of power' in which these decisions are made is ignored. This context includes a 'nation-state with an established Christian church and active participation in a long European history of anti-Islamic and anti-Jewish thinking within which the denunciation of circumcision has played a major role' (Herman, 2011: p. 83), a history that, as noted, Herman sees as continuing into the present day. However, she also notes, although without, as I suggest below, drawing its full conclusions, that in a rejuvenation of a correspondence of Christianity with universality brought about in the 'post-9/11' era, 'this focus on circumcision, like a similar obsession with "the veil" or "forced marriage" comes to be emphasized as a problem' (Herman, 2011: p. 84).

Herman is, of course, perfectly correct to note a long-term distaste for circumcision emerging from a connection between Christianity and universalism on the one hand, and claims of Jewish 'particularism' on the other. However, the question remains whether the anti-circumcision sentiment found in both some contemporary medical literature and legal reasoning is to be attributed to an unbroken tradition of English-Christian thought or whether it is expressive of equally contemporary thinking. To put the question in other terms, to what extent is the *form* of these arguments distinct from their *content*? Finally, and taken together, what impact do these questions have on the contemporary concept of Jewishness (and Muslimness)?

Despite the paucity of reliable information on effects (both 'physical' and 'psychological'), it would appear that the origins of modern discussions around circumcision were framed in an intersection of medical and class concerns.⁴ Confined mainly to the aristocracy and associated classes, the increasing popularity of circumcision at the turn of the nineteenth century turned on its presentation as a 'cure' for a number of medical and 'moral' conditions, which has since been shown to be erroneous in both cases. Interestingly, it was at this time that the Jewish method of circumcision (which does not offer any reasons for its practice extraneous to religion) was adopted.

Opposition at this time was framed less, if at all, in the language of Christianity (unsurprising given its class-bound nature), but more through the (romantic) discourse of an idealized view of 'nature'.

I should have considered this mischievous instruction unworthy of serious consideration, did I not observe that it has lately become common among certain short-sighted but reputable physicians to laud this unnatural practice, and endeavour to introduce it into a Christian nation . . . Circumcision is based upon the erroneous principle that boys, i.e. one half of the human race, are so badly fashioned by Creative Power that they must be reformed by the surgeon; consequently that every male child must be mutilated by removing the natural covering with which nature has protected one of the most sensitive portions of the human body. The erroneous nature of such a practice is shown by the fact that although this custom (which originated amongst licentious nations in hot climates) has been carried out for many hundreds

of generations (by Moslems and Jews), yet nature continues to protect her children by reproducing the valuable protection in man and all the higher animals, regardless of impotent surgical interference . . . The protection which nature affords to these parts is an aid to physical purity . . . The plea that this unnatural practice will lessen the risk of infection to the sensualist in promiscuous intercourse is not one that our honourable profession will support. Parents, therefore, should be warned that this ugly mutilation of their children involves serious danger, both to their physical and moral health. (Blackwell, 1894: p. 35)

While reference is made to England as a 'Christian nation' and to Orientalism, the thrust of Blackwell's argument turns on the image of circumcision as an unnecessary intrusion upon the natural perfection of the (unaltered) human body.

It is its framing along the axis of this medical/nature opposition that one can begin to locate the legal cases relating to circumcision that appeared in the 1990s and which are discussed in *An Unfortunate Coincidence*. As I will argue, this periodization has an important significance for the post-national concept of Jewishness referred to above.

In many ways, the political atmosphere of the 1990s can be characterized as a weakening of the seeming dominance of the modern nation-state brought about, among other reasons, with the end of the Cold War and its replacement with a 'post-national' era articulated through the language of 'globalization'. Among its many reverberations was a resurgence of interest in the global dimensions of environmental damage and, at least in some of its aspects, a concomitant reification of nature.⁵

Implicit in this reification of the natural world was the core idea that the major developments of the (previous, i.e. 'modern') world were perceived as unwanted and negative impositions into an otherwise 'separate' and pristine natural world. In turn, these impositions were treated as evidence of the hubris of modernity and of the impulse to domination that many saw as an inherent attribute of the 'modernist project'. Although expressing itself in numerous social, political and cultural forms across a diversity of distinct fields, many of the discussions were underpinned by the concept of 'authenticity', here understood as the modern masking and post-modern unmasking of natural aspects of the world (including its human inhabitants) (Adorno, 1964/1973). It is this context that the romantically tinged framing of circumcision as an unnatural or anti-natural practice gained momentum and which offers both continuities and discontinuities with representations of Jews, Judaism and, especially, Jewishness.

The first point to notice is that the inference of circumcision as an 'unnatural' (as opposed to an un-Christian) practice chimes with an enduring representation (not entirely absent at the time) of Judaism's 'ambivalent' relationship with nature and the natural world, an ambiguity that is said to arise through diverse interpretations of Genesis 1:26 and 1:28, in which 'man' is granted 'dominion over' the animal world, and the ensuing conflict over whether this grant entails man's *domination* or *stewardship* over natural resources. Equally relevant is the German idealist notion of Judaism as inaugurating a split between 'spirit' and 'nature' that co-existed in the pre-Judaic 'pagan' era and which has been cited as evidence of Judaism's instrumental and materialist attitude to nature,

Jews long for God as a *spiritual* entity, as a person, not as a natural substance; and when God is grasped as spirit, nature loses the self-sufficiency it had in paganism and is reduced to

something created. Nature becomes subservient, reified, desacralized – and God, its creator, is elevated to the status of the sublime. (Yovel, 1998: p. 61)⁶

However, views connecting Jews with acting against nature offer also *continuity* with the modern era of the nation-state. As discussed above, it was in that age that as much as nations were defined in natural and naturalist terms, so the Jews were characterized at the time as ‘the Wandering Jew [who] has no nation’ (to cite Lord Denning and a title of one of the chapters of *An Unfortunate Coincidence* (Herman, 2011: p. 126)) and thus presented as nature’s antithesis.

Finally, and related to these two previous points, it was around the issue of the alleged unnaturalness of circumcision that there emerged in law (and elsewhere, i.e. medicine) a new concept of Jewishness, freed from its former requisite of assimilation, but which, nonetheless, continued its pathologizing of Jewish (and Muslim) men. It is this reference to the ‘psychological’ (as well as the ‘physical’) damage circumcision is said to inflict on these men that appears in the case of *Re: J* (1999) cited by Herman and which offers a concise summation of contemporary anti-circumcision arguments rehearsed above:

The medical benefits arising from circumcision ... are highly *contentious* ... There is a *powerful* body of medical opinion which puts strongly in issue any suggestion that male circumcision prevents or reduces the risk of urinary infection, penile cancer, or sexually transmitted disease. Equally *contentious* is the suggestion that it reduces the incidence of cervical cancer in women ... The procedure for a child of J’s age carries small but identifiable *physical and psychological risks*. It is an *invasive* procedure ... There is evidence that ... there is a consequential *loss of sensory pleasure* during sexual intercourse ... [This] is *an issue for society*, not the health professionals. (Herman, 2011: p. 78, *emphasis in Herman*)

Presented in this way, therefore, it is manifest that, since circumcision is a practice that includes the very large majority of Jewish men, the ‘small but identifiable ... psychological risks’ assumed by Wall J. cannot but appear more frequently among this group than in the gentile population in general. This judicial finding brings with it the emergence of a new, contemporary negative psychological concept of Jewishness (and, by inference, Muslimness), but which offers also continuity with previous, modern images of a specifically Jewish psychical ‘abnormality’.

A further novel ground for the continued evolution of the concept of Jewishness can be found in the judicial recognition of the Holocaust. Discussing the case of *Re: P* (2000), in which orthodox Jewish parents challenged a ruling that their Downes Syndrome daughter should permanently remain with her Catholic foster parents, Herman draws attention to the court’s characterization of the birth father’s behaviour during the course of the various proceedings. Rather than seeing his ‘emotional’ engagement as an outcome of the anxiety and unease at the prospect of his child being removed permanently not only from his home, but also from Judaism, Butler-Sloss J. explained it as a ‘consequence’ of the (from the point of view of the case, irrelevant) fact that, he ‘is a survivor of the Holocaust’ (Herman, 2011: p. 118). A construction of the father as ‘scarred, damaged and over-emotional’ implied his inability to know what was ‘best for his daughter’ (Herman, 2011: p. 120). Read in this light, therefore, surviving the

Holocaust becomes for the Court a new ‘pathology’ that adds a further negative dimension to the evolving concept of Jewishness.

English Law’s Commodification of the Holocaust

Taken as a whole, one of the enduring strengths of *An Unfortunate Coincidence* is Herman’s shattering of the many myths that continue to sustain English law’s ‘engagement’ (if that is the right word) with matters ‘Jewish’. Nowhere is this strength more in evidence than in her discussions of law’s confrontation with the Holocaust.

In the chapter detailing English law’s engagement with the Nazi mass killings, Herman shows when and how recognition of the Holocaust enters judicial discourse and the effect that followed for both Jews and other minorities. She notes that, at the time of its occurrence and its immediate aftermath (that is, when the Holocaust had its most profound and determining influence on the actions of European Jews both individually and collectively), the courts remained silent. The contemporaneous and the then immediate context of the extermination were simply not mentioned as a relevant ‘fact’ to the cases at hand.

Aside from a single case in the 1970s, the Holocaust finally entered judicial cognisance from the mid-1980s. Yet, as Herman illustrates, this recognition was not without its own equivocations and ambivalences. Through a careful reading of the cases, she shows that judicial reference to the Holocaust brings with it a hollowing out of any *particular* meaning. It becomes, to use Herman’s accurate phrase, nothing more than ‘stock footage’. As paradoxical as it may sound, she traces the fact that the *more* the Holocaust appears in the language of the courts, the less it comes to signify the actual events.

The question that arises here is the extent to which this ‘hollowing out’ of the Holocaust is unique to English law, or whether it is only English law’s articulation of a more universal and global tendency. As difficult as it may be to recall today, it was only during the 1980s that the Holocaust became a subject of general public interest (Cesearani and Sundquist, 2011). While the reasons for this surge of interest are beyond the scope of this paper, the evidence for this observation can be gleaned from the increase in personal memoirs of Holocaust survivors, academic reflections on the events in question and its increased presence in popular media, culminating in 1993 with the release of Steven Spielberg’s *Schindler’s List* and the opening of the US Holocaust Memorial Museum in the same year.

Yet, as Jeffrey Alexander (2002), amongst others (Cole, 2000; Levy and Sznajder, 2002, 2004; Rosenfeld, 2011), has noted, the emphasis in many of these works centred on the Holocaust’s *universal* message of ‘man’s inhumanity to man’ and as a symbol for contemporary political and human atrocities in general. This point is summarized distinctly by Levy and Sznajder (2002, 2004) in their work on the impact of the Holocaust on the emergence of a globalized understanding of universal human rights,

The Holocaust is now a concept that has been dislocated from time and space and precisely because it can be used to dramatize any injustice, racism or crime perpetrated anywhere on the planet. (Levy and Sznajder, 2004: p. 156)

Inherent in this universalizing of the Holocaust and its application to other events, past and present, is the dissolution of its particular content. The more it is made to serve a timeless and global role, the more the specifics of the original events recede from view. Not to put too fine a point on it, the Holocaust takes on the appearance of the 'master commodity' or medium of exchange in a new 'post-Holocaust' moral economy.

This meaning and impact of the simultaneous universalizing and dissolution of the Holocaust and its effects both in English law and elsewhere can best be encapsulated by reference to Adorno and Horkheimer's critique of *commodification* in *Dialectic of Enlightenment*, a work written as a direct response to the rise of Nazism (Adorno and Horkheimer, 1951/1997). For them, commodification is the process whereby unique and distinct elements of nature are caught up within the near-universal realm of capitalist exchange. As a condition of entry into that realm, each individual element has to become exchangeable for all others. As a consequence of the demand, any *specific* or *particular* quality that inheres within them, and obstructs that exchange, has to be expunged. It is only when emptied of such content and reformulated in strictly formal and, hence, universal terms that an element becomes a commodity and can take its place within the realm of the economy.

Reduced to a value of a legal-moral economy and serving as the master commodity in an idealized conflict between 'abstract nature of "good and evil"', the Holocaust can only serve its role as universal warning and call to action once it has been abstracted from or, rather, emptied of its particularist elements of its historical occurrence including, of course, its specifically *Jewish* dimensions. Moreover, any reference to that now expelled content by Jews is seen as an illegitimate particularist abuse of a now universalized historical memory.

The consequences of this commodification tendency by English law are that the universalizing and abstraction of the specifics of the Holocaust mask rather than illuminate any serious understanding of either those events themselves or the particular nature of English antisemitism, both past (including, of course, England's ambivalent relationship with Hitler's Germany) and present, but also the particular nature of the experience of discrimination suffered by other non-Jewish 'minorities' within England.

Secondly, and intimately connected to this last point, is the ways this presentation of the Holocaust can serve as a means to *exclude* all 'minorities' (including Jews) from findings of discrimination. These exclusions express themselves through the twin ideas that, first, as regards non-Jewish groups, the harms suffered in England have never matched those suffered by Jews under Nazism (including, of course, the experience of the *Shoah*). Consequently, an appropriately wide-ranging application of English anti-discrimination legislation carries the potential of its own neutralization. Also, and in specific relation to Jews, the antisemitism that both predated and postdated their inclusion within Nazi racism not only disappears from view, but with the military defeat of national socialism, becomes absorbed into the Nazi worldview, and is, therefore, treated as irrelevant in today's (post-Holocaust) England.

Thirdly, the negative effects of the commodification of the Holocaust reach further in their potentially harmful consequences for actually existing English Jews. The universalizing of the Holocaust and the concomitant dissolution of its specific *Jewish* aspects is, ironically, the generation of (further) anti-Jewish hostility from within the *praxis* of

anti-discrimination legislation itself. This negative potential arises from the myth that recognition of the *Shoah* confers on Jews a 'privilege' denied other 'minorities'. Although *An Unfortunate Coincidence* does not address the anti-Jewishness of this mythologizing, we see it a consequence of judicial findings that, of all religious groups in England, it is was the Jews who were the benchmark for the Race Relations Acts that were passed from the last third of the twentieth century onward; this is a particular irony since no Jew has been successful in a claim of racial discrimination against a non-Jew.

In my view it is important to read Herman's discussion of the Jews in race relations against this background of the commodification of the Holocaust. Herman notes that, whilst the Holocaust and the 'paradigmatic' Jewish victim formed the master-trope for the relevant Parliamentary debates, the immediate focus of this legislation was with the overt discrimination faced by those with a 'different skin colour' and assumed point of origin. (As she notes, this legislation is not to be understood without its connections with the contemporaneous acts restricting immigration from Asia and Africa; Herman, 2011: pp. 126–128.) At that time there was and indeed still is little disagreement about an almost universal acceptance of the concept of 'race' and 'racism' as applied to these situations. Yet, it is precisely these concepts that have caused the English judiciary such difficulties when related to Jews. Despite the centrality of the Holocaust to the race relation legislation debates, the question of whether Jews were to be included within the legislation's purview ultimately was left by Parliament for the courts to decide.

Herman shows how, in short, the Jews' inclusion as a 'race' was by default. It did not arise through a careful consideration of the meaning of 'race', but rather from a hotchpotch of assumptions and unreflective reasoning (again, overlooking Jewish self-knowledge on this question that explicitly denies 'racial' criteria). Moreover, in *Mandla v Dowell Lee* (1982) (the case that, until 2009, was the leading authority on this question), the case that determined their inclusion had nothing whatsoever do to with definitions of Jews and Jewishness. Instead, Jewishness was used as a standard against which to measure the tenets of the Sikh religion.

Yet, this Jewish inclusion in the body of race-relations legislation, an inclusion premised on no more than *obiter dicta*, was to be a double-edged sword for Jews themselves. On the one hand, until 2009 not one Jewish person was successful in their claim against anti-Jewish discrimination; on the other hand, it laid the ground for finding that, as a 'race', Jews could be found liable for racial discrimination in connection with those of their own faith.

It is in the final chapter's critique of the Supreme Court's judgment in the *JFS* case that Herman weaves together the three themes of *An Unfortunate Coincidence* – Orientalism, racialization and Christianity (especially its conversionary impulse). Although present throughout the work as a whole, one can present her findings of that case through the articulation of a series of binary oppositions – universal/particular; Christian/Jewish (and Muslim); English/Oriental; inclusion/exclusion; invisible/visible; rational/irrational – in which the second of the pairings is not only allocated to Jews, Judaism and Jewishness, but is also produced by and placed upon the Jews by the law itself. In other words, what Herman shows so clearly is that the law itself produces the negative evaluation of the (Jewish) 'Other' that is at the heart of English law's confrontation with matters Jewish.

The *JFS* case turned on the question of whether the school's admission policy, which was based on an orthodox conception of Jewishness, 'racially-discriminates against

those of other branches of Judaism'. Herman shows that the court's construction of Jews, Judaism and Jewishness has little or nothing to do with actually existing Jews and their (albeit internally contested) self-knowledge of Judaism, but articulates instead a view of both as 'Oriental' (as measured against an 'invisible' criterion of 'Christian universalism and a Christian-infused notion of the secular), as 'racialized' ('resolving' questions of who is or who is not a 'Jew' that are premised on a racialized version of Jewishness) and as Christian (exhibiting a conversionary impulse along with what Herman refers to as a 'de-Judification' of England).

In finding the JFS's admittance criteria 'racist', the Court, despite Judaism's *rejection* of blood ties, reproduces a racist and erroneous reading of Judaism. Moreover, in so doing, it substitutes the Jewish matrilineal test with what Herman sees as a Christian 'evidence of worship', which, as she further notes, would actually lead to the *legitimate* exclusion of Jews from the school for those who are seen as falling short of religious observance (i.e. via weekly attendance at synagogue) or through any other links they may have with Judaism.

There is little doubt that in the context of *An Unfortunate Coincidence* as a whole, Herman's reading of the JFS case is astute in noting the court's complete disregard of the (diversity of) Jewish law(s) on questions of conversions into Judaism and its universal rejection of 'blood lines', and its supplanting of them by Christian (Protestant) notions of worship. It makes Judaism in Christianity's own image. This case resonates with earlier decisions, especially those of the early and mid-twentieth century cases that presented Jews and Jewishness in strictly 'racial' terms. However, as noted, I wonder whether it is a matter less of *continuity*, but more a *revival* of Christian ways of thinking that have recently gained, or, regained ascendancy. It is arguable that the language of 'race', of 'nationality' and of 'Christianity' has become more central within social and political debate since the events of 9/11 and the nonsense of the 'clash of civilizations' that followed in its wake. On this account one need only think of what is termed the 're-nationalization' of Europe as well as the attempt by some European states to define the European Union in specifically Christian terms. Likewise, in the field of academia one can note the number of works centring on the 'politics' of St Paul as well as the emergence of 'radical orthodoxy' pioneered by the Christian theologian John Milbank, and so on (Agamben, 2006; Badiou, 2003; Millbank, 1998, 2010; Zizek, 2009)

Conclusion

In conclusion, my caution about *An Unfortunate Coincidence* is not directed at its underlying thesis of the role played by Orientalism and racialization and underpinned by an enduring Christianity in the negative constructions and representations of Jews and Jewishness. Rather it lies in my suspicion that other factors, although mentioned by Herman, are not treated sufficiently seriously as contributing also to judicial attitudes to Jews and Jewishness. Could it be, for example, that after the 1970s, at least for the trust cases, the concern for the law is less with *Jewish* Otherness and more to do with the alleged 'Otherness' of what are seen as more recent newcomers?

In more general terms, I am also cautious about seeing a continuity of negative contemporary judicial constructions of Jews and Jewishness with those of earlier times. More specifically, I think that the change in *form* of the presentation of Jews and

Jewishness that Herman identifies means also a change in *content*. I do not doubt that there is something particularly ‘English’ about judicial constructions of Jewishness, but it may be possible to locate them within a constellation of factors rather than within only a timeless and static ‘England’ and ‘Englishness’. To do so would denaturalize not only Jews and Jewishness, but also England, Englishness and the common law.

Notes

1. See, for example, David Sugarman’s comment that, ‘During the Enlightenment, law had a strongly cosmopolitan foundation and inter-disciplinary complexion. In England, cultural and legal borrowings and transplants were by no means unusual, though they were not systematically acknowledged’ . . . ‘Indeed, one might argue that Austin and the so-called English school of jurisprudence that he founded was a myrrh; that there was no English jurisprudence but rather a German one’ (Sugarman, 2002: p. 221).
2. Here, it is interesting to note the distinction between the two definitions of *Jewishness* supplied by the OED. The first, seemingly current between the sixteenth and seventeenth centuries, defines it in terms of ‘The religious system of the Jews; Judaism’; this is replaced in 1822 and later by a definition as ‘Jewish quality or trait’.
3. See Hannah Arendt’s discussion of Disraeli as an exemplary case of this alleged ‘exceptionalism’ (Arendt, 1951/2004).
4. In contrast the question of circumcision gained a religious dimension for a short period in the 1830s and 1840s at an early stage of the Jewish emancipation debate (Judd, 2007).
5. This notion of a ‘reification of nature’ is, of course, not confined to the present, but has existed throughout the modern era within a constant tension with its dialectical partner, a ‘reification of artifice’. See on this point, Adorno and Horkheimer (1951/1997), Adorno (1964/1973, 2006) and Arendt (1958/1999); see also, Klinck (1994) and Mayfield (2010).
6. See also Adorno and Horkheimer, *Dialectic of Enlightenment* (1951/1997). Following from this comment, Yovel notes that, ‘Nietzsche would later denounce the Jewish break with nature as a source of Western corruption’. It is worth pointing out in this context that the post-national period identified above saw also a revival in the writings of Nietzsche.

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