

An Unfortunate Coincidence: Jews, Jewishness, & English Law, by Didi Herman. Oxford: Oxford University Press, 2011 - Book Review

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An Unfortunate Coincidence: Jews, Jewishness, & English Law. By Didi Herman. Oxford: Oxford University Press, 2011. 175 pages. £51.00 (cloth).

In 1998, Mr Misha Chaim Baruch Elias was on trial in an English criminal court for handling stolen goods. In his closing speech to the jury, the prosecutor said, “Mr Elias [is] completely and thoroughly dishonest to the heart, I suggest to you. The most self-regarding, utterly cynical, greedy man, you can’t believe a word he says. A master of deceit. I draw the analogy with Oliver Twist who is seen in the musical where Fagin goes through all the money and the lolly and the jewels because, like Fagin, he is in the end keeping his hands on his own material [...] he is very similar because of course, he doesn’t actually go out and directly grubby his hands with the burglary”. In an appeal against his conviction, Mr Elias argued that he had not received a fair trial because the jury had been prejudiced by the prosecutor’s “racially and religiously offensive” remarks about him. The appeal court, however, dismissed his appeal, agreeing with the trial judge that although Mr Elias “might be Jewish”, any offence caused “was because of an unfortunate coincidence” as “reference to Fagin in the handling of cases occurred almost daily in the courts by way of analogy.” It is from this case in which both courts agreed that a literary reference to Fagin with a Jewish defendant was merely “an unfortunate coincidence” that Didi Herman’s excellent 2011 book, *An Unfortunate Coincidence: Jews, Jewishness & English Law*, takes its title. The book was the deserving winner of the SLSA-Hart Book Prize 2012.

Didi Herman is Professor of Law & Social Change at Kent Law School. Her book examines reported judicial decisions between 1927 and 2010 in a variety of legal cases in which at least one of the litigants identified, or was identified in the case, as Jewish in order to map and illustrate the terrain of English judicial representations of Jews and Jewishness. In so doing she demonstrates that the prevailing narrative of English tolerance, secularism, and multiculturalism is at odds with the trajectory of the cases. Instead, the English judiciary draw on and contribute to “orientalising and racializing processes to find their way around and through Jews and Jewishness” (14) and remain heavily indebted to the portrayal of ‘the Jew’ in English literature, most notably the work of Dickens and Shakespeare.

Herman stresses that she is not interested in identifying antisemitism among the English judiciary or in accusing individual judges of antisemitism. Her interest lies in exploring “racialized understandings” (24) of Jews in English judicial discourse and to this end she rarely uses the word ‘antisemitism’ in her book, a term which, she maintains, she does not find helpful. Indeed, she asserts that what she has found in the cases is “not ‘hatred’, but *distaste*, not ‘malice,’ but *unease and confusion*” (25). In this respect Herman takes a critical race approach, which seeks to analyse racial discourse rather than catalogue instances of racism. By applying a critical race methodology to a consideration of Jews, Jewishness and English law, Herman makes an important and original contribution to the field of critical race scholarship. There is little critical race scholarship in the field of law in England and Wales, and even in the USA where it is plentiful, there is little to no account taken of Jews and Jewishness. Accordingly, Herman’s book fills an important gap in the literature, providing an account of how, and in relation to what norms, Jews are understood by the judiciary, and providing a consideration of racial and religious knowledge

formation about Jews amongst the judiciary. It is the contention of critical race theory that judges are active creators of official racial knowledge.

Herman also stresses that she is not concerned with the background, politics, religion or ethnicity of any particular judge. Her concern is only with pervasive approaches in judicial discourse when dealing with Jews and Jewishness, although she does inform the reader that most of the judges come from a Christian, mainly Anglican, background. There are one or two Jewish judges mentioned by Herman, but she does not identify them as Jewish, nor does she refer to their personal background. She merely points out in Chapter 1, An Introduction, that Jewish judges who believe themselves to be adjudicating in a secular court system are also capable of engaging in race-thinking about Jews and Jewishness. Herman's refusal to consider the personal characteristics of the judges distinguishes her work from that of the legal realists who seek to understand judicial decisions by engaging in a behavioural analysis of the judge.

The key argument and theme throughout Herman's book is that the English judiciary engage in "orientalising and racializing processes" (14) in cases involving Jews and Jewish issues. She uses the term 'orientalism' to signify a range of judicial practices that include particular ways of characterising people that have come from the 'east', along with recurring restatements about what is 'English.' In Chapter 2, 'An Unfortunate Coincidence': Race, Nation and Character, Herman demonstrates the process of orientalising with a discussion of insurance cases involving allegations of fraud against the Jewish claimant on the grounds that he failed to disclose a material fact. One such case is *Horne v Poland* (1922). The Jewish plaintiff's failure to disclose that he had been born in Romania and to state his original Romanian Jewish name was held to be a material fact which defeated his insurance claim. In

finding that his Romanian nationality was a material fact, the judge described the plaintiff as “the son of a Romanian Hebrew teacher” and explained that his original Eastern European origins were important to judging the risk that the underwriters ran in entering the insurance contract with him. The “alien signifiers” (35) that the judge ascribed to the plaintiff were juxtaposed against judicial references to high standards in English habits, training, education and ‘notoriously exacting’ law. Herman suggests that the judicial disparaging of the eastern Jew seen in this case is based on an understanding of character through the prism of ‘race’ and ‘nationality’ and notes that in the first half of the 20th Century the relationship between Jews, Jewishness and English judges was shaped by the waves of Jewish immigration from Eastern Europe. She relies on the work of Tony Kushner, who shows that the disparaging of the ‘eastern Jew’ persisted unabated in post-war political culture generally because he was perceived to have failed to assimilate to English culture (see, Tony Kushner, ‘Remembering to Forget: Racism and Anti-racism in Postwar Britain,’ in B. Cheyette and L. Marcus (eds), *Modernity, Culture and the Jew* (Stanford: Stanford University Press, 1998) 226 – 41). Herman maintains that the relationship between nation, race and character persists in judicial thinking to the present day.

‘Orientalism’ also has a theological component. Herman uses the term to signify a judicial approach that compares the Christian civilization with other civilizations and places Christianity at the “civilizational apex of world religions” (15), with Judaism in an inferior position. Underpinning this approach is the view that Christianity is the true faith that superseded Judaism. In Chapter 4, ‘She is and Will Forever Remain a Jew’: Child Welfare and the Courts, Herman illustrates what she refers to as the “*Christian imperialism*” (15) component of orientalism with a

discussion of child welfare cases, which include cases involving male circumcision. She argues that the courts' refusal to authorize male circumcision where one parent is Christian and the other is Jewish (or Muslim), although draped in the language of medical and psychological health, is informed by a Christian imperialism which relegates circumcision to an inferior pre-modernity practice of unreason and pain. The courts' decision, however, is as much a normative ethno-religious choice as is the act of circumcision itself and it promotes Christian universalism. These decisions, suggests Herman, result in judicially authorised de facto Christian conversions. She is only able to point to two cases, one decided in 2002 and one decided in 2004, where the judges were committed to the possibility of mixed identity for the child, which they saw as the court's duty to facilitate.

'Racialization' is the term Herman uses to signify a particular form of understanding and way-finding which English judges apply to people they perceive to be alien to the 'home' environment. It typically involves the use of phenotypical signifiers or characteristics and in the case of Jews often entails an analysis of 'blood.' At the same time, white Christian blood remains unremarked upon. In Chapter 3, 'If Only I Knew': Race and Faith in the Law of Trusts, Herman uses trusts cases to show the racialization process at work in relation to the judges' understanding and characterisation of Jewishness. These trust cases concerned the legal enforceability of clauses in the wills of wealthy Jewish testators which provided for property transmission to their progeny only if they 'married in' the Jewish faith. The question of how to determine who was of the 'Jewish faith' was therefore crucial to deciding the validity of the clauses in question. With a few notable exceptions in cases from 1978 onwards, the judges viewed Jewishness in terms of a line of historical descent from the ancient Israelites. Herman explains that the judicial

emphasis on the original Hebraic Jew is an effect of Christian teachings and wider abstracting tendencies in English law. She notes that finding this authentic line of descent from the Israelites makes Jews meaningful as a racial category but also allows them to produce the legal problem of racial ambiguity. This is because the judges confessed to not knowing what percentage of 'Jewish blood' is enough to make someone Jewish; and because no English Jew can be traced through an unbroken line to the Hebraic Patriarchs. This left Jewishness indefinable as a racial category and therefore the clauses in question had to be declared unenforceable on the grounds of uncertainty. Herman notes that the judges could have used Judaism's own historical self-classification based on matrilineal descent to determine Jewishness but they made no attempt to enlighten themselves and saw their ignorance as determinative. Herman's point that the judges consistently frustrated the intentions of these Jewish testators is well made. She explains that Jewish testators inserted conditions into their wills in order to ensure the continuity of Jewish families and the Jewish community and that, by refusing to uphold their conditions for inheritance, the courts were effectively breaking these familial and communal ties and, in many cases, sanctioning the loss of Jewish identity. She uses the word "de-Judification" (17) to refer to the process of breaking ties to Judaism and Jewish communities. She suggests that this is another example of the judicial authorisation of de facto Christian conversions that promotes, and is informed by, Christian universalism and Christian imperialism. Christianity was found to be wholly knowable by the judges in contrast to Judaism. Thus, racialization also has a theological component. In fact, Herman makes it clear that Christian normativity underlies both the orientalisising and the racializing processes.

Herman explains that by the 1980s 'race relations' law and culture had come to dominate the field and judges responded by adopting a different racialization approach to Jews and Jewishness. The concept of 'ethnicity' gradually replaced that of 'race', although this term was also underpinned by racial assumptions. Herman discusses two employment law cases in Chapter 2, 'An Unfortunate Coincidence': *Race, Nation and Character*, which illustrate that Jewish parties continued to be held in disregard by the judiciary through a series of articulations which, whilst ostensibly race-less, succeeded in presenting Jewish parties as un-English and unattractive. In both these cases, *Seide v Gillette Industries* [1980] and *Garnel v Brighton Branch of the Musicians' Union* [1983], Jewish claimants alleged race discrimination in employment and both claims were dismissed. In both instances, the claimant was constructed as 'strange', 'intemperate' and 'provocative' and to have deserved what he got. Indeed, in *Garnel*, the claimant's behaviour was said by the court to have engendered a feeling of antisemitism where none had existed previously. In both cases, emphasis was placed on the claimant's conduct, which was 'over-emotional', 'disruptive', and 'impolite'. While the judges focused on conduct and behaviour rather than on lineage and 'blood', this was also a racializing process. This is because the judicial focus on 'character' distinguished between English character and the 'alien' character of the Jew. In *Seide*, for example, the claimant's bad behaviour was juxtaposed against that of his employer, which was 'careful and patient', 'democratic and fair'; while in *Garnel*, the un-English character of the Jew was brought into sharper focus by the allegation that the Jewish claimant failed to accept and understand the English rule of law, which was described as 'fair', 'measured' and 'ruly' and, according to Herman, represented "the perfect English gentleman" (44). Herman explains that the racialization process is a two-way one: it also involves a

depiction of English nationhood and English law as 'democratic', 'fair', 'careful' 'patient' 'exacting', 'orderly,' and 'proper.' Englishness is infused with all that is good and valued and Jewishness is everything that Englishness is not.

Herman also discusses racialisation from a different perspective in Chapter 5 'We Live in The Age of The Holocaust of The Jews' where she explains that the judicial privileging of 'legal formalism' is driven and informed by "extrinsic projects of racialisation" (107). Legal formalism is the liberal position that says that law can be separated from the social world in which it is embedded. It draws a distinction between pure law and its social, economic and political contexts. Herman believes that legal formalism is a judicial route that is consciously chosen in cases involving Jews and Jewish issues "in order to marginalise extrinsic political factors" (106), that is, in order to deem certain facts irrelevant to the court. She illustrates this with a discussion of *R v Sec of State for Foreign Affairs, ex parte Greenberg* (1947). This case involved an application for a writ of habeas corpus with respect to 4,500 European Jewish passengers on three ships, on the ground that they were being unlawfully detained by the British Government off the coast of Palestine. The judge denied the writ without any reference to the Holocaust, or indeed, without any reference to any of the persecution that led the passengers to leave Europe and flee to Palestine. Nor did the judge once mention the fact that the ships' passengers were Jewish, despite their lawyer referring to them throughout as "displaced Jews." According to Herman, this judicial blindness to certain facts served to impose Christian norms and values, synonymous with secular norms and values, on the law and evinced total indifference to the millions of Jewish deaths. In this respect, the claim of the Jewish litigants was not only denied but their lived experience was marginalised and disrespected. Indeed, it is the contention of critical race theorists

that the courts' adherence to legal formalism in cases involving race results in the law's failure to address the minority experience and to understand the nature of racism. This is because race or ethnicity is an account of social being; it is the lived experience, and recognition of minority suffering therefore requires judicial sensitivity to social and political context.

Herman has produced an insightful, lively, thought-provoking and important book on a subject that has hitherto been ignored. Moreover, it is well-structured, clearly written, and has an engaging style that is accessible to lay people as well as to lawyers. It is hoped that she will build on this work by adding a chapter on *Fraser v The University & College Union* (2013). This is a discrimination case under the Equality Act 2010 whose lengthy judgment dismissing a Jewish trade union member's claim against his academic union for antisemitic harassment is replete with race-thinking of the kind that Herman identifies in the *Seide* and *Garnel* cases. It is also hoped that she, or others, will widen the scope of her investigation to include the decisions of regulatory bodies and universities. There is evidence of race-thinking about Jews among regulators, such as local authorities when passing anti-Israel boycott motions, and in universities when dealing with student complaints about anti-Zionist expression on campus. Much academic work needs to be done to verify and expose this unsatisfactory phenomenon, which is facilitating the gradual development of a climate distinctly hostile to Britain's Jewish population. In the meantime, Didi Herman's book, *An Unfortunate Coincidence: Jews, Jewishness & English Law*, thoroughly deserves to be read.

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