CHAPTER ONE

INTRODUCTION

Jewish Questions Past and Present

Once one of Christian Europe's most paradigmatic Others, Jews are now mostly seen as a well-integrated and successful religious minority group. For centuries, Jews faced political, social, and legal exclusion from the societies in which they lived. Today, politicians proudly invoke the West's shared 'Judeo-Christian' heritage, suggesting the unity and parity of Jews and Christians as founding members of 'Western civilisation'. Compared to the past, Jews have seemingly moved from being the paradigmatic outsiders to accepted and even embraced insiders. However, despite this undoubted success, there are still moments when this narrative can become suddenly unsettled. By this, I do not refer to the terrible attacks on Jewish life, such as the synagogue shootings in Halle in 2019 and in Pittsburgh a year earlier in 2018, the still alarming rates of antisemitic violence, the groups of White supremacists chanting in the streets that Jews will not replace them, or the flourishing antisemitic conspiracy theories in the online and offline world. Uneasiness with Jews and Judaism also still manifests in less extreme and less overtly hostile ways in the midst of society on the terrain of liberal law, suggesting that the relationship between law and Jewishness is more complicated than the Judeo-Christian parity narrative suggests.

The practice of shechita, the slaughter of animals without prior stunning, for example, has been the subject of numerous controversies, regulations, and bans over many decades, such as in Sweden, Denmark, Switzerland, Belgium, and New Zealand. Supporters of such a ban claim the welfare of animals as their primary concern, accusing Jews alongside

Muslims of cruelty and insisting that state law must prevail over 'medieval' religious custom. Infant male circumcision, long an accepted and even promoted surgery in some Western societies, such as the United States and England, is now increasingly discussed alongside such practices as female genital cutting as a pre-modern and barbaric violation of a child's bodily integrity that oversteps the limits of religious freedom. In 2018, both Iceland and Denmark discussed draft bills criminalising male circumcision and in 2017, one of Norway's ruling parties called for a ban on the practice. Earlier in 2012, a German court declared the practice a criminal assault, arguing that neither parental rights nor religious freedom can trump the rights of the child. Similarly, the practice of the eruv, an inconspicuous installation of wires and poles in public space allowing Orthodox Jews to transport objects on Shabbat, has turned into a thorny issue for residents in Canada, the United Kingdom, Australia, South Africa, and the United States. Neighbours opposing this almost invisible installation in the name of the secularity of public space warn against a Jewish take-over of their neighbourhood, claiming the eruv would turn their locality into a religious 'ghetto' and impose Jewish law on secular citizens.

At first sight, these cases may appear unconnected, a collection of temporary and geographically dispersed disturbances of the general acceptance of Jews and Judaism in Western societies. These cases cover an array of legal concerns, including the built environment, children's rights, and the welfare of animals. Yet, reading under the surface of each of these cases reveals something similar that extends beyond the narrow legal issue in question. These disputes are often not only about foreskins, wires, or butcher knives, but about the difference these things signify; a difference some find so troubling that it has to be contained by law.

This book takes these 'disturbances' as a vantage point to explore the question of Jewish difference in Western secular liberal law.[1] My argument is that contemporary legal responses to Jews, Judaism, and Jewishness reveal a persistent ambivalence about the place and belonging of Jews and Judaism in Western societies. I use the term 'ambivalence' deliberately instead of antisemitism. An analytical focus on antisemitism conceals more than it reveals, potentially narrowing the

[1] I use the terms 'the West' and 'Western' to refer to the societies of Western/Latin Christendom in Western Europe and settler societies of Western European descent, such as Australia, Canada, and the United States.

analysis to questions of hatred, hostility, and violence that still dominate approaches to antisemitism.[2] However, reading legal debates about Jews and Judaism both past and present reveals a more complex set of dynamics and interactions that cannot be reduced to hatred, hostility, or enmity alone. In using the concept of ambivalence, I draw from work in the Jewish studies that uses the notion of ambivalence to capture a more complex set of attitudes and responses to Jews and Judaism beyond antisemitism. Ambivalence, as Tony Kushner notes, can take the 'form of praising westernized, assimilated Jews and rejecting those who were deemed foreign'.[3] Ambivalence assigns Jews a liminal position in the dominant cultures of the West by constructing Jews 'as *both* anti-Christs *and* potential converts as *both* inherently Other or as potential citizens'.[4]

In law and legal conflict, ambivalence towards Jews and Judaism manifests as a contradictory pattern of arguments: On the one hand, there is the promise of inclusion, incorporation, and equality. However, this inclusion is rarely ever unconditional and hinges upon the remaking and transformation of Jewishness in line with dominant cultural and religious norms. Inclusion and equal rights are often still predicated on assimilation, which is to be enforced through the law to ensure that Jews adhere to values presented as secular, and universal – sometimes even as 'Judeo-Christian'. On the other hand, there remains a profound suspicion and anxiety of Jewish difference. This line of legal arguments often rests on a racialising and essentialising logic that casts doubt on the possibility of a successful assimilation and defers equality. In oscillating between conditional inclusion and exclusion, between incorporation and differentiation, and between proximity and distance, ambivalence creates a tension around the belonging of Jews that is never fully resolved.

Sociolegal scholarship and critical legal analyses have long been concerned with how Western law has been implicated in maintaining social hierarchies and inequality along various lines of difference, such

[2] See, for example, Robert S. Wistrich, *Antisemitism: The Longest Hatred* (London: Thames Methuen, 1991). For a detailed critique of antisemitism as under-theorised, see Jonathan Judaken, 'AHR Roundtable: Rethinking Anti-Semitism. Introduction', *American Historical Review* 123, no. 4 (2018): 1122–38.

[3] Tony Kushner, 'Anti-Semitism in Britain: Continuity and the Absence of a Resurgence?', *Ethnic and Racial Studies* 36, no. 3 (2013): 434–49, p. 441. For an extensive discussion of 'ambivalence' as a force in modernity, see Zygmunt Bauman, *Modernity and Ambivalence* (Ithaca: Cornell University Press, 1991).

[4] Bryan Cheyette, 'English Anti-Semitism: A Counter-Narrative', *Textual Practice* 25, no. 1 (2011): 15–32, p. 22. (Italics in original.)

as gender, race, and sexuality. However, the question of Jewish difference and issues of antisemitism more broadly have to date received little attention. There are of course notable exceptions, such as Didi Herman's excellent work on representations of Jewishness in modern English judicial discourse and Stephen Feldman's critical history of the American constitutional separation of state and church 'from the viewpoint of an American Jew'. Their work reveals that the belonging of Jews to the imagined communities of the West is far from settled and that the law remains implicated in the cultural domination of Jews.[5] Apart from these studies, however, Jews, Judaism, and antisemitism have remained largely absent from critical sociolegal scholarship. The reasons for this lacuna are diverse and complex, perhaps partly owing to perceptions of Jews as members of a privileged Western 'White Judeo-Christian' mainstream and understandable concern with more overt forms of legal oppression and domination.[6] This lacuna, however, is a missed opportunity, not only because, as Didi Herman has already pointed out in the context of England, our understanding of identity and difference in Western law must remain incomplete without considering Jews and Judaism.[7] The legal encounter with Jewish difference, I argue in this book, also offers an opportunity to critically engage with the religious-cultural foundations of Western secular law by examining how the historical relationship between Christianity and one of its most significant Others has shaped central ideas, knowledge, and meanings in secular liberal law.

The significance of Christian theology and Christian attitudes towards Judaism for not only the history of Jews but also for the development

[5] Didi Herman, *An Unfortunate Coincidence: Jews, Jewishness, and English Law* (Oxford: Oxford University Press, 2011); Stephen M. Feldman, *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State* (New York: New York University Press, 1998) (quote at p. 9).

[6] See also Bryan Cheyette, 'Postcolonialism and the Study of Anti-Semitism', *American Historical Review* 123, no. 4 (2018), p. 1238. A note on the spelling of White in this book: spelling 'Black' with a capital letter has become increasingly common to account for the fact that 'Black' is a constructed racial identity. There remains debate whether 'white' too should be spelled with a capital letter to highlight its constructed and artificial nature. Those against such a spelling worry that it would elevate White Supremacists. For an argument in favour of capitalising both 'Black' and 'White', see, for example, Kwame Anthony Appiah, 'The Case for Capitalizing the B in Black', *The Atlantic*, 20 June 2020. In this book, I follow Appiah's argument by spelling 'White' with a capital letter when referring to a racial category rather than a colour.

[7] Herman, *An Unfortunate Coincidence*, pp. 174–75.

of foundational categories of thought in Western Christendom or what today is often called 'the West' is well-known to scholars in the humanities. David Nirenberg, for example, has shown how thinking about Jews and Judaism and engaging the question of Jewish difference allowed Christian and Western thinkers to make sense of their own identities and histories as well as of broader questions of their times.[8] These 'Jewish questions', Nirenberg contends, shaped fundamental categories and habits of Western thought by mobilising a figure of 'the Jew' and of 'Judaism' as a foil and this thinking could often have profound consequences for actual living Jews. The societies of Greek and Roman antiquity of course thought about Jews too, but the question of Jewish difference became a particularly troubling and irritating issue with the rise of Christianity. For Christianity, Jews constituted unstable 'figures of difference' that have reinforced but also continuously troubled Christian identity by challenging its central narratives of universalism and truth.[9] Ideas about Jewish difference, therefore, have profoundly shaped the Christian tradition and, as I seek to show in this book, continue to reverberate in modern liberal law.

My aim in this book is to bring sociolegal studies into conversation with this work in the humanities to offer a critical perspective on secular law and Jewish difference that foregrounds the role of Christian ambivalence for shaping foundational categories and assumption in secular law and legal thinking. That the tradition of Western Christendom has left an imprint on secular liberal law is not a novel claim in sociolegal scholarship and in the critical study of religion and secularism. However, the central argument that I advance in this book is that we cannot understand contemporary legal responses to Jews, Judaism, and Jewishness – and indeed, to other non-Christians – without considering the legacy of *Christian ambivalence* towards Jews and Judaism in Western secular law.[10] By Christian ambivalence, I refer to a set of secularised Christian discourses and ideas about Jews and Judaism that

[8] David Nirenberg, *Anti-Judaism: The Western Tradition* (New York; London: WW Norton, 2013). See also Sander L. Gilman, *The Jew's Body* (New York; London: Routledge, 1991); Jeremy Cohen, *Living Letters of the Law: Ideas of the Jew in Medieval Christianity* (Berkeley and Los Angeles: University of California Press, 1999).

[9] Jonathan Boyarin, *The Unconverted Self: Jews, Indians, and the Identity of Christian Europe* (Chicago; London: University of Chicago Press, 2009).

[10] See also Zygmunt Bauman, 'Allosemitism: Premodern, Modern, Postmodern', In *Modernity, Culture, and 'The Jew'*, eds., Bryan Cheyette and Laura Marcus (Cambridge: Polity Press, 1998), 143–56, p. 148.

emerged from Christian theology and its attempts to make sense of its Jewish origins. Christian ambivalence, as I explore in this book, has shaped both policies and laws towards Jews in ways that rejected Jews but also desired and even required Jewish inclusion, yet rarely ever unconditional. However, Christian attitudes towards Jews and Judaism did not only shape the lives of Jews in Western societies in a myriad of ways but also established ways of thinking and reasoning that continue to underpin modern secular law – with consequences not only for the equality and rights of Jews but also for other non-Christians. This book is, therefore, at one level a study of how Christian ambivalence has shaped legal responses towards Jews and Judaism, yet it is also a study of the often-unstated assumptions and biases about religion and religious difference and about some of their roots in Christian ambivalence towards Jews. These assumption and biases entrench and reproduce the dominance of Christian normativity in law and society, perpetuate Christian privilege, and contribute to the assimilation, racialisation, and marginalisation of not only Jews but also other non-Christians.[11] This book is thus also an attempt to engage through the lens of Jewish difference more broadly with the issue of Christian privilege and its impact on religious equality in Western law at a time when a populist and nationalist backlash against diversity and multiculturalism increasingly involves the mobilisation of Christianity as a central element of an allegedly beleaguered and threatened 'Western civilisation' that secular law is called upon to defend.[12]

Moreover, this book contends that taking note of the Christian underpinnings of Western secular law and legal thought must also grapple with questions of race. To date, the critical sociolegal analysis of religion in law and of race in law has not always occurred in tandem, reflecting how there has often been little conversation between

[11] Work on Christian privilege and the law has largely focused on the United States, see, for example, Khyati Y. Joshi, *White Christian Privilege: The Illusion of Religious Equality* (New York: New York University Press, 2020); Caroline Mala Corbin, 'Justice Scalia, the Establishment Clause, and Christian Privilege', *First Amendment Law Review* 15, no. 22 (2017): 185–220. On Christian privilege in Western Europe more generally albeit not focused on law specifically, see A. Sophie Lauwers, 'Religion, Secularity, Culture? Investigating Christian Privilege in Western Europe', *Ethnicities* 23, no. 3 (2023): 403–25.

[12] Rogers Brubakers speaks of 'Christianism' as a part of the shift from nationalism to civilizationism: Rogers Brubakers, 'Between Nationalism and Civilizationism: The European Populist Moment in Comparative Perspective', *Ethnic and Racial Studies* 40, no. 8 (2017): 1191–1226.

theories of race and theories of religion more broadly.[13] However, I would suggest that a critical consideration of contemporary debates about religious difference needs to attend to the racialisation of religious difference, which renders religious differences insurmountable and therefore unassimilable. This dynamic has been particularly salient in relation to Islam but, as I will show, also still permeates responses to Jewish practices, such as infant male circumcision and the eruv. The intersection of religion and race in legal and political responses to religious difference is, I suggest neither accidental nor novel but reflects how the modern problem of what is termed cultural racism finds some of its roots in the Christian attempt to distance itself from its Jewish origins. The question of Jewish difference in secular law therefore also offers a vantage point from which to examine the interplay between Christian ambivalence, the racialisation of religious difference, and Western law in both contemporary and historical perspectives. Before setting out the approach this book takes in more detail, this introductory chapter will proceed by locating Jews, Judaism, and Jewishness in the interdisciplinary scholarly debates about religion, secularism, and the law on the one hand as well as the literature on law and the racialisation of religion on the other.

SECULAR LAW AND CHRISTIAN NORMATIVITY

Religious symbols and practices remain the source of much public debate, litigation, and legislation across Western liberal democracies. In these debates and conflicts, secular law is tasked with drawing the

[13] On this lack of conversation in legal scholarship, see also Nomi Maya Stolzenberg, 'Righting the Relationship between Race and Religion in Law', *Oxford Journal of Legal Studies* 31, no. 3 (2011): 583–602. For example, Stephen Feldman's otherwise excellent study of Christianity's influence on the development of contemporary US constitutional law does not mention race, although it identifies religious antisemitism as an important factor in this history, see Feldman, *Please Don't Wish Me*. Didi Herman's *An Unfortunate Coincidence* work is highly attentive to processes of racialisation in judicial discourses but does not centre on the historical relationship between Christianity, Jewishness, and race. For a cultural legal history of religion and race as overlapping and intersecting forces in the development of Western law, see Eve Darian-Smith, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law* (Oxford; Portland: Hart Publishing, 2010). On the racialisation of Muslims in American law, see, for example, Neil Gotanda, 'The Racialization of Islam in American Law', *Annals of the American Academy* 637, no. 1 (2011): 184–95; Margaret Chon and Donna E. Arzt, 'Walking While Muslim', *Law and Contemporary Problems* 68, no. 2 (2005): 215–54.

appropriate line between religion and the public sphere and with protecting the right to religious freedom for minorities and majorities alike in a way that reflects secular and not religious values. The secularity of law implies that state law remains largely unencumbered by religious particularities. This view underpins the term 'law and religion' that describes a field of scholarly inquiry in which law and religion are largely seen as two separated realms, mirroring an understanding of 'the secular' and 'the religious' as distinct and separate. However, as critical studies of secularism have shown, the relationship between 'the religious' and 'the secular' is not one of simple opposition. Instead, the secular state and its law remain deeply involved in defining and shaping religion.[14] Secularism as both a regime of governance and an ideology does not just draw a line of separation between religion and state to enable tolerance of difference and diversity but also involves 'remaking certain kinds of religious subjectivities'.[15] In doing so, secularism constructs and produces that which is 'religious' as well as that which is 'secular', delineating 'religion' from other spheres of life and from other aspects of identity and community attachment.[16]

Secular law as a key site for instituting secular rule participates in constructing 'religion' and in drawing the boundaries of religious difference and religious freedom. In defining and regulating religion, secular liberal law does not operate from an entirely neutral standpoint. Instead, by being embedded in historical power relations, secular law often reflects majoritarian norms, expectations, and biases about what constitutes 'proper religion', which, in a Western context, remain indebted to the tradition of Western Christianity. Even if the influence of Christian religious institutions in public life has changed compared to the past, affiliation with institutional Christianity is in decline, and religious diversity has increased, Christian culture and traditions remain ubiquitous in Western secular societies. The secular calendar of the year reflects the Christian calendar, while the rhythm of the week follows the Christian rhythm of the week that designates Sunday as the central day of rest. Many Christian holidays are nationally recognised holidays, Christian symbols, such as Christmas decorations but

[14] See, for example, Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

[15] Saba Mahmood, 'Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation', *Public Culture* 18, no. 2 (2006): 323–47, p. 328.

[16] Mayanthi L. Fernando, *The Republic Unsettled: Muslim French and the Contradictions of Secularism* (Durham; London: Duke University Press, 2014), 22.

also crucifixes remain common sights in public spaces, and Christian prayers open the sittings of parliaments, such as in Australia. The Christian tradition maintains a dominant and hegemonic *cultural* presence, which also manifests in and through secular law.

There remains a Christian residue in secular law that reflects and reproduces Christian normativity, values, and knowledge. In making this argument, I build on a body of interdisciplinary scholarship that explores the influence of Christian knowledge and thought, particularly in its Protestant variant, on Western formations of secularism and secular law.[17] This influence is most evident in the way that Western law often privileges a notion of religion as private, voluntary, individual, autonomous faith. This liberal notion of religion is presented as a religiously neutral, ahistorical, and universal category of secular law. Yet, in privileging subjective and individual interior belief, this notion of religion marginalises religion's outward manifestation. Indeed, most other religious traditions, such as Judaism, Islam, or Hinduism, do not fit as easily within such limited notion of 'religion' as private, individual, and voluntary faith.[18] Instead, these religions often value and privilege other elements of identification and attachment, such as community, public religiosity, descent, and ritual practice. Indeed, as Robert Yelle points out, there are few traditions in which such an 'antiritualistic' notion of religion makes sense.[19]

This mismatch is not just an epistemic problem. Once constituted as the legal benchmark for religion, this Christo-centric notion of religion is deployed to regulate other traditions by turning them 'from

[17] See, for example, Suhraiya Jivraj, *The Religion of Law: Race, Citizenship and Children's Belonging* (Basingstoke: Palgrave Macmillan, 2013); Feldman, *Please Don't Wish Me*; Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (New Haven: Princeton University Press, 2005); Herman, *An Unfortunate Coincidence*; Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo, eds., *After Secular Law* (Stanford: Stanford University Press, 2011); Wendy Brown, 'Civilizational Delusions: Secularism, Tolerance, Equality', *Theory & Event* 15, no. 2 (2012). Practices of separating religion and state are not unique to Western Christian societies. On Jewish approaches to secularism, see, for example, Suzanne Last Stone, 'Religion and State: Models of Separation from within Jewish Law', *International Journal of Constitutional Law* 6, no. 3–4 (2008): 631–61.

[18] See, for example, Lena Salaymeh and Shai Lavi, 'Religion Is Secularised Tradition: Jewish and Muslim Circumcisions in Germany', *Oxford Journal of Legal Studies* 41, no. 2 (2021): 431–58.

[19] Robert Yelle, 'Imagining the Hebrew Republic: Christian Genealogies of Religious Freedom', in *Politics of Religious Freedom*, eds., Winnifred Fallers Sullivan et al. (Chicago: University of Chicago Press, 2015), 17–28, p. 25.

public actors of communal traditions into individual believers of private choice'.[20] However, much like in relation to gender and race, law's biased religious benchmark is rendered invisible and normal, even though this benchmark privileges and universalises one religion over others in ways that marginalise non-Christian religions and impacts on their rights and citizenship. Despite the diverse manifestations of secularism and the variety of legal frameworks of state–church relations, the privileging of Christian normativity in and through secular law runs like a common thread through Western jurisdictions.[21]

A growing body of work documents the various ways in which the law remains complicit in reproducing and protecting Christian values across different Western legal systems. 'Christianity', Suhraiya Jivraj notes in the context of English law, 'has had and continues to have, an embedded, dominant and regulatory role within juridical state discourse, even despite the different theological and cultural forms it takes in particular contexts'.[22] Christian values and sensibilities, Jivraj observes, have become associated with the secular values of the English state and its institutions in both judicial and policy discourse where these secularised Christian values provide both a lens and a point of – often – negative comparison for assessing non-Christian religions who are presented as uncivilised and potentially dangerous. Didi Herman too highlights the influence of the Christian tradition on secular legal reasoning and argues that secularism serves 'as a term that facilitates judicial Christian thinking'.[23] Christian values and norms circulates through English law masked as supposedly universal and secular values and norms despite their religious particularity. Analysing court cases involving Jewish litigants, Herman how this judicial thinking leads to Christian impositions

[20] Shai Lavi and Lena Salaymeh, 'Secularism', in *Key Concepts in the Study of Antisemitism*, ed. Sol Goldberg, Scott Ury, and Kalman Weiser (London: Palgrave, 2021), 257–72, p. 267.

[21] Lena Salaymeh argues that there is no authentic form of secularism, only a fluctuating and diverse ideology albeit with a Eurocentric bend, see Lena Salaymeh, 'The Eurocentrism of Secularism', *West Windows*, 14 September 2020. On remarkable similarities between the legal responses of different European countries to the issue of religious symbols despite significant differences of state–church relationships, see also Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence', *Cardozo Law Review* 30, no. 6 (2009): 2629–68.

[22] Jivraj, *Religion of Law*, p. 10.

[23] Herman, *An Unfortunate Coincidence*, p. 16.

onto Jewish litigants, such as in the case of a Jewish school case in which the UK Supreme Court imposed a Christian understanding of religion as belief onto the Jewish Orthodox school that disregards Jewish self-understanding and the complexity of Jewish identity that cuts across notions of religion, ethnicity, and culture.[24] In applying a Christo-centric notion of religion to non-Christians, the Court, a secular legal institution, engages in their assimilation to a majoritarian religious norm.

In the United States, Khyati Joshi makes a similar observation and describes the relationship between Christianity and law as institutional and structural despite the legal line that the Constitution's First Amendment seeks to draw between church and state: 'Christian privilege is built into the edifice of American law'.[25] Due to the social and historical power of Christianity, American law and public institutions reflect the 'accretion of Christian privilege and Christian normativity into an infrastructure of Christian hegemony'.[26] For Joshi, the First Amendment is shaped by a profoundly Protestant view of religion that prioritises belief over action and that provides the 'face' for when courts assess the impact of 'facially neutral' laws on other traditions, rendering Christianity the implicit benchmark.[27] Despite the state's supposed religious neutrality and the separation of state and church, the law fails to deliver equality for all religions. Stephen Feldman's critical history of the separation of state and church supports this argument by showing how the core secular principle of separation and its constitutional enactment and interpretation is an outgrowth of the history of Christianity and continues to entrench Christian privilege. Contemporary judicial interpretation of the First Amendment manifest and reinforce Christian cultural and political dominance at the expense of non-Christian groups.[28] In a predominantly Christian society, Stephen Feldman concludes, a 'neutral' standpoint equals a Christian standpoint, allowing Christian practices a pass whereas non-Christian practices are scrutinised and constrained.[29]

Even nominally Catholic states, Winifred Fallers Sullivan observes, can rely on a Protestant-Christian notion of religion as voluntary,

[24] See the discussion in Herman, *An Unfortunate Coincidence*, pp. 168–69.
[25] Joshi, *White Christian Privilege*, p. 33.
[26] Joshi, *White Christian Privilege*, p. 4.
[27] Joshi, *White Christian Privilege*, pp. 33–36.
[28] Feldman, *Please Don't Wish Me*.
[29] Feldman, *Please Don't Wish Me*, pp. 275–76.

individual, and private, which does not make them Protestant but small-p 'protestant' in their religio-politico-legal arrangements.[30] An example is predominantly Catholic France where in contemporary debates about the Muslim headscarf private faith has been constituted as the most authentic site of religion.[31] However, this 'small-p Protestantism' does nonetheless accommodate the majoritarian religion of Catholicism. Similarly, in Germany's mixed Protestant-Catholic setting, small-p 'protestant' notions of religion remain influential in secular legal thinking, as I explore in Chapter 4.[32]

The Protestant-Christian influence on secular understandings of religion is also apparent in international human rights law, such as in Article 9 of the *European Convention on Human Rights* that reflects the split of religion into a spiritual/belief and a ceremonial/practice/exercise component. Article 9 distinguishes between a *forum internum* and a *forum externum*. The *forum internum* is conceptualised as absolute, whereas the *forum externum* is subject to legal regulation, a view that elevates private faith over practice, but fails to capture how Judaism, Islam, and other religions view this relationship.[33] 'Belief' is seen as a private matter and therefore largely out of the reach of the state and its law, while 'practice' as the outward manifestation of religion is subject to legal regulation. Lena Salaymeh and Shai Lavi argue that in the caselaw of the European Court of Human Rights on the headscarf, practice is construed as 'belief-based choice'. This approach renders practices discretionary, such as when the headscarf is treated like an optional piece of clothing in cases such as *Dogru* v. *France* or *Kervanci* v. *France*.[34] The practice-belief distinction acts as an assimilatory device that can be deployed to remake non-Christians in line with majoritarian expectations about what constitutes 'religion', while ostensibly guaranteeing religious freedom.

However, the emphasis on belief is not always deployed in the same way to Christian practices. The privatisation of non-Christian

[30] Sullivan, *Impossibility of Religious Freedom*, p. 7.
[31] See the analysis in Fernando, *The Republic Unsettled*, pp. 132–33.
[32] See also Salaymeh and Lavi, 'Religion Is Secularised Tradition'.
[33] For a critique of this distinction, see, for example, Saba Mahmood and Peter G. Danchin, 'Immunity or Regulation? Antinomies of Religious Freedom', *South Atlantic Quarterly* 113, no. 1 (2014): 129–59.
[34] Salaymeh and Lavi, 'Religion Is Secularised Tradition', p. 446 (discussing *Dogru* v. *France* (App no. 27058/05) ECtHR 4 December 2008 and *Kervanci* v. *France* (App no. 31645/04) ECtHR 4 March 2009).

religions intersects with the legal accommodation of Christian symbols and practices in public. Case law reveals a tendency to associate Christianity with national culture and heritage and thereby to withdraw the public elements of Christianity from the legal mandates of separation that underpin the public–private distinction. Most notably, Christmas trees maintain a pervasive presence in public spaces across the West and courts have given crucifixes[35], crosses[36], and crèches[37] in public spaces a pass. Moreover, in distinguishing between symbols deemed inconspicuous and conspicuous, secular law accommodates Christian symbols, such as the wearing of a crucifix, whereas non-Christian symbols, such as the headscarf or the kippah, have been seen as threatening values of state neutrality.[38] Christian privilege thus operates not only through marginalising and assimilating non-Christian religions. Law also maintains Christian privilege by legitimising and naturalising the public presence of Christianity through a different process of secularisation that turns Christian symbols into *non-religion*.[39] Christianity therefore continues to slip through the cracks of the private sphere's boundaries, rearticulated as 'culture', 'national heritage', and 'shared tradition', and thereby legitimised as areligious representations of the shared identity and history of *all* citizens in a given national context.

The critique of secular law's biases does not mean that secular law is just Protestant Christianity in disguise or that the institutions of Christianity or certain Christian groups still yield overwhelming power in Western law.[40] The critical inquiry into secular law's biases

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

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

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

[38] On the legal distinction between conspicuous and non-conspicuous symbols and how this distinction privileges Christianity in France, see Ratna Kapur, 'Secularism's Others: The Legal Regulation of Religion and Hierarchy of Citizenship', in *Constitutions and Religions*, ed. Susanna Mancini (Cheltenham: Edward Elgar, 2020): 41–48. On the kippah, see the decision in *Goldman v. Weinberger*, 475 U.S. 503 (1986).

[39] I consider this legal strategy in Chapter 5. See also Lori G. Beaman, *The Transition of Religion to Culture in Law and Public Discourse* (London: Routledge, 2020).

[40] While related, my line of analysis is different from the conversation about 'Christian Human Rights'. This conversation, on the one hand, explores the influence of Christian ethics as well as of Christian groups and individuals on the formulation of the right to religious freedom in international human rights law

is instead concerned with the unstated assumptions that continue to underpin influential secular legal discourses and reasoning that *if not always consciously* but *in effect* can privilege a (Protestant) Christian normativity. This Christian normativity in law is not the same as Christian theology. Secularised Christianity normativity emerged out of the traditions of Christian thought that have been transformed, modified, adapted, and secularised over time and become embedded in central categories of liberal thought. This point has been made by many scholars, including Gil Anidjar, who, paraphrasing Carl Schmitt, notes that 'all significant concepts of the modern world are *liquidated* theological concepts'.[41] Similarly, as Elizabeth Mensch has shown, modern liberal thought and liberal law derive much of their foundational categories from Christianity.[42] Christian normativity, therefore, refers to a set of discourses, values, and preferences that have been secularised into a cultural repertoire.

Approaching Christianity in this way is neither meant to essentialise Christianity nor to homogenise what is an internally diverse and often contested tradition. As a cultural repertoire, manifestations of Christian normativity in law also may not necessarily align with how confessional Christians see themselves and their own faith. Many groups of the Christian Right in fact would argue that they too are marginalised by secular law.[43] Indeed, Christians have been among

and examines, on the other, how Christian groups mobilised religious freedom to push back against what they perceived as a threatening form of secularism. See, for example, Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015). On Jewish contributions to this history, see, for example, James Loeffler, 'The Religions of Human Rights', *Harvard Theological Review* 116, no. 1 (2023): 147–71.

[41] Gil Anidjar, *Blood: A Critique of Christianity* (New York: Columbia University Press, 2014).

[42] Elizabeth Mensch, 'Christianity and the Roots of Liberalism', in *Christian Perspectives on Legal Thought*, ed. Robert F. Cochran, Michael W. McConnell, and Angela C. Carmella (New Haven: Yale University Press, 2001), 54–72. See also Brown, 'Civilizational Delusions'. Emphasising the role of Christianity in shaping categories of Western thought does not mean that the relationship between Christianity and liberal secularism is a one-way street. Clearly, liberal secularism has shaped and continues to shape Christianity in profound ways too. On this dialectical relationship, see, for example, Sarah Shortall, 'From the Three Bodies of Christ to the King's Two Bodies: The Theological Origins of Secularization Theory', *Modern Intellectual History* (2022): 1–23, https://doi.org/10.1017/S147924432200035X.

[43] Elenie Poulos, 'Protecting Freedom/Protecting Privilege: Church Responses to Anti-Discrimination Law Reform in Australia', *Australian Journal of Human Rights* 24, no. 1 (2018): 117–33.

the staunchest critics of secularism. 'Christianity', Elizabeth Mensch observes in the US context, 'finds in liberalism both its own reflection, and, simultaneously, a starkly conceived and alien antagonist'.[44] Indeed, not all Christians will benefit equally from Christian privilege given that privilege is always intersectional, contextual, historically contingent, and nationally as well as locally specific. Depending on its context, Christian privilege will be more beneficial to some Christians than to others. For example, depending on the legal and political context, it might be more beneficial to those whose Christian identity – be it confessional or cultural only – fits more easily with the idea of a private and autonomous faith.[45] Despite these complexities and tensions, I believe that it is not only possible but also crucial to acknowledge how the Christian tradition as one of 'the most powerful hegemonic cultural systems in the history of the world'[46] has influenced ways of seeing, knowing, and approaching 'difference' in Western law and society in ways that render some religions the natural and desirable norm, while treating others as in need of legal reform.

CHRISTIAN AMBIVALENCE TOWARDS JEWS

Critical studies of secularism identify the Protestant Reformation as a crucial moment for the formation of Western notions of secularism and their association with Protestant values. During the Reformation, the Protestant rejection of Catholic ritualism gave rise to a crucial set of distinctions between belief and reason, thought and action, and body and mind that came to underpin the emerging secular order.[47]

[44] Mensch, 'Christianity and the Roots of Liberalism', p. 54.

[45] However, even non-mainstream Christians will benefit from Christian privilege not only because it affords a 'basic' privilege but also because it renders their practices and traditions more palatable to the state. See the discussion of the US Supreme Court's treatment of the Amish in Feldman, *Please Don't Wish Me*, pp. 246–47. On secular Christians as 'main recipients' of Christian privilege, see also Lauwers, 'Religion, Secularity, Culture?', p. 411. Political and therefore legal landscapes also shift and thereby change the contours of Christian privilege. On the legal protection of conservative Christians in US law and possible implications for liberal Jews, see, for example, David H. Schraub, 'Liberal Jews and Religious Liberty', *New York University Law Review* 98 (2023): 1–72.

[46] Daniel Boyarin, *A Radical Jew: Paul and the Politics of Identity* (Berkeley: University of California Press, 1994), 9.

[47] Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore; London: Johns Hopkins University Press, 2009). See also

After the Reformation, the modern notion of religion gained further contours in the writings of Protestant writers and in the academic study of 'world religions' that further entrenched the blueprint of what constitutes proper religion.[48] Influential thinkers, such as John Locke, for example, argued that toleration necessitated a personalised notion of religion, a privately held, non-political, and spiritual belief, to enable loyalty to the law of the nation state in the public sphere. Yet, many of these ideas about what is 'good' and 'true' religion and what is not have been forged even earlier – in Christianity's encounter with Jews. Ari Joskowicz and Ethan Katz draw attention to this genealogy by highlighting that

> many of the key dichotomies underpinning secularist discourse evolved from the oppositions that Christian thinkers historically constructed to juxtapose Christianity and Judaism. Indeed, the idea that a forward-looking Christianity had superseded an archaic Judaism established patterns of thinking about time and meaning in history that shaped notions of progress among religious, non-religious, and anti-religious thinkers alike.[49]

From its early days, ambivalence towards Jews has been a crucial component of Christian identity formation in which Christianity struggled with its Jewish roots. Christian attitudes towards Jews were marked by a profound ambivalence that affirmed the inferiority of Jews alongside their necessity. The production of Christian identity needed Jews, so Christianity could not outright reject them. Jews were seen as a cursed community to be punished for their rejection of the gospel and the death of Jesus. But they were also witnesses to the Christian truth and their conversion in large numbers would signal the second coming of Jesus. In constructing its identity in relation to Jews, Christianity

Cécile Laborde, 'Rescuing Liberalism from Critical Religion', *Journal of the American Academy of Religion* 88, no. 1 (2020): 58–73, pp. 60–61; Darian-Smith, *Religion, Race, Rights*, ch. 1.

[48] See, for example, Janet R. Jakobsen and Ann Pellegrini, 'Introduction: Times Like These', in *Secularisms*, ed. Janet R. Jakobsen and Ann Pellegrini (Durham: Duke University Press, 2008), 1–35, pp. 7–9; Tomoko Masuzawa, *The Invention of World Religions. Or, How European Universalism Was Preserved in the Language of Pluralism* (Chicago: University of Chicago Press, 2005).

[49] Ari Joskowicz and Ethan B. Katz, 'Introduction: Rethinking Jews and Secularism', in *Secularism in Question. Jews and Judaism in Modern Times*, ed. Ari Joskowicz and Ethan B. Katz (Philadelphia: University of Pennsylvania Press, 2015), 1–22, p. 2. See also the contribution by Amnon Raz-Krakotzkin in the same volume.

created what Jeremy Cohen termed the 'hermeneutical Jew'. However, the images of this 'hermeneutical Jew' and therefore of 'Jewish difference' often clashed with what Jews in real life did, which could make those real Jews who did not properly perform this ideological role less deserving of protection in Christian eyes.[50] Jews, of course, did not constitute Christianity's only Other. Muslims, in particular, also played an important role in Christianity's identity formation, and my focus in this book on Jewish difference is not meant to deny this significance. Thinking and discourses about Jews and Muslims in fact often intersected and occasionally converged in Christian polemics and church legal theory and continue to do so today in secular legal debates – a point to which I will return in Chapters 4 and 7. But Jews and Muslims also figured differently in the self-understanding of the Christian world. Whereas Muslims, often also called Saracens, were perceived as external Others and political enemies that were seen as beleaguering and threatening lands claimed by Christians, Jews constituted theological and internal enemies, living among Christians and through their continued existence also challenging Christianity's claim to truth and unity.[51]

Supersessionist thinking has constituted a central feature of Christian ambivalence towards Jews and established ideas and knowledge about progress, history, and time that remain relevant today as ideas and assumptions underpinning secular legal thinking and secular legal reasoning. Supersessionism forms what Jeremy Cohen calls a 'replacement theology' in Latin Christendom:

> From apostolic times until our own, Christian believers and teachers have held that the Passion of Christ inaugurated a new covenant of grace that superseded the old covenant of Mosaic law. Christians had come to constitute a new Israel of the spirit; they had replaced the Jews, Israel of the flesh, as God's chosen people. Christianity now offered the only viable path to salvation.[52]

The idea that true religion is first and foremost a matter of the spirit and not of law, ritual, or ceremony became the Christian founding

[50] Cohen, *Living Letters*, p. 2.
[51] Gil Anidjar, *The Jew, the Arab: A History of the Enemy* (Stanford: Stanford University Press, 2003), p. 38.
[52] Jeremy Cohen, 'Supersessionism, the Epistle to the Romans, Thomas Aquinas, and the Jews of the Eschaton', *Journal of Ecumenical Studies* 52, no. 4 (2017): 527–53, p. 528.

narrative in the writings of Paul who distinguished between Jewish 'law' and 'flesh' and Christian 'grace' and 'spirit'.[53] Paul's writing, Daniel Boyarin notes, was underpinned by an interlinked set of binaries and relations, such as literal–figurative, circumcision–baptism, and Israel–Church, all of which elevated Christianity and assigned Jews to an earlier time that had been overcome.[54] When Jews failed to accept the Gospel, they found themselves taken out of progress, out of time and history.[55] Their laws with their ritual orientation were seen as holding Jews back and tied to this past. In Christian thought, Jewish rituals merely foreshadowed what was to come and Christ's sacrifice on the cross made them obsolete. Christianity saw itself as removing Judaism's 'marks of an external discipline',[56] replacing and thereby perfecting them through a superior spiritual discipline. One consequence of this turn from law to spirit was then the denigration of the ceremonial aspect of Judaism that Christian thinkers viewed as a veil that left Jews in darkness and in separation from other peoples.[57] It is therefore no surprise that embodied rituals, such as infant male circumcision, became the topic of much Christian polemics, as I explore in Chapter 3. Moreover, for Christian thinkers, Jewish ritual law, such as the dietary laws of kashrut or the practice of circumcision, signified the particularistic and therefore exclusionary ethno-religious character of Jews that had been replaced by Christian universalism that could encompass all of humanity. As Paul stipulated, 'there is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for ye are all one in Christ Jesus'.[58]

Supersessionary thinking not only matters for understanding the place of Jews in Western thought. In attempting to distance itself from Jews, Christian Europe developed a vocabulary of difference that it applied, refined, and modified not only in relation to Jews but also

[53] Robert A. Yelle, 'Moses' Veil. Secularization as Christian Myth', in *After Secular Law*, ed. Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo (Stanford: Stanford University Press, 2011), 24–42, p. 24.
[54] Boyarin, *A Radical Jew*, p. 31.
[55] Amnon Raz-Krakotzkin, 'Secularism, the Christian Ambivalence toward the Jews and the Notion of Exile', in *Secularism in Question*, ed. Ari Joskowicz and Ethan B. Katz (Philadelphia: University of Pennsylvania Press, 2015), 276–98, p. 282.
[56] Yelle, 'Moses' Veil', p. 26.
[57] Yelle, 'Moses' Veil', p. 25.
[58] Galatians 3:28. Boyarin reads Paul as a Jewish cultural critic who was motivated by a 'Hellenistic desire for the One … beyond difference and hierarchy'. Boyarin, *A Radical Jew*, p. 7.

in encounters with other Others.[59] European Christian expansion brought ideas about the proper religion to the colonies and extended them to other religions that they perceived as ritualistic, such as Islam or Hinduism. For example, the British in colonial India perceived of the Hindu rituals of purification much like Christianity perceived of the Jewish rituals: As unnecessary signs of social separation that clashed with Christian universalism and as primitive signs of an earlier stage of the development of law and religion.[60] In India, the British colonial administration relegated Hindu ritual law to the private sphere but also marginalised the legal significance of rituals for areas of law governing areas such as contracts and succession.[61] The mission of civilising colonised populations of Muslims and Hindus redeployed ideas that had been forged earlier to assure an anxious Christian self vis-à-vis its Jewish Other and now became embedded and further developed in an broader Orientalist discourse that positioned European Christian culture as the beacon of process and colonised people at a lower stage of civilisation.[62] European secular rule, Amnon Raz-Krakotzkin argues, can therefore be seen as 'the expansion of the Christian ambivalence towards the Jews, to include also other non-Christians'.[63] These ideas and arguments also influenced evolving secular categories that helped to delineate the religious from the legal and religion from state. As Robert Yelle argues, in carving out a space for religion, secular law eventually employed similar supersessionary strategies that Christianity had already used to distinguish itself from Judaism. 'Religion' became spiritual in opposition to law that was redefined as a 'disenchanted, bureaucratic technology', an opposition that once more mirrored the exclusion and rejection of Jewish ritual law.[64]

[59] Boyarin, *The Unconverted Self*.

[60] Robert Yelle, 'The Hindu Moses: Christian Polemics against Jewish Ritual and the Secularization of Hindu Law under Colonialism', *History of Religions* 49, no. 2 (2009): 141–71.

[61] Yelle, 'The Hindu Moses', pp. 147–49. See also Leora Batnitzky, 'Between Ancestry and Belief: "Judaism" and "Hinduism" in the Nineteenth Century', *Modern Judaism – A Journal of Jewish Ideas and Experience* 41, no. 2 (2021), 194–219.

[62] In his study of orientalism, Edward Said notes that he has found himself studying 'the history of a strange, secret sharer of Western anti-Semitism'. Edward Said, *Orientalism*, 25th ed. (New York: Vintage Books 1994 [1979]), at 27.

[63] Raz-Krakotzkin, 'Secularism', p. 279.

[64] Yelle, 'Moses' Veil', pp. 34–35. See also David Kennedy, 'Images of Religion in International Legal Theory', in *Religion and International Law*, ed. Mark Janis and Carolyn Evans (The Hague: Martinus Nijhoff, 1999), 145–53, pp. 151–52.

The privileging of the spirit over the body in Paulinian thought does not mean that the body became irrelevant in Christian thought and practice. Christianity has of course maintained its own corporeal practices, such as the communion or Christian asceticism, but there has been a correct hierarchy assumed between the two.[65] With the Reformation, Protestant Christianity deepened the critique of rituals when it wrestled with Catholicism. As Protestants expressed their aversion for rituals as 'either "empty works" or outright idolatry',[66] their main target was the Catholic Church, yet their arguments reiterated older Christian engagements with Jews – whom they also did not spare from criticism, as the writings of Luther for example show. Remarkably, even though the suspicion of ritual and devotional practices became further entrenched through Protestantism's critique of Catholicism and remains a key issue in secular legal Christian normativity, today, secular law has largely shed its bias towards Catholics. As Udi Greenberg notes, from the mid-twentieth century, the small-p Protestant secularism prevalent in many Western societies became more inclusive of Catholic practices in favour of a pan-Christian identity as a bulwark against the perceived threat of communist secularism, affording protections to Catholic practices previously shunned.[67] Yet, despite numerous references to the narrative of Judeo-Christianity that emerged at around the same time and purported to include Jews into this pan-Christian identity, the acceptance of Jews and Judaism has remained much more ambivalent, conditional, and incomplete.

The strange narrative of Judeo-Christianity also alludes to the fact that the history of Jewish difference in the Christian West is not only a story of rejection, exclusion, or distance but has also involved various acts of not only toleration but also incorporation and inclusion as another facet of Christian ambivalence. These acts of incorporation

[65] Boyarin, *A Radical Jew*, p. 15.
[66] Yelle, 'Moses' Veil', p. 28.
[67] Udi Greenberg, 'Is Religious Freedom Protestant? On the History of a Critical Idea', *Journal of the American Academy of Religion* 88, no. 1 (2020): 74–91. In this regard, Christianity as a dominant identity operates in somewhat comparable ways to Whiteness that has over time become more expansive and inclusive of groups previously not always considered White, such as Jews, the Irish, or Southern Europeans. See, for example, David R. Roediger, *Working towards Whiteness. How America's Immigrants Became White. The Strange Journey from Ellis Island to the Suburbs* (New York: Basic Books, 2005).

and inclusion, however, were not necessarily unconditional but often required the remaking or even abandonment of Jewish identity either via conversion or assimilation. The desire and in fact the necessity that Jews would convert eventually to attest to the truth of Christianity have been a central feature of Christian ambivalence, which translated into attempts by both church and secular authorities to convert Jews to Christianity, sometimes by nudging them, sometimes through more coercive means, even though Church doctrine was sceptical of forced conversions. As Julia Tartakoff notes, converting Jews was a 'Christian desideratum' because 'for Christianity to be true, Judaism had to be misguided'.[68] The period of emancipation during the eighteenth and nineteenth centuries that would gradually grant Jews legal equality did not expect Jews to convert in exchange for equal rights but still required the transformation of Jews into citizens of the Mosaic faith. Access to legal equality frequently hinged upon the remaking of Jewishness into a de-politicised and de-nationalised private belief through a process of secularisation driven as much by law as by social and cultural pressures and expectations emanating from both non-Jews and Jews. However, in light of the Christian history of the prevailing notion of religion, it is perhaps more apt to use the term 'Christianisation' to highlight how secularisation and assimilation expected Jews to become a 'religion' in a Christian sense, thereby creating an unresolved tension in post-emancipatory times around the more complex nature of Jewish identity and community that transcends a narrow category of private faith.[69]

By contextualising contemporary secular legal attempts to ban or restrict Jewish practices (and thereby to properly 'secularise' Judaism) in this longer history, my aim in this book is to show how today's legal dynamics reflect and echo this longer history of attempts to 'Christianise' Jews in post-emancipatory times. This may appear like a

[68] Paola Tartakoff, 'Testing Boundaries: Jewish Conversion and Cultural Fluidity in Medieval Europe, C. 1200–1391', *Speculum* 90, no. 3 (2015): 728–62, p. 736.

[69] Leora Batnitzky, *How Judaism Became a Religion: An Introduction to Modern Jewish Thought* (Princeton: Princeton University Press, 2011). Assimilation has been a complex process in which Jews have been active agents. My focus in this book here is primarily on the role of law as a force for assimilating Jews to majoritarian norms. For a critical discussion of 'assimilation' in the context of Jewish history, see Todd M. Endelman, 'Assimilation and Assimilationism', in *The Cambridge History of Judaism. Volume Eight: The Modern World 1815–2000*, ed. Mitchell B. Hart and Tony Michels (Cambridge: Cambridge University Press, 2017).

stark statement, but I agree here with Didi Herman who argues that the secular legal imposition of Christian norms can be seen as 'de-facto conversions' that seek to de-Judaise Jews.[70] There is, as I will discuss in in this book, a lingering assimilationism that often hides behind the language of secularism, of liberal rights, of religious freedom, of multiculturalism, and of tolerance that masks how the colonialist relationship between Christianity and Judaism endures in a language of secularism and liberal values. In making this point, I do not suggest that the pressure to assimilate today is the same as the pressure to assimilate during emancipation or earlier Christian attempts to convert Jews when lives would be at stake. However, it is important to remain attentive to the ways in which assimilatory and conversionary processes morph over time to tell a more nuanced story of legal progress and unmask how pressures to 'convert', to change one's identity in order to fully benefit from citizenship and equality in all its dimensions, can underpin seemingly more benign assimilatory or even tolerating strategies of secular law in dealing with difference.[71] These processes have become more subtle over time, yet as I hope to show in the in this book, there is still an assimilating Christianising logic that pervades contemporary encounters with Jewish difference in secular law. Moreover, attending to this ambivalent dynamic is an important step towards unmasking how such partial Jewish inclusion has served as a vehicle for hiding Christian privilege behind a supposed pluralism.

THE RACIALISATION OF RELIGIOUS DIFFERENCE IN LAW

Contemporary secular legal discourses not only produce and regulate 'religion', but in the process also distinguish 'good religion' from 'bad religion' in ways that are often racialised and that render non-Christian traditions foreign, backward, and uncivilised when they fail to fit a Christo-centric notion of 'religion'. Racialisation essentialises and solidifies religious differences, making them innate to certain cultures, and creating hierarchies of civilisation. While 'good religion' conforms to majoritarian expectations, 'bad religion'

[70] Herman, *An Unfortunate Coincidence*, p. 17.

[71] On lingering assimilationism and conversion demands in liberal law, see Kenji Yoshino, 'Covering', *Yale Law Journal* 111, no. 4 (2002): 769–940. I return to Yoshino's framework in the conclusion.

is construed as in need of reform through the law but also the subject of racialised suspicion about the effectiveness of reform. In this book, I therefore consider secularisation *and* racialisation as intersecting techniques for explaining, constituting, and regulating Jewish difference in law. To grapple with the intersection of religion and race in law, it is necessary to go beyond accounts of race that privilege biology, skin colour, and/or phenotype. In approaching race and racialisation in this book, I draw on the work of Geraldine Heng who resists a definition of race that prioritises biology and somatic features to excavate the longer history of race and its intersection and co-constitution with religion in Christian Europe, a history that predates secular modernity. Heng approaches race as 'a structural relationship for the articulation and management of human differences, rather than a substantive content'.[72] For Heng, race-marking or racialisation works through 'strategic essentialisms' that demarcate human beings through the selective essentialising of differences as 'absolute and fundamental' for the allocation of powers, rights, privileges, and positions. These 'strategic essentialisms' construct hierarchies of human beings through a multitude of interlocking discourses and practices that have shifted and changed across time and space, attaching to bodies and somatic features here, and to social, cultural, and religious practices elsewhere.[73] As Anne Stoler and Frederick Cooper observe, racism has never relied on phenotype alone but 'depended on hierarchies of civility, on cultural distinctions of breeding, character, and psychological disposition'.[74]

Such hierarchies of civility also underpin much contemporary discourse about religious difference in the West, in particular in relation to Muslims and Islam. Legal and political debates posit forms of Muslim religiosity, such as the headscarf as worn by Muslim women, as a problem for secular legality.[75] While framed as protecting gender

[72] Geraldine Heng, *The Invention of Race in the European Middle Ages* (Cambridge: Cambridge University Press, 2018), p. 19.

[73] Heng, *Invention of Race*, p. 27.

[74] Laura Ann Stoler and Frederick Cooper, 'Between Metropole and Colony. Rethinking a Research Agenda'. In *Tensions of Empire*, ed. Laura Ann Stoler and Frederick Cooper (Berkeley: University of California Press, 1997), 1–56, p. 34.

[75] Susanna Mancini, 'Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism', *International Journal of Constitutional Law* 10, no. 2 (2012): 411–28. On the racialisation of Muslims, see also Suhraiya Jivraj, 'Interrogating Religion: Christian/Secular Values, Citizenship

equality, female autonomy, secular neutrality, or *vivre ensemble*, the various laws and court decisions attempting to ban this piece of clothing have often relied on a logic of cultural racism that renders Muslim men inherently patriarchal and Muslim women inherently oppressed yet also dangerous.[76] Drawing on the work of Etienne Balibar on cultural racism, Susanna Mancini observes that

> [i]rrespective of whether Muslims are depicted as 'black sheep', as uncivilized and barbarian, or just as not liberal enough to successfully integrate in Western societies, the crux of the matter is the 'insurmountability of cultural differences' between us and them.[77]

The production of religion, Suhraiya Jivraj observes in the context of English law, involves 'a value judgement that is often racialized in being deemed a form of non-acceptable religion'.[78] The racialisation of non-Christians presents their traditions as static and intrinsic but also as potentially culturally contaminating. Law's notion of religion, Jivraj notes, 'comes to circulate as a signifier of belonging, community and nationhood in ways that distinguish and demarcate the secular Christian West from (uncivilized) racialized non-Christian Others'.[79] Didi Herman and Davina Cooper make a similar observation, noting that English legal discourses depict Jews as 'people joined by culture, ancestry and blood … according to a racialised discourse of difference'.[80] At the same time, Englishness is constructed as White and Christian, but remains unremarked upon and is thereby constituted as the invisible, yet privileged religio-racial identity. However, cultural racism towards non-Christian religious difference holds the promise of what Jivraj terms 'racial upliftment'. Educating non-Christian

and Racial Upliftment in Governmental Education Policy', *International Journal of Law in Context* 9, no. 3 (2013): 318–42; Sherene H. Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: Toronto University Press, 2008).

[76] Mancini, 'Patriarchy as the Exclusive Domain of the Other'.

[77] Mancini, 'The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism', 115. Mancini refers to Etienne Balibar, 'Is There a "Neo-Racism"?', in *Race, Nation, Class. Ambiguous Identities*, ed. Etienne Balibar and Immanuel Wallerstein (London; New York: Verso, 1991), 17–36, p. 22.

[78] Jivraj, *Religion of Law*, p. 42.

[79] Jivraj, *Religion of Law*, p. 11.

[80] Davina Cooper and Didi Herman, 'Jews and Other Uncertainties: Race, Faith and English Law', *Legal Studies* 19, no. 3 (1999): 339–66, p. 340.

children in secularised Christian values functions not only as a remaking of their religiosity but also as a promise to shed the stigma of race, akin to colonial practices of 'civilising' natives by encouraging their conversion and cultural assimilation – only now that this process takes place in the metropole instead of in the colonies.[81] Yet, the promise of upliftment never fully materialised as the stigma of race remained, thereby maintaining the superiority of the colonial culture.

In Australia too, the racialisation of religious differences shapes legal norms and the protections afforded to different religious groups. Margaret Thornton and Trish Luker observe how Christianity provides the unstated norm in in law, whereby non-Christian Others are constructed in racialised terms as 'the unknown, the exotic and the dangerous'.[82] This implicit norm for what constitutes appropriate religious behaviour impacts in particular on Muslims whose identity and experiences are assessed through an Islamophobic lens that perpetuates representations of Muslims as threatening and suspicious. Instead of acknowledging experiences of discrimination, the law participates in the racialisation of Muslim religiosity and identity and thereby shifts the blame for discrimination onto Muslims as threatening and foreign.[83]

Even in the United States where the colour line has often been more significant than in Europe where religious difference has loomed large, religion continues to intersect with race in a myriad of ways, impacting on the rights and equality of both non-Christians and those racialised as non-White. Kyathi Joshi argues that contemporary US constitutional law still remains implicated in constituting American national identity as both White *and* Christian.[84] Joshi writes against treating questions of religious equality in the United States in isolation from race given that Christian and White superiority have intersected and amplified each other in the history of the US and its European heritage. Religious equality is an 'optical illusion', Joshi contends, given that

[81] Jivraj, *Religion of Law*, p. 143.
[82] Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination', *Macquarie Law Journal* 9 (2009): 71–91, p. 74.
[83] Mareike Riedel, 'Studying While Muslim: Anti-Discrimination Law, Countering Violent Extremism, and Suspect Youth', *Griffith Law Review* 31, no. 2 (2022): 193–216. See also Margaret Thornton and Trish Luker, 'The New Racism in Employment Discrimination: Tales from the Global Economy', *Sydney Law Review* 32, no. 1 (2010): 1–28.
[84] Joshi, *White Christian Privilege*.

US law and policy remain imbued with a racialised Christian normativity that renders certain expressions of Christianity normal, ordinary, invisible, and therefore privileged. Moreover, this Christian privilege is stratified along racialised lines with White Protestantism at the top of the hierarchy and non-White Christians marginalised.[85] This intimate connection between Whiteness and Christianity in the United States, legal scholar Khaled Beydoun argues, denies non-Christians full equality and rights.[86] Religious minority groups, such as Jews and Muslims, may be formally classified as White by the state but need to 'exercise and perform their religious identities against negative racial meanings assigned to their faith by law, political and popular discourse' in order to avoid losing their racial privilege.[87] Commonly assumed White, Beydoun argues, '[f]ormal whiteness hardly insulated Jewish Americans from the violent reminders, echoed by state and private actors, that *Jews weren't really white*'.[88]

These contemporary dynamics point to the historical significance of both Whiteness *and* Protestant Christianity in constituting US American notions of national identity. In her study of the rhetorics of religious freedom in the United States from the end of the nineteenth century to the Second World War, Tisa Wenger observes that those who appealed to this ideal often linked it to Protestant Christianity, racial Whiteness, and American national identity. As a tool of imperial categorisation and control, the idea of religious freedom served to delineate 'good religion' from 'bad religion' but also to assert racial superiority.[89] Wenger notes that Anglo-Americans believed in their 'racial-religious propensity for freedom'.[90] For them, their racial superiority rested in part on their possession of the truly modern religion of Protestant Christianity, the rational, ethical, and free religion, which imbued them with the values of modernity, freedom, and civilisation. Being Protestant-Christian associated them with values that rendered them White and racially superior. Those racialised as non-white, such

[85] Joshi, *White Christian Privilege*, p. 17.
[86] Khaled A. Beydoun, 'Faith in Whiteness: Free Exercise of Religion as Racial Expression', *Iowa Law Review* 105, no. 4 (2020): 1475–1536.
[87] Beydoun, 'Faith in Whiteness', p. 1481. By formal Whiteness, Beydoun refers to the categories of the US census.
[88] Beydoun, 'Faith in Whiteness', p. 1493.
[89] Tisa Joy Wenger, *Religious Freedom. The Contested History of an American Ideal* (Chapel Hill: University of North Carolina Press, 2017), p. 3.
[90] Wenger, *Religious Freedom*, p. 6.

as African Americans, or those with a more precarious Whiteness, such as Catholics and Jews, sought to escape racial stigma and redefine their identities in religious terms by appealing to religious freedom too. While US American Jews, particularly those with fair skin, were able to apply this strategy with success and thereby to access Whiteness and shed some of the racial stigma of antisemitism, African Americans however could not overcome the entrenched racial boundaries of religious freedom given the deep association of Christianity with Whiteness.[91] However, as scholars such as Beydoun and those working in Jewish studies note, US American (fair-skinned) Jews may be White but remain ambivalently positioned in a context of racialised Christian dominance. Not only does is access to Whiteness premised on assimilation. Conceiving Jewish difference only in terms of religion also veils how racialised ideas about Jews continue to regulate the boundaries of acceptable Jewish difference in the name of secular legal values and how the problem of cultural racism remains connected to Christian supersessionism and supremacy.

JEWS, RACE, AND THE LIMITS OF LIBERAL ASSIMILATION

While there remains a lively debate about the origins of race and, relatedly, the exact definition of race, studies of pre-modern race-making emphasise the role of Christian supersessionism and ambivalence towards Jews in shaping ideas about racial difference and in laying the groundwork for the emergence of modern forms of racism and the contemporary racialisation of religion. '[M]odernity's racial imagination', J. Kameron Carter observes, 'has its genesis in the theological problem of Christianity's quest to sever itself from its Jewish roots'.[92] Similarly, Magda Teter argues that the 'modern rejection of equality of both Jews and Black people in the West is the legacy of Christian supersessionism' – and, Teter notes, law was crucial for this process by

[91] See Chapter 5 in Wenger, *Religious Freedom*. On the erasure of Jews of Colour and Jews of African descent in perceptions of *all* Jews as White, see also Lewis R. Gordon, 'Rarely Kosher: Studying Jews of Color in North America', *American Jewish History* 100, no. 1 (2016): 105–16.

[92] J. Kameron Carter, *Race: A Theological Account* (Oxford: Oxford University Press, 2008), at 4. On the role of Christian intellectual history for the development of racial thought, see also Terence Keel, *Divine Variations: How Christian Thought Became Racial Science* (Stanford: Stanford University Press, 2018).

reifying these supersessionist narratives and ideas.[93] Even though early Christianity constituted itself as the universal and egalitarian faith in opposition to the perceived particularism of Jews, Denise Kimber Buell argues, ethno-racial ideas have formed part of Christianity's rhetorics and self-understanding of peoplehood from its early beginnings. Ethno-racial reasoning offered early Christians a tool to 'demarcate the limits of authentic Christianness'.[94] Different to modern biological accounts of race, early Christians understood race and ethnicity to be both fluid and fixed. Fluidity enabled the making of universalising arguments, that everyone could become Christian via conversion. Fixity constructed others as particular(istic) while also ascribing an essence to Christians.[95] In late antiquity, '[b]y collapsing Christianity with humanity, early Christians could argue that Christians constitute the ideal form of the human race, whereas all other peoples (and their forms of piety) fall short'.[96]

Early Christians, Buell suggests, resorted to ethno-racial reasoning as a rhetorical strategy to justify Christianity as 'the universal, most authentic manifestation of humanity' but also to affirm their superiority in relation to others, including Jews.[97] As Jonathan Boyarin notes, this Christian argument that associated Christianity with humanity was 'more than garden variety ethnocentrism. It depended … on the potential of Christianity to include all of humanity; but it also left plenty of space for rhetorics that treated non-Christians as not quite human'.[98] By denigrating or even denying the humanity of non-Christians who failed to see its truth, Christianity could re-assert its superiority. Indeed, in the twelfth century, the failure of Jews to convert became attributed to their lack of reason, with reason constituting the hallmark of humanity.[99] If Christianity's truth was accessible

[93] Magda Teter, *Christian Supremacy: Reckoning with the Roots of Antisemitism and Racism* (Princeton: Princeton University Press, 2023), p. 3.
[94] Denise Kimber Buell, *Why This New Race. Ethnic Reasoning in Early Christianity* (New York: Columbia University Press, 2008), 165.
[95] Buell, *Why This New Race*, p. 3. On the significance of fluidity and fixity for race, see Laura Ann Stoler, 'Racial Histories and Their Regimes of Truth'. *Political Power and Social Theory* 11 (1997): 183–206
[96] Buell, *Why This New Race*, pp. 77–78.
[97] Buell, *Why This New Race*, p. 2.
[98] Boyarin, *The Unconverted Self*, p. 72.
[99] Julia Costa Lopez, 'Beyond Eurocentrism and Orientalism: Revisiting the Othering of Jews and Muslims through Medieval Canon Law', *Review of International Studies* 42, no. 3 (2016): 450–70, p. 466.

to all humans, then failure to accept this truth could only mean that someone lacked a capacity that made one human. The existence of such racial ideas does not imply that early Christians were racist or that Christian thought is inherently racist but highlights how conceiving of Christianity in racial terms as a people helped Christians at times to assure themselves of their own identity and boundaries vis-à-vis others, such as Jews whom they accused of ethnic particularism and exclusionism.[100] Buell's work suggests that despite its ostensible universalism, there has been an exclusionary streak to Christianity that at times deployed proto-racial ideas as a means to re-assert boundaries and secure an emerging Christian identity.

Focusing on inferiority instead of biology or culture as a defining feature of an emerging race concept, Lindsay Kaplan argues that the medieval Christian theological discourse of the 'cursed inferiority' of Jews eventually created 'a racial status that functions like and anticipates modern racism'.[101] Although much Christian writing on Jewish difference was directed towards the self-assurance and identity formation of Christians, with the consolidation of Christian political power in the medieval period, this theological discourse about Jewish inferiority began entering and shaping both canon and secular laws. Albeit often erratically and unevenly, medieval law and policy slowly entrenched increasingly racialised religious hierarchies that affirmed Christian supremacy. The interplay between religious laws, secular laws, and theological discourses about 'the Jew' gradually solidified social and economic boundaries between Jews and Christians and provided ideological justifications for the exclusion and subordination of actual living Jews, even though these images of 'the Jew' sometimes clashed with the reality of medieval societies in which Jews and Christians lived side by side and interacted in a myriad of ways.

Christian theology of course did not alone give rise to racial thought and practices, and it is important to acknowledge the internal heterogeneity of Christian thought, Christian resistance to racism, and the role of Christianity and Black theology as a source of empowerment for People of Colour. Moreover, there have been many ruptures

[100] Buell argues that acknowledging the existence of such ideas is also important to work against tendencies within Christianity to locate the unrealised but potential ideal of racial inclusiveness within Christianity against the implicit racial and ethnic exclusiveness of Judaism, see Buell, *Why This New Race*, p. 12.

[101] M. Lindsay Kaplan, *Figuring Racism in Medieval Christianity* (Oxford: Oxford University Press, 2018), 1.

and transformations along the way to modern racism through the Reformation, colonial expansion, the Atlantic slave trade, and the modern emphasis on phenotypical markers of difference as well as the renewed turn to culture in contemporary racism. However, what this body of work on premodern race highlights is the significance of the narrative of Christian superiority vis-à-vis Jews and other non-Christians for supplying crucial arguments and patterns of thinking that continue to justify the subordination and exclusion of not only Jews but also other non-Christians, of Black People, and of People of Colour in law and society today.[102]

Over the course of history, the racialisation of Jewish difference has ebbed and flowed, changed its logic and language, singled out certain Jewish groups over others, and served many different purposes. The prospect of Jewish equality and therefore proximity – via conversion or via assimilation – arguably constituted one of the moments when racialisation became salient. While many Jews converted successfully in the medieval period, there remained at times doubts about the efficacy of conversion in eliminating Jewish difference such as in medieval England or early modern Spain. These doubts expressed not only an ambivalence about the 'true nature' of Jews and, by extension, what it meant to become and be Christian. While a variety of factors have contributed to the racial formation of Jews, it also enabled, as Geraldine Heng notes, the perpetual delay of equality that conversion promised.[103] Race made a forceful return during and shortly after the period of emancipation that had granted Jews legal equality. While this period saw the rise of racial antisemitism that entrenched Jewish difference in biological and allegedly scientific terms, there was also a more subtle form of antisemitism that Bryan Cheyette and Nadia Valman call 'liberal antisemitism'.[104] Writing against accounts that locate antisemitism outside or in opposition to liberalism, Cheyette and Valman focus on ambivalence towards Jews within nineteenth-century liberal thought and politics. The liberal support for rights and universal citizenship for Jews remained coupled with liberalism's enduring attachment to the idea of the homogenous nation, which rendered the particularity of Jews and other

[102] See also Teter, *Christian Supremacy*, p. 3.
[103] Heng, *Invention of Race*, p. 39.
[104] Bryan Cheyette and Nadia Valman, 'Introduction: Liberalism and Anti-Semitism', *Jewish Culture and History* 6, no. 1 (2003): 1–26.

ethno-religious groups inherently problematic. The liberal view of Jews expected them to assimilate to majoritarian norms, but there was a limit to this liberal tolerance, surfacing in

> discourses of religious and/or secular conversion which only 'tolerates' Jews when they are seen to be good citizens who have transcended their difference. But this liberal formulation of anti-semitism always has a Jewish Other in reserve (in contrast to 'his' benevolent counterpart) who is deemed not to conform to the dominant norms of society.[105]

This unassimilated Jewish Other was constituted as one that either cannot be assimilated or that embodies the failure of assimilation. Thus, in this liberal antisemitism, assimilation intersected with a process of dissimilation that delineated and affirmed difference in frequently racialised terms.

Scholars studying the past and present of Jewish assimilation suggest that this process of 'dissimilation' or differentiation is not the accidental by-product of liberal assimilation but that the logic of assimilation in fact produces this difference.[106] Writing about the period of Jewish emancipation during the eighteenth and nineteenth centuries, Yolande Jansen refers to this problem as the 'paradox of assimilation'. She argues that the demand of assimilation 'causes its own impossibility' by enabling cultural majorities 'to focus on the detection of deviance, especially in times of conflict'.[107] One of the responses to this suspected 'deviance' is racialisation. 'Racialization', Wendy Brown explains, 'facilitated the coexistence of pressure to assimilate, on the one hand, and the marking of Jews as an object of surveillance to ensure conformity with the terms of their emancipation on the other'.[108] Racialisation enabled the policing of the acceptable boundaries of Jewish difference and maintained the idea of Jews as naturally linked, even though the terms of emancipation had involved their secularisation with the aim of dissolving the communal elements that suggested Jewish nationhood. This interplay of assimilation and dissimilation has also allowed

[105] Cheyette and Valman, 'Liberalism and Anti-Semitism', p. 5.

[106] Other scholars suggest that acts of exclusion, including through race, are an inherent element of liberalism, see, for example, Uday Mehta, 'Liberal Strategies of Exclusion', *Politics & Society* 18, no. 4 (1990): 427–54.

[107] Yolande Jansen, *Secularism, Assimilation and the Crisis of Multiculturalism: French Modernist Legacies* (Amsterdam: Amsterdam University Press, 2013), p. 278.

[108] Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006), p. 69.

to make Jews complicit in policing their difference. By constituting Jews in racial terms, non- or less-assimilated Jews are rendered a threat to assimilated Jews because, as Zygmunt Bauman summarises, 'the collective maturity of acceptance … would be measured by the quality of its weakest section'.[109] The persistence of non-conforming Jewish difference threatened the 'racial upliftment' of assimilated Jews, thereby undermining the solidarity of assimilated Jews with their less assimilated kin[110] – a dynamic that still surfaces in contemporary eruvin controversies in which Jews of different levels of observance have at times mobilised the law to 'discipline', 'secularise', and 'modernise' other Jews, as I discuss in Chapters 5 and 6.

Laura Levitt similarly notes that the paradigm of liberal assimilation via secularisation still creates Jewish Otherness post-emancipation. By expecting Jews to fit into a Christian category of religion, liberal assimilation 'produces a subject who is almost but not quite dominant'.[111] This misfit leads to a constant excess. On the one hand, there is the excess of 'too much' Jewishness through public expressions of Jewishness that transgress the category of private faith. On the other hand, there is an excess of 'too little religion' given that Jewishness is more than just a religious identity, instead encompassing a myriad of identifications, including but not limited to ethnicity and culture that cannot be captured by private faith.[112] However, by containing Jewishness in the category of religion, these identifications cause

[109] Zygmunt Bauman, 'Modernity and Ambivalence', *Theory, Culture & Society* 7, no. 2 (1990): 143–69.

[110] Cynthia Levine-Rasky describes how North American Jews paid a similar price for their access to Whiteness by becoming involved in distinguishing 'acceptable' from 'less acceptable' forms from Jewishness, see Cynthia Levine-Rasky, 'White Privilege. Jewish Women's Writing and the Instability of Categories', *Journal of Modern Jewish Studies* 7, no. 1 (2008): 51–66. On this topic, see also Eric L. Goldstein, *The Price of Whiteness: Jews, Race, and American Identity* (Princeton: Princeton University Press, 2006).

[111] Laura Levitt, 'Other Moderns, Other Jews: Revisiting Jewish Secularism in America', in *Secularisms*, ed. Janet R. Jakobsen and Ann Pellegrini (Durham: Duke University Press, 2008), 108–38, at 111. Levitt's and Jansen's analysis of liberal assimilation shares elements with Homi Bhaba's idea of colonial mimicry: Homi Bhaba, 'Of Mimicry and Man. The Ambivalence of Colonial Discourse', in *Tensions of Empire*, ed. Laura Ann Stoler and Frederick Cooper (Berkeley: University of California Press, 1997), 152–60.

[112] Levitt, 'Other Moderns, Other Jews', p. 110. On the diversity of definitions of Jewish identity, see, for example, Susan A. Glenn and Naomi B. Sokoloff, *Boundaries of Jewish Identity* (Seattle: University of Washington Press, 2011).

confusion, including in the realm of law.[113] Assimilation, Levitt concludes, does not so much achieve sameness but creates 'an excess that always marks this subject as other'.[114]

Although Levitt's analysis relates to the situation of American Jews, my aim in this book is to show that this analysis is also relevant for understanding contemporary legal conflict over Jewish practices in other Western societies. As I go on to discuss in this book, these paradoxes and tensions of assimilation still weave through contemporary secular legal discourses and debates on Jewish difference, suggesting a persistent suspicion and anxiety around 'excesses' of Jewishness even in post-emancipatory times. Visible signs of Jewish identity in particular, such as the eruv and male circumcision, that do not fit the prevailing paradigm of 'religion' thereby turn into racialised attributes. Scholars studying the racialisation of Islam have highlighted how cultural traits read as Muslim, including 'customs and costumes' as Junaid Rana put it,[115] have been essentialised in negative terms as inferior, barbaric, patriarchal, disloyal, terrorist, and foreign, as non-White and non-Western.[116] Saher Selod argues that Muslim religious signifiers, such as the hijab, come to stand as racialised symbols of an imagined cultural conflict, signifying support for misogyny and a conflict with national values.[117] Racialised meanings, buttressed by ideas about national character and civilisation, are also projected onto signifiers of Jewish 'excess', such as infant male circumcision and the eruv. These racialised projections echo older Christian devaluations of the public elements of Judaism and together with secularisation circumscribe the boundaries of acceptable Jewish difference while maintaining the superiority of Christian culture and its distance from Jewishness.[118]

[113] Susanna 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', *European Constitutional Law Review* 6 (2010): 481–502. I also briefly discuss the JFS case in Chapter 4.

[114] Levitt, 'Other Moderns, Other Jews', p. 11.

[115] Junaid Rana, *Terrifying Muslims. Race and Labor in the South Asian Diaspora* (Durham; London: Duke University Press, 2011), p. 28.

[116] Saher Selod and David G. Embrick. 'Racialization and Muslims: Situating the Muslim Experience in Race Scholarship'. *Sociology Compass* 7/8 (2013): 644–55, p. 649.

[117] Saher Selod, *Forever Suspect: Racialized Surveillance of Muslim Americans in the War on Terror* (New Brunswick: Rutgers University Press, 2018).

[118] By drawing this parallel, my point is not that Jews experience the same amount of racialisation as Muslims in law and society. Instead, these dynamics unfold within a hierarchy of *Semitic difference*, a point to which I will return in the conclusion.

A CULTURAL STUDY OF LAW: A NOTE ON METHODOLOGY

In tracing the interplay between law and Christian ambivalence, this book follows the circulation of a set of discourses in and through law. I am not a theologian, and this book is not meant as a study of Christian theology. Instead, my analysis is indebted to a rich and insightful body of writing in Jewish studies and on the history of Christian attitudes towards Jews in Europe/the West, which I aim to bring into conversation with a long tradition of sociolegal analysis that seeks to understand the unstated norms and assumptions of law. In doing so, this book pursues a critical cultural study of law. A cultural study of law views the relationship between law and culture as co-constitutive, dynamic, and dialectical. 'To focus on culture', Eve Darian-Smith writes, 'is to locate the ways in which law influences who we are and who we aspire to be, and moves beyond the standard critique of what the law is and what we want it to be'.[119] A cultural study of law centres on how law shapes the identity of groups and individuals, of cultural meanings, and of social practices, which in turn shape legal meanings and what is seen as lawful, desirable, and acceptable.

This book is therefore, at once, a study of discourses and representations, which I described as the secularised cultural repertoire of Christian ambivalence. Thus, when I speak of Jewish difference, I do not refer to some reality that law and legal discourse simply reflect, and in many ways, this is a book much more about the 'us' from which Jews have been imagined to be different in so many profound and often deeply consequential and tragic ways. Christian ambivalence, as noted earlier, has produced its own 'hermeneutical' or 'theological Jew' that may have very little to do with what actual Jews think and do.[120] Similarly, the law, legal discourses, and cultural debates surrounding legal conflict constitute and regulate 'Jewish difference', but there is a limit to the power of law to create social realities. Thinking in terms of images and representations also highlights how Jewish questions have offered societies a forum to debate the larger questions of their time. As James Shapiro points out in the context of England, 'the English turned to

[119] Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge: Cambridge University Press, 2013), p. 72.

[120] For a study of the 'hermeneutical Jew' in medieval Christian thought, see Cohen, *Living Letters*.

Jewish questions in order to answer English ones'.[121] While Jews and Judaism sometimes took on the role of a metaphorical reference point in these debates, the answers that Western societies found to these questions could have significant consequences for real living Jews.

This book is thus not only a study of discourses and representations. It is also a study of what kind of legal work these discourses perform. I therefore consider, on the one hand, how 'law's often abstract and indeterminate form'[122] enables the importation and reproduction of elements of Christian ambivalence and, on the other, how legal form, categories, and structures reflect but also adapt and transform Christian normativity and ambivalence towards Jews.[123] In following the interplay between Christian ambivalence and the law, I draw on critical race theorist Ian Haney López's approach to the interaction between law and race to explore how the law constructs Jewish difference both formally through legislation and litigation but also informally 'by relying on, promulgating, and giving force … to particular ideas' about Jewish difference and its place in the Christian West.[124] Moreover, I also explore how the law participates in defining 'the spectrum of domination and subordination'[125] that reflects a Christian view of its own superiority vis-à-vis Jews and supersession of Judaism, while requiring their however partial inclusion and toleration.

Tracing the interplay between law and Christian ambivalence does not assume an unchanged continuity or causality between past and present, for example, between the thinking of Paul to the Holocaust or today's contemporary legal challenges to Jewish practices. Instead, I understand the career of Christian ambivalence and its translation and adaptation into a secular legal vocabulary in terms of a legacy in which categories, concepts, and ideas are, to some extent, shaped by

[121] James Shapiro, *Shakespeare and the Jews* (New York: Columbia University Press, 2016), p. 1.

[122] Marlee Kline, 'The Colour of Law: Ideological Representations of First Nations in Legal Discourse', *Social & Legal Studies* 3 (1994): 451–76, p. 452.

[123] In analysing these two dimensions, I draw on Marlee Kline's conceptualisation of these two types of relations between law and racist ideologies, which she described as 'interdependent and mutually reinforcing'. See Marlee Kline, 'Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations', *Osgoode Hall Law Journal* 30, no. 2 (1992): 375–426, p. 381, note 20.

[124] Ian Haney López, *White by Law. The Legal Construction of Race* (New York; London: New York University Press, 10ed., 2006), pp. xv–xvi.

[125] López (2006), p. 8.

remnants of their previous deployments and use but also adapted and transformed by them. To use Paul Kahn's words:

> The remnants of past meanings endure not because they are included in dictionary definitions, but because we find ourselves responding to them. They are drawn up into claims, narratives, and arguments. They remain as long as they persuade us, that is, as long as we respond to them. They become linked to other meanings as they are deployed in new contexts. In time, they may simply fail to move us.[126]

Thinking in terms of legacy does not imply that certain ideas or representations mean the same across time and space or that they serve the same purpose. Although the basic structure of the discourse of Christian ambivalence remains somewhat stable in its oscillation between inclusion and exclusion, it manifests and matters differently in different contexts, accentuates inclusion over exclusion at certain times and vice versa at others, and reflects prevailing concerns of a period such as religion, nation, and race. My inquiry therefore takes inspiration from Talal Asad's call to shift the analysis away from seeking to prove the Christian origins of secularism – and by extension, the Christian origins of secular law, but to 'identify elements of a tradition that have been retrieved, reorganized, and put to modern use in contemporary formations'.[127] I aim to explore how these ambivalent ideas and discourses have been mobilised *both for and against* certain legal arrangements and reforms but also how they sit within larger local debates about rights, citizenship, belonging, and national identities.

In identifying elements of the tradition of Christian ambivalence in the realm of law, this book is organised around select case studies and iconic events that cast light on dynamics and patterns, tendencies and strategies, continuities, and changes in the interplay between Christian ambivalence and law. The narrative I tell in this book is by no means exhaustive and I do not provide a comprehensive account of the interaction between Christian ambivalence and the genealogy of what would be called 'secular law'. My aim is also not to tell a complete history of Jews in Christian Europe/the Christian West – I refer

[126] Paul Kahn in Daniel Bonilla Maldonado, 'The Cultural Analysis of Law: Questions and Answers with Paul Kahn', *German Law Journal* 21 (2020): 284–98, p. 294.

[127] Talal Asad, 'Thinking about the Secular Body, Pain, and Liberal Politics', in *Living and Dying in the Contemporary World: A Compendium*, ed. Veena Das and Clara Han (Oakland: University of California Press, 2015), 337–53, p. 251.

to scholars who have written these kinds of studies throughout this book. Moreover, as I explain further below, I do neither suggest that this has been the only force at play nor that these events have been exemplary for the whole of Jewish history in the Christian West. The dichotomies and binaries but also the contradictions of Christian ambivalence reflect only part of the worlds that Jews and Christians have shared and continue to share.

Chapter 2 traces Christian ambivalence from a theological position into the secular legal imagination by discussing historical events and turning points drawn from Western Europe and settler societies of European descent.[128] Beginning in the late medieval period, I explore the role of law in reifying and promulgating ideas of Christian supersessionism and pf the role of Jews in the Christian salvation story. I am conscious that a discussion of different events could produce an alternative yet not entirely different narrative, but I believe that these events are significant in illuminating and illustrating some of the features of the complex interplay between Christian ambivalence and Western law. Chapters 3 and 4 as well as Chapters 5 and 6 form pairs. These chapters focus on infant male circumcision and the eruv, respectively, and track their journey from both cherished Jewish practices and Christian theological issues into problems of secular law. I have chosen these practices given that the body and space have been paradigmatic sites for the construction, regulation, and negotiation of Jewish difference.[129] Practices such as circumcision and the observance of Shabbat, to which the eruv relates, have been seen as 'emblematic' of Jewish difference in Western Christian thought.[130] Historically, they have often served as tropes for the imagined deficiencies of Judaism, as indicators of Jewish assimilability or lack thereof, and as reference points to shore up anxieties about Jewish equality and influence. In modern times, they have become increasingly the subject of legal regulation.

[128] There has been criticism of the Eurocentric focus of much Jewish history that marginalises Jews in other parts of the world. My focus in this book reflects my interest in the role of Jewish difference for a Western legal vocabulary.

[129] Shechita and the laws of kashrut would have offered another obvious case study. I discuss religious slaughter and the intersection of the othering of Jews in Muslims in Mareike Riedel, '"They Are from Mars": The Othering of Jews and Muslims in European Legal Debates', in *Religious Othering. Global Dimensions*, ed. Mark Juergensmeyer, Kathleen Moore, and Dominic Sachsenmaier (Abingdon, Oxon: Routledge, 2022), 77–93.

[130] Boyarin, *A Radical Jew*, p. 53.

Both practices take Jewish difference into the public, even if only in the most inconspicuous ways. Moreover, infant male circumcision as an almost universally practiced Jewish rite and the eruv as a distinctly Orthodox Jewish practice allow me to consider with more nuance how the boundaries of acceptable Jewish difference are drawn in specific local contexts and in relation to different kinds of Jewishness. Importantly, the boundaries of 'acceptable Jewish difference' shift and change and are often contingent on prevailing majoritarian norms and interests in law and society. The two practices also serve as reminders that a simple binary of majority – minority, of domination and subjugation, can be insufficient for capturing Jewish-Christian dynamics given the ambiguous and complex positionality of Jews and of different Jewish groups in different contexts. As I discuss in Chapter 3, circumcision has a different meaning in a context where Christians circumcise too, such as in the US, as compared to a context where Jews and Muslims are the main circumcising groups, such as in continental Europe. Similarly, as I explore in Chapter 5, the eruv complicates a simple Jewish-Christian binary when other Jews join the legal case for opposition and mobilise what may seem at first sight like the rhetorical repertoire of Christian ambivalence to resist a public expression of Jewishness through the eruv.

I then devote a chapter each to a close reading of a particular contemporary case – the German circumcision controversy in 2012 (Chapter 4) and the dispute about an eruv in an Australian suburb between 2008 and 2016 (Chapter 6). While the selection of these cases is partly pragmatic given that I understand both languages and the events were unfolding as I was conducting this research, this selection also allows me to undertake a more fine-grained analysis of how contemporary secular law participates in managing Jewish difference according to local grammars of religion and race, different legal traditions, and particular national anxieties against the broader backdrop of persistent ideas about 'Christian Europe' as a hegemonic and privileged identity of Western liberal societies. While Germany remains heavily associated with the Holocaust and its relationship with its Jewish population remains complicated, Australia has often been seen, much like the United States, as a Jewish success story. However, placing these two contemporary instances side-by-side enables me to tell a more nuanced story of success and legal progress and to illustrate how Christian ambivalence manifests in different national and legal contexts. There is a further advantage of selecting these two cases. The

small but insightful body of work on the politics of Jewish difference in law has to date largely focused on the United States, reflecting the prominence of Jewish studies in the American academy. Focusing on Germany and Australia offers an opportunity to add other countries and contexts to an emerging 'map'.[131]

It is worth repeating that in discussing these two particular cases, my intent is not to declare any of these cases as paradigmatic for how contemporary Western secular law responds to Jewish difference or for how Christian ambivalence manifests in particular secular legal settings. Instead, this book is an attempt to begin mapping the persistence of Christian ambivalence and of supersessionary thinking in law and to examine the ways in which Christian ambivalence has been mobilised and embedded in law, legal discourse, and legal reasoning. Through this analysis, I hope to shed light on what these events may tell us about the enduring influence of our Christian past on the way we think about Jewish questions and difference more broadly today and to invite others to consider how my observations might play out in other contexts. Tracing how secularised Christian ambivalence manifests in law and legal discourses does therefore neither imply that individuals or institutions subscribe to an ideology of Christian superiority nor that they are antisemitic. It also does not deny the genuine nature of concerns about children's rights, the limits of religious freedom, or the use of city space. Instead, my aim is to cast some light on the manifestations of Christian ambivalence and Christian normativity as the product of the particular histories of Western societies and the resulting pervasiveness and dominance of certain perceptions, values, and habits of mind that are seen as the natural and normal state of being and doing despite their particularistic origins.

Two further caveats are necessary. First, I am conscious of the problems of focusing on one particular set of ideas and patterns of thought, as this focus means that I can pay less attention to other

[131] I discussed some of this work earlier in this chapter, including Feldman, *Please Don't Wish Me*; Beydoun, 'Faith in Whiteness'. See also Annalise Glauz-Todrank, *Judging Jewish Identity in the United States* (Lanham: Lexington Books, 2022); Schraub, 'Liberal Jews'; Nomi M. Stolzenberg and David N. Myers, *American Shtetl: The Making of Kiryas Joel, a Hasidic Village in Upstate New York* (Princeton: Princeton University Press, 2022); Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (Oxford; New York; Toronto: Oxford University Press, 1992). On representations of Jewishness in English law, see Herman, *An Unfortunate Coincidence*.

relevant and influential concerns. Clearly, gender, class, sexuality but also broader structures and forces such as capitalism, imperialism, and the state's pursuit of sovereignty and power have influenced and still influence legal responses to Jewish difference. For example, as I discuss in Chapter 2, the economic, cultural, and political usefulness of Jews for secular rulers has tempered, amplified, sidelined, and modified pursuits of Christian dominance. Therefore, my focus on the role of Christian ambivalence does not suggest that this is the only way that this history and these present legal conflicts should be read or that there is a singular causal relationship between Christian ambivalence and certain legal outcomes. The power and persuasiveness of Christian ambivalence depend on local historical and legal contexts and will therefore play out differently for Jews and for other non-Christian groups in different national and local contexts. Indeed, as I noted earlier and as I will discuss in throughout this book, Christian ambivalence does not automatically lead to particular material effects, such as the denial of rights, but involves sometimes seemingly contradictory practices of inclusion and assimilation. Moreover, I agree with Robert Hefner that specific systems of religious governance, including particular legal ideas, emerged from 'a more diverse assortment of actors, discourses, and powers, and more varied array of ethicoreligious imaginaries'.[132] Nonetheless, I believe it is worth focusing on this part of the story given that the dominant popular narrative still appears to be that 'we' and 'our' law are secular, having moved beyond our religious particularities, whereas 'they' have either too much religion or the wrong kind of religion, a narrative not only countlessly repeated in the various accusations levelled against Islam as insufficiently secularised but also resonating in contemporary backlash against Jewish religious practices.

Second and related to this, I therefore also do not suggest that secular law is the product of a coherent ideological formation and reflects only one clear set of values, ideas, and meanings. Instead, I understand secular law as inherently plural and as the product of ongoing struggles over meaning and power. Here, I draw on Margaret Davies account of law as plural. Law is, as Davies observes, 'fragmented and complex' as well as 'full of gaps, contradictions, unresolved histories,

[132] Robert A. Hefner, 'Varieties of Religious Freedom and Governance: A Practical Perspective', in *Politics of Religious Freedom*, ed. Winnifred Fallers Sullivan et al. (Chicago; London: University of Chicago Press, 2015), 127–34, p. 128.

counter-narratives and, most pertinently, composed of multiple dimensions and layers'.[133] I thus analyse the interaction between legal categories and the narratives of those who appeal to the law's authority and explore how the law absorbs, values, and authorises some these narratives in ways that reproduce and reflect Christian ambivalence. However, understanding law as reflecting plural concerns is necessary to avoid painting a picture of Christian ambivalence in Western secular law as all-dominating. Such an approach would write out the agency and contributions of Jews, Judaism, and Jewishness as well as of those who supported them, suggesting a history of eternal Jewish victimhood. As noted above, a purely binary approach to Jewish-Christian legal interactions does not fully capture the complexity of Jewish-Christian interactions, even though the reality of unequal power must be acknowledged.

Jews, alongside other marginalised and non-dominant groups, including other non-dominant Christians, have actively resisted pressures of assimilation, challenged Christian cultural hegemony, appropriated, subverted, and contested categories of difference, and advanced their own visions of identity and belonging in the secular nation state by means of law. Jewish resistance has constrained and shaped Christian ambivalence and Jews in all their diversity themselves have been agents in and of secular law, challenging an account of the relationship between Western law and Jewish difference as one-directional domination. As Austin Sarat and Thomas Kearns note, legal meaning-making is a multi-directional process because legal subjects 'deploy and use meanings strategically to advance interests and goals. They press their understandings in and on law and, in so doing, invite adaptation and change in the practices of law. Law thus exists as what Raymond Williams called "moving hegemony"'.[134] Part of the problem of ambivalence then also hints at the futile struggle of maintaining and policing boundaries and categories of identity and difference, of 'Jewish' and 'Christian', of 'White' and 'non-White', of 'Europe' and 'the West' that in reality are always permeable, contested, precarious, entangled, and inherently unstable.

[133] Margaret Davies, 'The Ethos of Pluralism', *Sydney Law Review* 27, no. 1 (2005): 87–112, pp. 93 and 96.

[134] Austin Sarat and Thomas R. Kearns, 'The Cultural Lives of Law', in *Law in the Domains of Culture*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 2009), 1–20, p. 8.

Although not the primary focus of this book, in the debates and events analysed here, Jews have been active participants, contesting, appropriating, subverting, and resisting but also promoting and endorsing specific legal arrangements by leveraging dominant legal discourses as well as ideas about religion and race to carve out a space for Jewish identity in societies dominated by Christianity. In their struggle for legal equality, Jews have successfully manipulated and leveraged the dominant structures of law and deployed secularisation and racialisation as powerful rhetorical strategies for their own purposes to carve out space for Jewish particularism in the face of an assimilating universalism, thereby leaving an imprint on secular legal meanings and ideas.[135] Of course, discerning what makes an imprint 'Jewish' is difficult given the diversity of Jewish identifications, interests, and aspirations,[136] but this difficulty should not prevent us from acknowledging the existence and significance of these interactions. While it often required Jewish individuals and institutions to engage with a restrictive majoritarian framing and to potentially reinforce the problematic assumption of Christian ambivalence, their wrestling with the law nonetheless opened opportunities for alternative meanings and therefore legal outcomes. Hence, Jewish responses to the pressures and expectations of assimilation and their own cultural, social, legal, and political aspirations have left a mark too, thereby contributing to the discourses of secular law. I will return to the significance of Jewish engagements with secular law as a challenge to the hegemonic and universalising legal impulses of the Christian West in the final Chapter 7.

[135] There is a growing body of literature that examines Jewish engagement with Western law, particularly in the international sphere, see, for example, James Loeffler, *Rooted Cosmopolitans. Jews and Human Rights in the Twentieth Century* (New Haven; London: Yale University Press, 2018); Reut Yael Paz, *A Gateway between a Distant God and a Cruel World: The Contributions of Jewish German-Speaking Scholars to International Law* (Leiden: Brill, 2012).

[136] On this difficulty, see, for example, James Loeffler and Moria Paz, 'Introduction', in *The Law of Strangers. Jewish Lawyers and International Law in the Twentieth Century*, ed. James Loeffler and Moria Paz (Cambridge: Cambridge University Press, 2019), 1–20.