

Ambivalent Encounters

Law and the Construction of Jewish Difference

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Declaration

I hereby state that this thesis is entirely my own work and has not been submitted for any other degree at any other university or educational institution. All sources of information have been indicated and due acknowledgement has been given to the work of others.

A handwritten signature in black ink, appearing to read 'Mareike Riedel', written in a cursive style.

Mareike Riedel

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Abstract

Despite the significance of the figure of ‘the Jew’ as Other in the Western imagination, critical legal scholarship has so far paid little attention to representations of Jews, Jewishness, and Judaism in contemporary legal discourse. This scholarship emphasises the role of law in the construction of religious and racial difference, but Jews have remained almost absent from such analyses. Once Europe’s paradigmatic non-Christian minority, Jews are today seen increasingly as a successful, accepted, and well-integrated model-minority. A growing number of legal conflicts over Jewish practices, such as male circumcision, kosher slaughter, or the construction of *eruv* (religious spaces in public for the observance of Shabbat) suggests however that tolerance for Jews can still be fragile and ideas about Jews as different persist.

In this thesis, I explore law and legal discourse as a site for the construction of Jewish difference. Through a cultural study of law, I analyse two such contemporary legal conflicts concerning Jewish practices – the German controversy over the legality of male circumcision and an Australian dispute regarding the construction of an *eruv* in a Sydney suburb. Informed by critical law and religion scholarship, critical race theory, and Jewish studies, I explore images and representations of ‘the Jew’ in these encounters through a historically contextualised reading of the legal narratives presented by opponents of male circumcision and the *eruv*. Instead of focussing on Antisemitic imagery, I draw on the notion of ambivalence as a lens in order to capture a range of different attitudes – all of which perceive Jews as different. In each case, I identify the legal techniques through which Jews are rendered as different, thereby providing yet another challenge to the persistent myth of law’s neutrality, universality, and objectivity. What emerges from these two case studies is not only the enduring relevance of ideas about Jews as Others and their fluid construction, but also the significance of law and legal discourse as an authoritative and powerful site for this construction. The thesis concludes by highlighting the importance of integrating the Jewish experience into scholarly theorising of the relation between law, religion, and race, allowing us to understand the dynamic nature of exclusion and inclusion as well as the role of law as a site for resistance to exclusion.

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1 JEWISH QUESTIONS

Introduction

In 2012, Germany became embroiled in a heated debate about the practice of male circumcision and its compatibility with human rights after a regional court ruled that carrying out the rite constituted a criminal assault.¹ Although the initial case concerned the circumcision of a young Muslim boy, the controversy quickly turned into a tense encounter between Jews and non-Jews, given that male circumcision, or *brit milah*, as the practice is called in Hebrew, is a central tenet of Jewish identity. Over several months, the German public fiercely discussed the future of the tradition and its place in contemporary Germany. Throughout this debate, Jews were shocked by the hostility and aversion of circumcision opponents and by the use of language that depicted them as ‘violent’² and ‘backward.’³ Although the German parliament was quick to reaffirm the legality of the practice,⁴ it could not undo the social damage, which had left many Jews with a feeling of ‘restrangement.’⁵ After

¹ Landgericht Köln (District Court of Cologne), 7 May 2012, Case 151 Ns 169/11. An unofficial English translation of the decision is available on the website of Durham University: <https://www.dur.ac.uk/ilm/news/?itemno=14984>. All hyperlinks in this thesis were last accessed on 15 January 2019.

² See e.g. the open letter from 21 July 2012 signed by hundreds of mostly medical professionals and addressed to German government and parliament, available from <http://www.faz.net/aktuell/politik/inland/offener-brief-zur-beschneidung-religionsfreiheit-kann-kein-freibrief-fuer-gewalt-sein-11827590.html>.

³ See e.g. the press release of the Giordano Bruno Foundation, “Bundestag will Kinderrechte beschneiden,” 19 July 2012, available from <https://hpd.de/node/13792>.

⁴ Section 1631d Circumcision of the Male Child. Section Added Through the Law Concerning the Scope of Parental Care with Regard to the Circumcision of the Male Child, German Civil Code, 20 December 2012, Federal Law Gazette I, 28 December 2012. (§ 1631d Beschneidung des männlichen Kindes. Vorschrift eingefügt durch das Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes, Bürgerliches Gesetzbuch (BGB), 20. Dezember 2012, Bundesgesetzblatt (BGBl.) I, 28. Dezember 2012).

⁵ The Swiss Jewish Studies scholar Alfred Bodenheimer coined this term to illustrate the renewed feeling of alienation after decades of slow and careful rapprochement between Jews and non-Jews in Germany, see Alfred Bodenheimer, *Haut Ab! Die Juden in der Beschneidungsdebatte* (Göttingen: Wallstein Verlag, 2012), 12.

the tradition had for centuries been tolerated, or at least ignored, Jews suddenly felt rejected and pilloried because of it. “It’s almost as though the circumcision ruling by the Cologne regional court had only brought the truth of people’s real differences to light,”⁶ concluded the German magazine *Der Spiegel*.

In the meantime, far away on the other side of the globe, a local Jewish community in Sydney’s quiet North Shore struggled to set up an *eruv*, a symbolic religious boundary marked by wires and poles created to ease the restriction on carrying during the day of Shabbat. The development applications submitted by the Jewish community to establish this inconspicuous structure were met with vehement opposition by their neighbours, who used the Local Council and planning regulations to prevent what they perceived as an unwanted intrusion into the leafy streetscape of their suburb. The fear for many was that the Jewish structure would turn St. Ives into a ‘ghetto’ and would encourage more Jews to move to the area.⁷ Even though the local Jewish community had anticipated some suspicion towards their somewhat unusual application, the amount of energy and time that neighbours invested into fighting the proposal came as a sad and troubling surprise. It reminded them, as one local Rabbi put it, how quickly Jews can turn into ‘the other’ again.⁸

At first glance, these two cases do not seem to have much in common. Geographically distant from each other, they appear unconnected. One is a conflict about the body, the other is concerned with public space. One is a debate about human rights and criminal law, the other a planning conflict. Yet, in each of these legal events, under the surface, something similar was going on that extended beyond the narrow legal issue in question. These disputes were not simply about foreskins and wires, but about the difference these things signified; a difference many found so troubling that it had to be contained by law.

The Trouble with Jewish Difference

There is a distinct historical echo to the question of Jewish difference. Today, secularism, legal pluralism, and multiculturalism are meant to provide answers to what was during the eighteenth, nineteenth centuries known as – given the Jews’ status as Europe’s most significant non-Christian minority – the ‘Jewish question’. At the time, the question was about whether the Jews, a group perceived as fundamentally different, could be granted equal citizenship and, if so, under which conditions. In late December 1789, Stanislas Clermont-Tonnerre formulated a famous response in

⁶ Matthias Bartsch et al., “‘Great Anxiety’: Jews Question Their Future in Germany,” *Der Spiegel*, 10 September 2012, available from <http://www.spiegel.de/international/germany/amid-circumcision-debate-jews-question-their-future-in-germany-a-854863.html>.

⁷ Amy Corderoy, “Council Rejects Jewish Boundary Plan,” *Sydney Morning Herald*, 24 August 2011, <https://www.smh.com.au/national/nsw/council-rejects-jewish-boundary-plan-20110824-1j8qi.html>.

⁸ Interview with Rabbi 1, Sydney, July 2016.

his speech to the French National Assembly: “Il faut tout refuser aux Juifs comme nation et tout accorder aux Juifs comme individus.”⁹ As the wave of emancipation swept over Europe, in order to obtain civil equality, the Jews had to dissolve their corporate status and become French, Dutch or Germans of the Mosaic faith. But secularisation and assimilation into the nation-state did not end suspicion towards Jewish particularity. The racialising discourse of the nineteenth century fixed Jewishness as an eternal and unsurmountable difference, one for which Jews would ultimately pay the most terrible price.

Things appear vastly different today. In most countries of the Western world,¹⁰ public perception sees Jews as a successful, influential, and well-integrated group.¹¹ Governments are committed to fight against Antisemitism and have set up laws and policies to protect Jews from discrimination, while Antisemitism is often considered as a problem only among the deviant fringes of society.¹² Jews have enjoyed great educational, economic, and social success. They are law school professors, business people, and parliamentarians. After Jews for centuries experienced political obstacles, politicians now proudly invoke the West’s shared “Judeo-Christian” heritage.¹³ Jews have seemingly

⁹ “We have to refuse everything to the Jews as a nation but grant everything to the Jews as individuals.” For the full speech see Lynn Hunt, *The French Revolution and Human Rights. A Brief Documentary History*, (Boston; New York: Bedford, 1996). 86-88.

¹⁰ I am aware of the problems and pitfalls involved when speaking of the social construct of ‘the West.’ However, in this thesis, I use ‘the West’ or ‘Western societies’ as a shorthand to refer to highly industrialised European societies, such as Germany, and those of European descent, such as Australia. For a critical reading of the social construct of ‘the West’ see e.g. Stuart Hall, “The West and the Rest: Discourse and Power,” in *Race and Racialisation: Essential Readings*, eds. Tania Das Gupta, et al. (Toronto; Vancouver: Canadian Scholars, 2018), 85-93.

¹¹ On the idea of Jews as a ‘model minority’ see Irina Kudenko and Deborah Phillips, “The Model of Integration? Social and Spatial Transformations in the Leeds Jewish Community,” *Journal of Ethnic and Migration Studies* 35, no. 9 (2009): 1533-49; Jonathan Freedman, “Transgressions of a Model Minority,” *Shofar: An Interdisciplinary Journal of Jewish Studies* 23, no. 4 (2005): 69-97.

¹² Writing in the context of Germany, Monika Schwarz-Friesel criticises the fact that, although studies show the persistence of Antisemitic attitudes, these results are often rejected by mainstream society: “There is a long and cherished illusion in modern German society that anti-Semitism is either a past historical phenomenon or is nurtured in its contemporary form only by Right-wing extremists at the edges of society.” Monika Schwarz-Friesel, “Educated German Anti-Semitism in the Middle of German Society. Empirical Findings,” in *Being Jewish in 21st-Century Germany*, eds. Haim Fireberg and Olaf Glöckner (Oldenbourg: De Gruyter), 165-87, at 166.

¹³ Conservative politicians in particular refer to Judeo-Christian values as foundations of their countries. In 2018, the German federal minister of the interior, Horst Seehofer, argued that the country was built on Judeo-Christian values and that Islam did not belong to Germany, see Frank Capellan, “Duftmarke nach Amtsantritt,” *Deutschlandfunk*, available from https://www.deutschlandfunk.de/seehofer-zum-islam-duftmarke-nach-amtsantritt.1773.de.html?dram:article_id=413173.) In 2010, Angela Merkel’s party CDU (Christian Democratic Union) adopted a resolution which defined Judeo-Christianity as German *Leitkultur*, see Beschluss des 23. Parteitages der CDU Deutschlands, “Verantwortung Zukunft,” 2010, available from <https://www.cdu.de/system/tdf/media/dokumente/101116-verantwortung-zukunft-beschluss.pdf?file=1>.

In 2014, the Australian minister for education, Christopher Pyne, demanded that the national curriculum teach students the “significance of Judeo-Christian values to our institutions and way of life.” Quoted in Chloe Patton, “Curriculum Review: Where Did ‘Judeo-Christian’ Come From?,” *The Conversation*, 13 January 2013, available from <http://theconversation.com/curriculum-review-where-did-judeo-christian-come-from-21969>. Australian Prime Minister John Howard regularly referred to Australia’s Judeo-Christian heritage. For a critical analysis of Howard’s use of Judeo-Christianity see Jon Stratton, “Whiteness, Morality and Christianity in Australia,” *Journal of Intercultural Studies* 37, no. 1 (2016): 17-32.

moved from being the paradigmatic outsiders to full inclusion. Despite this undoubted success, there are moments when this position is suddenly unsettled and Jewish belonging is contested. I do not refer by this to the still numerous Antisemitic incidents that occur, but rather to those moments, for example, when the installation of a wire brings neighbours in Sydney to the barricades or when the long-ignored practice of *brit milah* suddenly fills German newspapers, TV shows, and legal journals for months on end.

These two cases are not isolated. In fact, Jewish practices increasingly have come under legal and political pressure. The practice of *shechita*, the slaughter of animals without prior stunning, has been the subject of numerous controversies, regulations, and bans over many decades. In 2017, the Belgian region of Wallonia joined countries such as Sweden and Switzerland by drafting a law banning the kosher and halal slaughter of animals for meat production.¹⁴ Supporters of such a ban claim the welfare of animals as their primary concern, while Jews invoke their freedom to practice their religion. Male circumcision, long an accepted and even promoted surgery in Western societies such as the United States, is now discussed alongside such practices as female genital cutting as a violation of a child's bodily integrity. In 2018, both Iceland and Denmark discussed draft bills criminalising male circumcision.¹⁵ Gender equality demands equal attention to male bodies and their integrity, the argument goes. Similarly, the inconspicuous *eruv* keeps turning into a thorny issue for neighbours in places such as Canada, the United Kingdom, Australia, South Africa, and the United States. No matter what the legal framing is – the constitutional separation of state and religion, the human right to freedom *from* religion, or objections based on local planning regimes – opponents insist that the *eruv* violates the law of the state and cannot be allowed into their neighbourhood. How can we understand these events?

Traditionally, legal scholarship approaches cases such as male circumcision and the *eruv* through a normative framework, mostly by considering them through the lens of human rights, multiculturalism, secularism, tolerance, or reasonable accommodation.¹⁶ Practically oriented, this

In the United States, Donald Trump sees Judeo-Christian values under attack, see e.g. Heidi M. Przybyla, "Trump to religious conservatives: 'Stopping cold' attacks on 'Judeo-Christian values'," *USA Today*, 13 October 2017, available from <https://eu.usatoday.com/story/news/politics/2017/10/13/trump-religious-conservatives-stopping-cold-attacks-judeo-christian-values/761454001/>.

¹⁴ Lianna Kolirin, "Legal Fight Starts for Belgian Kashrut," *Jewish Chronicle*, 30 November 2017, <https://www.thejc.com/news/world/legal-fight-starts-for-belgian-kashrut-kosher-1.449313>.

¹⁵ Christina Caron, "Bill Banning Circumcision in Iceland Alarms Religious Groups," *New York Times*, 28 February 2018, <https://www.nytimes.com/2018/02/28/world/europe/circumcision-ban-iceland.html>; Martin Selsoe Sorensen, "Denmark Talks (Reluctantly) About a Ban on Circumcising Boys," *New York Times*, 2 June 2018, <https://www.nytimes.com/2018/06/02/world/europe/denmark-circumcision.html>.

¹⁶ For legal discussions of male circumcision see e. g. Allan J. Jacobs and Kavita Shah Arora, "Ritual Male Infant Circumcision and Human Rights," *American Journal of Bioethics* 15, no. 2 (2015): 30-39; Reinhard Merkel and Holm Putzke, "After Cologne: Male Circumcision and the Law. Parental Right, Religious Liberty or Criminal Assault?," *Journal of Medical Ethics* 39, no. 7 (2013): 444-49. For legal approaches to the *eruv* see e.g. Alexandra Lang Susman, "Strings Attached: An Analysis of the Eruv under the Religion Clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act," *University of Maryland Law Journal*

scholarship offers solutions for societies on how to handle these ‘problems of diversity’ through balancing rights and fine-tuning legal frameworks. While this is an important contribution in itself, some scholars have become increasingly critical of how discourses of tolerance and accommodation work to sustain power imbalances between minorities and majorities, often reifying binaries between ‘us’ and ‘them’.¹⁷ The issue is then how law becomes a vehicle for this binary. This is the problem I address in this study. Instead of examining doctrinal questions around male circumcision and the *eruv*, this thesis critically engages with the discourse of difference in the legal encounter with Jewishness by investigating how the binaries between ‘us’ and ‘them’ are perpetuated through debates about male circumcision and the *eruv*.

This introductory chapter has four more parts. In the next section, I trace how the literature on law and its Others has engaged with racial and religious difference, as well as with the question of Jewish difference. After the discussion of the literature, I present my own approach by introducing the key concepts that I use. The third part outlines my methodology and explains the notion of legal discourse that underpins this research. The fourth and final section of this introduction summarises my main arguments and presents a thesis outline.

I. Law and its Others

My point of departure in this thesis is the insight of cultural theorists that the notion of difference is central to the formation of identity. Collective identities are often shaped in relation to an ‘Other’: another culture, another religion, another race.¹⁸ The reason for this is that ‘we’ often know better who ‘we’ are *not*, rather than who ‘we’ *are*. Simon Clarke writes:

of Race, Religion, Gender & Class 9 (2009): 93-134; Joshua Metzger, “The Eruv: Can Government Constitutionally Permit Jews to Build a Fictional Wall without Breaking the Wall between Church and State,” *National Jewish Law Review* 4 (1989): 67-92. More generally on questions of religious and cultural diversity, see e.g. Lori G. Beaman, ed. *Reasonable Accommodation: Managing Religious Diversity* (Vancouver; Toronto: University of British Columbia Press, 2012); Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

¹⁷ E.g. Lori G. Beaman, “Tolerance and Accommodation as Vestiges of the Empire,” in *Secular States and Religious Diversity*, eds. Bruce J. Berman, Rajeev Bhargava, and André Laliberté (Vancouver; Toronto: University of British Columbia Press, 2013), 120-35; Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006).

¹⁸ Jacques Derrida argued that Western thought, including everyday language and thought, is structured by polarities and dichotomies. See Jacques Derrida, *Dissemination*, trans. Barbara Johnson (London; New York: Continuum, 1981), viii.

The notion of cultural identity becomes much stronger and firmer when we define our ‘selves’ in relation to a cultural Other. We start then to see ideas around ‘ways of life’, ‘us’ and ‘them’, and this is at the heart of racism, hatred and exclusion.¹⁹

Law is not immune to such processes of exclusion. Exclusion is in fact inherent to law, as Margaret Davies argues.²⁰ Law excludes on many levels and constitutes thereby not only its own identity (by excluding other normative systems as ‘not law’), but also the identity of its subjects. This link has been well explored by the various critical approaches to law grounded in feminist theory, postcolonial studies, critical race theory, Third World Approaches to International Law (TWAAIL), and queer studies.²¹ These approaches show how law creates a myriad of Others, thereby exposing the myth of law being neutral and objective, and revealing its deeply gendered, racialised, and colonialist dimensions. Scholars drawing on these critical approaches have increasingly intervened in the debates about the politics of identity, multiculturalism, and secularism,²² debates which have come to occupy a central place in both society and academia. Instead of elaborating on normative questions, this scholarship critically engages with the identitarian dynamics that underpin these encounters with difference, which are negotiated through the language of secular law and multicultural norms.

In this section, I discuss some of the central insights of this scholarship, particularly as they pertain to the construction of religious and racial difference. I focus on these markers because these are two dominant discourses through which Jewish difference has been framed. Today, Jewish difference is mostly described as a religious difference. Thus, the normative discourse around religion serves as the main framework through which encounters with Jewishness, such as in the debate about male circumcision or the eruv, are discussed in the legal literature. This is evidenced by the narratives about male circumcision and the eruv as primarily being conflicts between secular law and religious

¹⁹ Simon Clarke, “Culture and Identity,” in *The Sage Handbook of Cultural Analysis*, eds. Tony Bennett and John Frow (London; Los Angeles: Sage, 2008), 510-529, at 511.

²⁰ Margaret Davies, “Exclusion and the Identity of Law,” *Macquarie Law Journal* 5 (2005): 5-30. See also Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990).

²¹ See e.g. Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2017); Nicola Lacey, “The Constitution of Identity: Gender, Feminist Legal Theory, and the Law and Society Movement,” in *The Blackwell Companion to Law and Society*, ed. Austin Sarat (Malden; Oxford; Carlton: Blackwell, 2008), 471-86; Anne Orford, ed. *International Law and Its Others* (Cambridge; New York: Cambridge University Press, 2006); Peter Fitzpatrick, *The Mythology of Modern Law* (London; New York: Taylor & Francis, 2002); Eve Darian-Smith and Peter Fitzpatrick, *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999); Hilary Charlesworth, Christine Chinkin, and Shelley Wright, “Feminist Approaches to International Law,” *American Journal of International Law* 85, no. 4 (1991): 613-45.

²² See e.g. Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Oxon; New York: Routledge, 2015); Sahar Ghumkhor and Juliet Rogers, “The Spectacle of the Veiled Woman and the Mutilated Child,” *Australian Feminist Law Journal* 40, no. 2 (2014): 199-213; 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; Brenna Bhandar, “The Ties That Bind: Multiculturalism and Secularism Reconsidered,” *Journal of Law and Society* 36, no. 3 (2009): 301-26; Sherene H. Razack, “Imperilled Muslim Women, Dangerous Muslim Men and Civilised Europeans: Legal and Social Responses to Forced Marriages,” *Feminist Legal Studies* 12, no. 2 (2004): 129-74.

practice.²³ Race, however, has also played a central role for the definition of Jewish difference. By definition, race is the “historically contingent social system of meaning that attach to elements of morphology and ancestry.”²⁴ Jews are among the first racialised people and Antisemitism has many parallels to other formations of racism.²⁵ Moreover, the concept of racialisation, which emphasises the “sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed,”²⁶ has provided an important analytical focus for the little existing scholarly work studying the legal construction of Jewish difference.

This is the first problem that this thesis encounters. There is indeed little critical literature on the legal construction of Jewish difference.²⁷ A notable exception is the work of Didi Herman,²⁸ some of which

²³ Mathias Möschel argues that the language of religious freedom and secularism in fact masks an underlying racial aspect, see Mathias Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (Abingdon, Oxon; New York: Routledge, 2014), 126.

²⁴ Ian Haney López, *White by Law: The Legal Construction of Race*, 10th ed. (New York: New York University Press, 2006), xvi.

²⁵ Generally, the relation between academic studies of Antisemitism and racism has often been marked by a lack of conversation between the two, see the discussion in Les Back and John Solomos, “Racism and Anti-Semitism,” in *Theories of Race and Racism. A Reader*, eds. Les Back and John Solomos (London; New York: Routledge, 2009), 191-94.

²⁶ Michael Omi and Howard Winant, *Racial Formation in the United States. From the 1960s to the 1990s* (New York; London: Routledge, 1994), 55. Omi and Winant use the terms racial formation and racialisation synonymously. The concept of racialisation has been the subject of much scholarly critique and attempts to redefine it. For an overview of the criticism see e.g. Adam Hochman, “Racialization: A Defense of the Concept,” *Ethnic and Racial Studies* (2018): 1-18, DOI: 10.1080/01419870.2018.1527937. Hochman suggests that racialisation is best understood as the process through which racialized groups – rather than *racess* – are constituted. See *ibid.*, 1.

²⁷ This is not to say that Jews are generally absent from critical legal analysis. Scholars have analysed historical legal constructions of Jews, such as in medieval Canon law, see 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. For a discussion of early common law representations of Jews see Jonathan A. Bush, “You’re Gonna Miss Me When I’m Gone: Early Modern Common Law Discourse and the Case of the Jews,” *Wisconsin Law Review* 5 (1993): 1225-85. Scholars have also critically discussed the judges’ understanding of Jewishness in the JFS case, see e. g. Peter Danchin and Louis Blond, “Unlawful Religion: Modern Secular Power and the Legal Reasoning in the JFS Case,” *Maryland Journal of International Law* 29 (2014): 419-80.

Moreover, Judaism has received some attention in the legal literature concerned with religious family law discussing the halakic problem of the *agunah*, the chained woman, whose husband refuses her a *get* (a letter of divorce) without which she is unable to remarry religiously. This legal pluralist situation raises complex questions about the relation between a secular legal order and religious norms and the protection of gender equality in the realm of religion. However, this literature is not concerned with the construction of Jewish difference. For discussions of the *agunah* see e.g. Pascale Fournier, “Halacha, the ‘Jewish State’ and the Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders,” *Journal of Legal Pluralism and Unofficial Law* 65 (2012): 165-204. There is also a small body of work which approaches legal problems through the lens of Jewish legal thought, see e.g. Suzanne Last Stone’s work on Jewish understandings of human rights and secularity: 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; Suzanne Last Stone, “A Jewish Perspective on Human Rights,” *Society* 41, no. 2 (2004): 17-22.

²⁸ Didi Herman, *An Unfortunate Coincidence: Jews, Jewishness, and English Law* (Oxford: Oxford University Press, 2011); Didi Herman, “‘The Wandering Jew Has No Nation’: Jewishness and Race Relations Law,” *Jewish Culture and History* 12, no. 1-2 (2010): 131-58; Didi Herman, “‘I do not Attach Great Significance to it’: Taking Note of ‘The Holocaust’ in English Case Law,” *Social & Legal Studies* 17, no. 4 (2008), 427–452; Didi Herman,

she co-authored with Davina Cooper.²⁹ These studies most comprehensively address the question of how the law engages in the construction of Jews, Jewishness, and Judaism. Particularly in her study *An Unfortunate Coincidence*, Herman examines how English judicial discourse depicts Jews using racialising and orientalisising language. Apart from challenging the narrative of English law as secular and neutral, she also shows how constructions of Jewishness and Englishness are deeply intertwined. Although her focus is historical, and on English law alone, Herman's arguments and approach have provided many important insights for this thesis. Since the publication of her work, however, there have been, to the best of my knowledge, no additions to the critical legal scholarship on the encounter with Jewish difference. Aware of this gap, I approach the literature on law and its Others with two questions: What is the relation between the law and religious/racial difference? And how does this literature engage with Jewish difference?

a. The Religious Other: Secularism and Christianity

The disputes over male circumcision and the eruv fall within wider debates about the management of religious diversity. Globalisation and mass migration have made societies increasingly diverse and turned the encounter with the religious Other for many into a daily experience. In particular, religious symbols – headscarves, minarets, kirpans, turbans, crucifixes, and kippahs – have become an ongoing source of much public debate about secularism, multiculturalism, and the status of minority beliefs.³⁰ Yet, scholars also note that religious symbols “play a key role in identity-related dynamics.”³¹ Whereas much of the literature in this field still takes a normative-doctrinal approach to the problem, a growing body of scholarship has thus begun to explore the unarticulated cultural assumptions of

“‘An Unfortunate Coincidence’: Jews and Jewishness in Twentieth-Century English Judicial Discourse,” *Journal of Law and Society* 33, no. 2 (2006): 277-301.

²⁹ Davina Cooper and Didi Herman, “Jews and Other Uncertainties: Race, Faith and English Law,” *Legal Studies* 19, no. 3 (1999): 339-66.

³⁰ David Miller, “Majorities and Minarets: Religious Freedom and Public Space,” *British Journal of Political Science* 46, no. 2 (2016): 437-56; Silvio Ferrari and Sabrina Pastorelli, eds., *Religion in Public Spaces: A European Perspective* (Farnham; Burlington: Ashgate, 2012); Ran Hirschl and Ayelet Shachar, “The New Wall of Separation: Permitting Diversity, Restricting Competition,” *Cardozo Law Review* 30, no. 6 (2009): 2535-60; Carolyn Evans, “The ‘Islamic Scarf’ in the European Court of Human Rights,” *Melbourne Journal of International Law* 7, no. 1 (2006): 52-73; Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford; Portland: Hart, 2006).

³¹ Susanna Mancini, “The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism,” in *Constitutional Secularism in an Age of Religious Revival*, eds. Susanna Mancini and Michel Rosenfeld (Oxford; New York: Oxford University Press, 2014), 111-35, at 116.

contemporary secular law.³² Building on anthropologist Talal Asad's work on secularism,³³ these scholars analyse how the secular state continues to define and shape religiosities, even if it claims to be neutral towards religion and to ensure religious freedom. Saba Mahmood argues that the "political solution that secularism proffers ... lies not so much in tolerating difference and diversity but in remaking certain kinds of religious subjectivities".³⁴ When faced with religious difference, this literature argues, the law's normative disposition is still geared towards the culture of the majority, which, in Western societies, is rooted in Christianity.³⁵ What emerges from this work is the insight that modern ideas about secular governance are far from neutral towards religion, but instead serve to contain and domesticate certain kinds of religiosities that are deemed illiberal or a 'threat'.³⁶

Muslims, in particular, have been caught up in these anxieties over the religious Other, for which the headscarf has come to serve as a paradigmatic symbol.³⁷ The various headscarf debates in different countries are testament to how signs of religious difference are reformulated as "threat to public order and as harbingers of sectarian strife that undermine democracy"³⁸ in order to justify state intervention. Countless laws and policies target this piece of fabric in the name of state neutrality, public security, *vivre ensemble*, or women's rights, turning the body of the woman into a battleground over the definition of what differentiates 'us' from 'them'.³⁹ For critics, the headscarf cases are not so much about balancing rights but hint at how "Muslim women have come to embody the projected

³² See e.g. Saba Mahmood, *Religious Difference in a Secular Age. A Minority Report* (Princeton; Oxford: Princeton University Press, 2016); Winnifred Fallers Sullivan et al., eds., *Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015); Eve Darian-Smith, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law* (Oxford; Portland: Hart Publishing, 2010); Janet R. Jakobsen and Ann Pellegrini, *Secularisms* (Durham: Duke University Press, 2008).

³³ Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003); Talal Asad, "French Secularism and the 'Islamic Veil Affair'," *Hedgehog Review* 8, no. 1-2 (2006): 93-106; Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore; London: Johns Hopkins University Press, 1993); Talal Asad et al., *Is Critique Secular? Blasphemy, Injury, and Free Speech* (New York: Fordham University Press, 2013).

³⁴ Saba Mahmood, "Secularism, Hermeneutics, and Empire: The Politics of Islamic Reformation," *Public Culture* 18, no. 2 (2006): 323-47, at 328.

³⁵ See e.g. Wendy Brown, "Civilizational Delusions: Secularism, Tolerance, Equality," *Theory & Event* 15, no. 2 (2012) [online only from <https://muse.jhu.edu/article/478356>, no pagination]; Darian-Smith, *Religion, Race, Rights*, 14; 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. Cécile Laborde speaks of 'Cathol-laïcité' in France, see Cécile Laborde, *Critical Republicanism. The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008), 69-70.

³⁶ Bhandar, "The Ties That Bind: Multiculturalism and Secularism Reconsidered," 236.

³⁷ See e.g. Mancini, "Patriarchy as the Exclusive Domain of the Other;" Maleiha Malik, "Feminism and Its Other: Female Autonomy in an Age of Difference," *Cardozo Law Review* 30 (2008): 2613-28; Asad, "French Secularism and the 'Islamic Veil Affair'."

³⁸ Nehal Bhuta, "Two Concepts of Religious Freedom in the European Court of Human Rights," *South Atlantic Quarterly* 113, no. 1 (2014): 9-35, at 11.

³⁹ Seyla Benhabib, "The Return of Political Theology: The Scarf Affair in Comparative Constitutional Perspective in France, Germany and Turkey," *Philosophy & Social Criticism* 36, no. 3-4 (2010): 451-71.

visions of Islam as ‘the’ patriarchal Other”.⁴⁰ In a similar vein, Christian Joppke describes the headscarf as a “mirror of identity”⁴¹ that reflects how people and societies want to see both themselves and those they perceive as Others. Drawing on Etienne Balibar’s thoughts on cultural racism, Susanna Mancini posits that

Irrespective 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.⁴²

The European encounter with Islam does not take place in a historical vacuum. Rather, it has to be understood within the longer history of colonial encounters between Christian European societies and Muslim societies in which Muslims were seen as dangerous Others. Islam’s purported antagonism to Christianity, argues Talal Asad, has played a decisive role in the formation of European identity. In this construction, Islam represents an attempt to destroy Europe from outside and, at the same time, signifies the internal threat of moral corruption that Europe has to fight.⁴³ In this imagined cultural opposition, Islam is constituted as “Europe’s primary alter.”⁴⁴

The critical scholarship on secularism draws on postcolonial theory and the concept of Orientalism in order to analyse today’s encounter with Islam in the West. Orientalism, a concept indebted to Edward Said, describes a way of representing and characterising people and their practices that come from the Muslim ‘Orient’ in comparison with ideas about the ‘Occident’. For Said, Orientalism has a crucial function in European identity formation in which ideas and images of the Muslim ‘Orient’ serve as a foil against which European identity is imagined.⁴⁵ Orientalism places the West in a position of superiority over other non-European cultures, which are associated with backwardness,⁴⁶ and thereby establishes cultural hegemony. Orientalism, however, is not simply a thing of the past. Scholars emphasise the continuities and discontinuities of this historical encounter and urge for historical awareness in order to understand the confrontations of today and how Orientalist thought continues to affect the legal responses to Muslim practices.⁴⁷

⁴⁰ Mancini, “Patriarchy as the Exclusive Domain of the Other,” 413.

⁴¹ Christian Joppke, *Veil: Mirror of Identity* (Malden; Cambridge: Polity Press, 2009).

⁴² Mancini, “The Tempting of Europe, the Political Seduction of the Cross,” 115. Mancini refers to Etienne Balibar, “Is There a ‘Neo-Racism’?,” in *Race, Nation, Class. Ambiguous Identities*, eds. Etienne Balibar and Immanuel Wallerstein (London; New York: Verso, 1991), 17-36, at 22.

⁴³ Asad, *Formations of the Secular: Christianity, Islam, Modernity*, Chapter 5.

⁴⁴ *Ibid.*, 169.

⁴⁵ Edward W. Said, *Orientalism* (London: Penguin Books, 2003), 3.

⁴⁶ *Ibid.*, 7.

⁴⁷ See e. g. Mayanthi L. Fernando, *The Republic Unsettled. Muslim French and the Contradictions of Secularism* (Durham; London: Duke University Press, 2014), 7. Brown, “Civilizational Delusions: Secularism, Tolerance, Equality.”

Many of these scholars in the critical literature on secularism acknowledge the disturbing similarities between the contemporary discourse on Muslims in the West and the historical discourses on Jews, which depicted them as unfit for modernity because of their adherence to Jewish law and its “concerns with ‘orthopraxy’”.⁴⁸ But there has been little attention to the contemporary encounter with Jewish difference. Thus, while the literature I discussed here yields many important insights on the discursive construction of collective identities and the historical Orientalist dimension of today’s attempts to manage the presence of Islam in Western societies, it tends to be limited in its focus on Muslims as ‘primary alters’. This approach, although understandable given the attention on Islam in media and popular debate, risks neglecting the complexities of European identity formation, which cannot be reduced to an opposition to Islam alone. There is a danger of losing sight of intertwined and related phenomena for the sake of telling a specific history of victimhood, whereby the oppressor is identified as the Judeo-Christian majority. For example, in Saba Mahmood’s otherwise illuminating critique of Europe’s relation with Islam, she states that

the future of the Muslim minority in Europe depends not so much on how the law might be expanded to accommodate its concerns but on a larger transformation of the cultural and ethical sensibilities of the majority Judeo-Christian population that undergird the law.⁴⁹

In a similar vein, anthropologist Talal Asad suggests that the emergence of the discourse of the Judeo-Christian tradition signals the new status of Jews in Europe after the Second World War, elevating them from their previously marginal position.⁵⁰ It is certainly correct, as Mahmood argues, that the accommodation of Islam in the West may require a fundamental questioning of the underlying assumptions of law in order to avoid replicating in the legal sphere structures of cultural dominance and orientalisating discourse. Yet, although this scholarship offers an important critique of current debates, it risks reproducing the same binaries it seeks to criticise by neglecting the significance of the myriad of other Others in the making of European-Western identity. Jews, Roma and Sinti, and Eastern Europeans, for example, have all provided foils against which the cultural majorities of European and European-descent societies imagined themselves – a role which has never been assigned exclusively to Islam.⁵¹ Scholars in Jewish Studies for example emphasise the significance of

⁴⁸ Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton; Oxford: Princeton University Press, 2012), xiv. See also Anya Topolski, “Good Jew, Bad Jew ... Good Muslim, Bad Muslim: “Managing” Europe’s Others,” *Ethnic and Racial Studies* (2017): 1-18; Maleiha Malik, “Muslims Are Now Getting the Same Treatment Jews Had a Century Ago,” *The Guardian*, 2 February 2007, <https://www.theguardian.com/commentisfree/2007/feb/02/comment.religion1>.

⁴⁹ Saba Mahmood, “Religious Reason and Secular Affect: An Incommensurable Divide?,” *Critical Inquiry* 35, no. 4 (2009): 836-62, at 860.

⁵⁰ Asad, *Formations of the Secular: Christianity, Islam, Modernity*, 168.

⁵¹ See the critique by Tony Kushner, “Racialization and ‘White European’ Immigration to Britain,” in *Racialization: Studies in Theory and Practice*, eds. Karim Murji and John Solomos (Oxford: Oxford University Press, 2004), 207-26. For attempts to bring Jewish and postcolonial studies into dialogue see e.g. Willi Goetschel and Ato Quayson, “Introduction: Jewish Studies and Postcolonialism,” *Cambridge Journal of*

Jews in the historical Orientalist imagination, a topic to which I will return in chapter two. Throughout history, Jews were seen as both Occidental and Oriental.⁵² Whereas today Jews are often perceived as a Western people, their identification with the biblical lands underpinned the historical perception of Jews as foreign ‘Orientals.’ Highlighting the theological dimension of Orientalist thought, Ivan Kalmar and Derek Penslar describe Orientalism as the Christian West’s attempt to come to terms with both its monotheistic Others.⁵³ Gil Anidjar thus argues that “the Jew is the theological (and internal) enemy, whereas the Muslim is the political (and external) enemy”.⁵⁴ These enemies, although different from each other, are both seen to threaten Christian Europe and its values.

Moreover, invoking the discourse of Judeo-Christianity to locate Jews among the privileged risks tapping into a highly politicised narrative. In the United States, references to the Judeo-Christian tradition of the country emerged during the late 1940s to promote a counter-narrative distinguishing and distancing itself from the atrocities committed by the Third Reich.⁵⁵ But the term simultaneously drew on interfaith efforts to create an inclusive vision of America’s foundation in religious pluralism around the three religions.⁵⁶ References to America’s Judeo-Christian heritage gradually declined but resurged in the 1980’s under Ronald Reagan to contrast the United States against the godless Soviet Union.⁵⁷ At the same time in West Germany, the term began to connote an overall worldview considered to be a foundation for the universal human rights to which the country committed after the end of the Second World War but also meant to signal efforts to repair German-Jewish relations.⁵⁸ In Australia, the conservative Prime Minister John Howard, who governed the country between 1996

Postcolonial Literary Inquiry 3, no. 1 (2016): 1-9; Bryan Cheyette, *Diasporas of the Mind: Jewish and Postcolonial Writing and the Nightmare of History* (New Haven; London: Yale University Press, 2013).

⁵² Ivan Davidson Kalmar and Derek Jonathan Penslar, “An Introduction,” in *Orientalism and the Jews*, eds. Ivan Davidson Kalmar and Derek Jonathan Penslar (Hanover and London: Brandeis University Press, 2005), xiii–xl, at xiii. See also Ethan B. Katz, Lisa Moses Leff, and Maud S. Mandel, eds., *Colonialism and the Jews* (Bloomington; Indianapolis: Indiana University Press, 2017).

⁵³ Kalmar and Penslar, “An Introduction,” xiv.

⁵⁴ Gil Anidjar, *The Jew, the Arab: A History of the Enemy* (Stanford: Stanford University Press, 2003), 38.

⁵⁵ Darian-Smith, *Religion, Race, Rights*, 229.

⁵⁶ See e.g. Will Herberg, *Protestant–Catholic–Jew: An Essay in American Religious Sociology* (Chicago: University of Chicago Press, 1983). Warren Zev Harvey notes that while some Jews back then welcomed the term as a means to combat Antisemitism and achieve greater inclusion, others feared that the discourse would blur the boundaries between Judaism and Christianity which would lead to intermarriage and assimilation. See Warren Zev Harvey, “The Judeo-Christian Tradition’s Five Others,” in *Is There a Judeo-Christian Tradition? A European Perspective*, eds. Emmanuel Nathan and Anya Topolski (Berlin; Boston: De Gruyter, 2016), 211–39, at 214.

⁵⁷ Samuel Moyn argues that US American Protestantism’s “generosity at the time occurred for the sake of stigmatizing secularism in a common front with the Catholics and Jews; and in foreign affairs, especially, Protestant liberalism in the standoff with Soviet secularism”. See Samuel Moyn, “From Communist to Muslim: European Human Rights, the Cold War, and Religious Liberty,” *South Atlantic Quarterly* 113, no. 1 (2014): 63–86, at 74.

⁵⁸ Amanda Kluvel, “Secular, Superior and, Desperately Searching for Its Soul: The Confusing Political-Cultural References to a Judeo-Christian Europe in the Twenty-First Century,” in *Is There a Judeo-Christian Tradition? A European Perspective*, eds. Emmanuel Nathan and Anya Topolski (Berlin; Boston: De Gruyter, 2016), 241–65, at 244.

and 2007, was notorious for his references to Judeo-Christianity.⁵⁹ Today the term has gained a foothold in contemporary anti-Islam rhetoric. This manoeuvre could perhaps be easily dismissed as the rhetoric of fringe right-wing politicians if the term had not found its way into the language of governments, courts and public institutions. In 2003 the European People's Party for example proposed an explicit reference to Europe's Judeo-Christian roots in the draft text for a European constitution, however the European Parliament's plenary assembly rejected this proposal.⁶⁰

An historical perspective also reveals doubts about the term. While references to Judeo-Christianity purport to include Jews as equals into an imagined shared tradition of the West, the term in fact masks the ambivalent history of Christian antagonism towards Judaism in which Christianity repeatedly tried to come to terms with its Jewish Other.⁶¹ Assuming an uncontested hegemonic Judeo-Christianity writes out the complex history that lies behind this term and fails to reflect on how exactly the 'Judeo' in this hyphenated compound has been imagined, contested, and circumscribed over the course of history. Speaking of a missed encounter between the critical literature on secularism and Jewish history, Ari Joskowitz and Ethan Katz remind us 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.⁶²

For Amnon Raz-Krakotzkin, Christian ambivalence towards the Jews is at the very heart of the secular order. "Secularism," he argues, "can be seen as the expansion of the Christian ambivalence towards the Jews, to include also other non-Christians".⁶³ Similarly, historian Robert Yelle emphasises the importance of further exploring the influence of Christian anti-Judaism on modern concepts of

⁵⁹ Holly Randell-Moon, "Common Values: Whiteness, Christianity, Asylum Seekers and the Howard Government," *Australian Critical Race and Whiteness Studies E-Journal* 2, no. 1 (2006): 1-14.

⁶⁰ "Europarlament Rejects Reference to Judeo-Christian Roots," *Zenit*, 25 September 2003, <https://zenit.org/articles/europarlament-rejects-reference-to-judeo-christian-roots/>. See also the discussion in Anya Topolski, "A Genealogy of the 'Judeo-Christian' Signifier: A Tale of Europe's Identity Crisis," in *Is there a Judeo-Christian Tradition? A European Perspective*, eds. Emmanuel Nathan and Anya Topolski (Berlin; Boston: De Gruyter, 2016), 267-284, at 274-79.

⁶¹ Daniel Boyarin, *Border Lines: The Partition of Judaeo-Christianity* (Philadelphia: University of Pennsylvania Press, 2004). For an overview of the history, theology, and politics of Judeo-Christianity see Emmanuel Nathan and Anya Topolski, *Is There a Judeo-Christian Tradition?: A European Perspective* (Berlin; Boston: De Gruyter, 2016).

⁶² Ari Joskowitz and Ethan B. Katz, "Introduction: Rethinking Jews and Secularism," in *Secularism in Question. Jews and Judaism in Modern Times*, eds. Ari Joskowitz and Ethan B. Katz (Philadelphia: University of Pennsylvania Press, 2015), 1-22, at 2.

⁶³ Amnon Raz-Krakotzkin, "Secularism, the Christian Ambivalence toward the Jews and the Notion of Exile," in *Secularism in Question*, eds. Ari Joskowitz and Ethan B. Katz (Philadelphia: University of Pennsylvania Press, 2015), 276-98, at 279.

secularism, an aspect that seems, so far, to not be sufficiently considered in this critical scholarship. Writing about early modern Europe, he argues that

part of what marks the Reformation discourse of secularism and religious freedom as Christian is precisely the use of Judaism as a foil or counterexample, in addition to the transformation of associated theological distinctions such as Paul's opposition between 'flesh' and 'spirit', or 'law' and 'grace'.⁶⁴

Approaching debates about secularism with historical awareness can contribute important insights into how ideas about Jews and Judaism have shaped concepts through which today's societies govern religious difference. Therefore, in order to understand present-day discussions about the meaning of secular law, the limits of religious freedom, or tolerance of religious difference, it is important to keep Christian-Jewish history in mind. Moreover, the question emerges of how those historical ideas about Jews as Other may be replicated in contemporary encounters with Jewish difference.

b. The Racialised Other: Racism, Antisemitism, and Whiteness

Race has played another central role in the discourse about Jewish difference. Jews belonged to the first racialised people and Antisemitism in its racial variant fixes Jewish difference as permanent and impossible to overcome. Legal studies on race and racialisation hence seem a suitable vantage point from which to examine the legal construction of Jewish difference. Jews have, however, remained largely absent from such critical legal approaches to race. Generally, there has been little conversation on the link between theories of race and racism and the question of Antisemitism, despite the fact "that one of the most consistent themes that runs through racist thinking and the values articulated by racist and fascist movements throughout this century has been anti-semitism."⁶⁵ The absence of Jews and Antisemitism is particularly apparent in the literature of critical race theory (CRT), which is understandable given its origins. Firmly grounded in a North American context, this theoretical work has yielded many important insights about the persistence of racism and the entanglement of law and race.⁶⁶ It aims, as Kimberlé Crenshaw and others describe it, at "uncovering how law was a

⁶⁴ 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, at 19.

⁶⁵ Back and Solomos, "Racism and Anti-Semitism," 191. However, see on W.E.B. DuBois' engagement with Antisemitism e.g. Harold Brackman, "'A Calamity Almost Beyond Comprehension': Nazi Anti-Semitism and the Holocaust in the Thought of W. E. B. Du Bois," *American Jewish History* 88, no. 1 (200): 53-93. (W.E.B. DuBois' thought has had a strong influence on critical race theory.)

⁶⁶ For an introduction to and an overview of critical race theory, see Delgado and Stefancic, *Critical Race Theory: An Introduction*. On the difficult reception of the theory in continental Europe see Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe*.

constitutive element of race itself: in other words, how law constructed race”.⁶⁷ For critical race theorists, racial power is not merely the result of biased legal decision-making, but “the sum total of the pervasive ways in which law shapes and is shaped by ‘race relations’ across the social plane.”⁶⁸ A number of insights are central to the theory’s approach to race, such as that race is the product of social construction, with law as one of its “key architects.”⁶⁹ This means that races are categories invented and manipulated by society and not the result of some inherent biological difference.⁷⁰ Moreover, critical race theorists stress the pervasiveness of racism, which sees racism not as some abhorrent behaviour of individuals but as a structural feature of discourses and institutions:

For race crits, racism is not only a matter of individual prejudice and everyday practice; rather race is deeply embedded in language, perceptions, and perhaps even ‘reason’ itself. In CRT’s ‘postmodern narratives,’ racism is an inescapable feature of western culture, and race is always already inscribed in the most innocent and neutral-seeming concepts.⁷¹

The theory’s approach to studying the relation between law and race holds many promising starting points for an analysis of the legal encounter with Jewish difference; for example, thinking about the constructed nature of Jewish difference in legal discourse, or the way that discourses about Jewish difference are embedded in society. Yet, critical race theorists have taken little account of Jews and Antisemitism beyond a historical nod to the racialisation of Jews, acknowledging that “in our history Irish, Jews, and Italians were considered non-white – that is, on par with African Americans.”⁷² Critical race theorists recognise that different groups are subject to differential racialisations at the hand of the white majority – not only in a historical perspective.⁷³ However, although the theory has become more diverse by including the perspectives of Asian Americans⁷⁴ and Latinas,⁷⁵ the colour binary still seems to be pervasive, pushing Jews outside scholarly attention in this field.⁷⁶ While some

⁶⁷ Kimberlé Crenshaw et al., “Introduction,” in *Critical Race Theory. The Key Writings That Formed the Movement*, eds. Kimberlé Crenshaw, et al. (New York: New Press, 1995), xiii-xxxii, at xxv.

⁶⁸ Ibid.

⁶⁹ Kitty Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law*, 2nd ed. (Chicago: University of Chicago Press, 2016), 185. See also López, *White by Law: The Legal Construction of Race*.

⁷⁰ Delgado and Stefancic, *Critical Race Theory: An Introduction*, 61.

⁷¹ Angela P. Harris, “The Jurisprudence of Reconstruction,” *California Law Review* 82 (1994): 741-85, at 743.

⁷² Delgado and Stefancic, *Critical Race Theory: An Introduction*, 165.

⁷³ Stefancic and Delgado acknowledge the risk of an oversimplifying black-white paradigm in critical race theory: “Binary thinking, which focuses on just two groups, usually whites and one other, can thus conceal the checkerboard of racial progress and retrenchment and hide the way dominant society often casts minority groups against one another to the detriment of each.” See *ibid.*, 154.

⁷⁴ See e.g. Robert S. Chang, “Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space,” *California Law Review* 81 (1993): 1241-323.

⁷⁵ See e.g. Francisco Valdes, “Latina/O Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities,” *La Raza Law Journal* 9 (1996): 1-31.

⁷⁶ For a critique of CRT’s ‘colourism’ see A. Javier Treviño, Michelle A. Harris, and Derron Wallace, “What’s So Critical About Critical Race Theory?,” *Contemporary Justice Review* 11, no. 1 (2008): 7-10.

scholars have even accused critical race theory of having an implicit anti-Jewish bias,⁷⁷ Edvard Rubin points out that in the United States, a society relatively free from religious conflict, Jews have indeed been able to pass as part of the white majority, which may make them “culpable as whites”.⁷⁸ The ‘Jewish blind spot’ may thus result from critical race scholars’ lack of interest in studying nuances within what they perceive to be the dominant group,⁷⁹ as Rubin suggests:

The theory makes few, if any, assertions about the relative success of different subgroups within the dominant majority. Its claim is only that this dominant group, defined on the basis of color, has oppressed and excluded racial minorities.⁸⁰

So, are Jews white? Rubin’s comment only hints at this complex question, to which critical race theory does not provide a definite answer. Based on skin colour, many Jews indeed enjoy white privilege vis-à-vis people of colour. Jews can usually pass as white as opposed to other ‘model minorities’ – minorities that have enjoyed upward mobility – such as Asian Americans.⁸¹ Yet, conceptualising Jews as white is disrupted by internal Jewish diversity. Not all Jews are white both based on skin colour or origin, if we conflate white with Europeanness. The Mizrahim, for example, hail from North Africa and the Middle East, and the Beta Israel from Ethiopia. As Cynthia Levine-Rasky emphasises, the relation between Jewishness and Whiteness is more complex, not only because of the diversity of Jews, but also because of the historical racialisation of Jews and their experience of Antisemitism.⁸²

The historical significance of Antisemitism provides the starting point for Stephen Feldman’s inquiry into US American state-church relations and the role of Christian antagonism towards Jews in its development. In his book *Please don’t wish me a Merry Christmas*, Feldman draws on some of critical race theory’s insights such as the idea of a ‘voice of colour’ to challenge the dominant story of

⁷⁷ Daniel A. Farber and Suzanna Sherry, “Is the Radical Critique of Merit Anti-Semitic?,” *California Law Review* 83 (1995): 853-84. The point of departure for this accusation was CRT’s criticism of ‘merit’, as for example formulated in Duncan Kennedy, “A Cultural Pluralist Case for Affirmative Action in Legal Academia,” *Duke Law Journal*, no. 4 (1990): 705-57. For Daniel Farber and Suzanna Sherry, CRT’s criticism of merit carried an implicit anti-Jewish and anti-Asian bias, given the notable economic and educational success of these previously oppressed groups. If their achievements could not be justified by genuine merit, then their success must be unfair or undeserved. The critical race theorists attack on merit, they argued, would paint Jews as “parasitic, unimaginative imitators” who take on the “cultural coloration” of society in order to benefit. Critical race theory, Farber and Sherry worry, could thus unintentionally perpetuate negative stereotypes about Jews and Asians. Yet, none of these characterisations are the words of critical race theorists but rather are the “emotionally laden terms” through which the two authors themselves interpret the criticism of merit, as pointed out by Edward L. Rubin, “Jews, Truth, and Critical Race Theory,” *Northwestern University Law Review* 93 (1999): 525-45, at 530.

⁷⁸ Rubin, “Jews, Truth, and Critical Race Theory,” 531. See also Karen Brodtkin, *How Jews Became White Folks and What That Says About Race in America* (New Brunswick: Rutgers University Press, 1998).

⁷⁹ This question has been taken up by scholars in the transdisciplinary field of whiteness studies, see e.g. Steve Garner, *Whiteness. An Introduction* (London; New York: Routledge, 2007).

⁸⁰ Rubin, “Jews, Truth, and Critical Race Theory,” 531.

⁸¹ See for a comparison of the two ‘model minorities’ Freedman, “Transgressions of a Model Minority.”

⁸² 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.

state/church separation in the US constitution.⁸³ This dominant story, he posits, is told from the perspective of the Christian majority. He offers his own critical counter-narrative of the constitutional principle of state/church separation from the “viewpoint of an American Jew”,⁸⁴ which enables him to trace how this principle derives from and reinforces the “Christian domination of American society and culture.”⁸⁵ Concepts such as ‘private’ or ‘secular’ reveal themselves, through Feldman’s Jewish lens, as deeply rooted in a Christian worldview and oppressive of other religions, such as Judaism.⁸⁶ His argument thus aligns with the critics of secularism more generally, who stress the entanglement of dominant understandings of secularism with its Christian historical context. Given the deep affinity of the United States with Christianity, Feldman argues that

the structure of American society constantly produces and reproduces Christian hegemonic domination, regardless of governmental involvement or non-involvement in religion. In other words, constitutional discourse furnishes a façade of governmental neutrality and individual religious freedom, but behind that legitimating façade, Christian cultural imperialism pulses through the social body of America.⁸⁷

The most pervasive manifestation of this Christian imperialism is, in Feldman’s argument, unconscious Antisemitism. Feldman understands Antisemitism as a product of acculturation and structural relations, which operates at an unconscious level. He thereby echoes critical race theory’s approach to racism in the society of the United States by describing Antisemitism as embedded in structures, language, and institutions that perpetuate ‘Christian privilege’. Consequently, Christians participate daily in cultural imperialism by “assuming that certain inherently Christian symbols and interpretations of social reality represent the normal, the neutral, and the natural.”⁸⁸ The most common form that Antisemitism takes nowadays, according to Feldman, is the denial of difference. The denial of difference means that Jews have to acknowledge the supposed secularity and neutrality of Christian mainstream culture, which requires them to acculturate to the dominant culture.⁸⁹ Feldman’s study is instructive, because it ties together arguments from critical race theory and critical

⁸³ Stephen M. Feldman, “A Christian America and the Separation of Church and State,” in *Law and Religion: A Critical Anthology*, ed. Stephen M. Feldman (New York: New York University Press, 2000), 261-77; 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). Mark Graber describes Feldman’s work as an example of critical Jewish studies, which he calls “a spin-off of critical race and feminist studies.” See Mark A. Graber, “Jewish Voices and Religious Freedom. A Jewish Critique of Critical Jewish Thinking,” in *Law and Religion: A Critical Anthology*, ed. Stephen M. Feldman (New York: New York University Press, 2000), 278-95, at 278.

⁸⁴ For another approach stressing a religious minority perspective on law, see Samuel J. Levine, “Toward a Religious Minority Voice: A Look at Free Exercise Law through a Religious Minority Perspective,” *William & Mary Bill of Rights Journal* 5 (1996): 153-84.

⁸⁵ Feldman, *Please Don’t Wish Me a Merry Christmas*, 8-9.

⁸⁶ *Ibid.*, 262.

⁸⁷ *Ibid.*, 272.

⁸⁸ *Ibid.*, 266.

⁸⁹ *Ibid.*, 260.

studies of secularism, showing how race, religion, and Otherness overlap and work together. Although he does not frame his argument in terms of whiteness/non-whiteness, Feldman's analysis challenges the assumption that Jews are completely equal and fully included members of the dominant group. Religion may thus stratify whiteness in subtle ways, reminding us of the internal hierarchies within the category of white.⁹⁰

However, not everyone agrees with the conclusion that the United States is an Antisemitically-structured society. Mark Graber, for example, criticises Feldman's overt focus on prejudice and domination, instead highlighting the contributions that an inquiry into the particularities of the Jewish experience could make to critical theories. He warns that a focus on the alleged persistence of prejudice and oppression fails to capture the particularities of the experience of a minority that has been disproportionately successful in American society.⁹¹ For Graber, there is a difference between what he calls insensitive inconveniences experienced by religious minority groups, such as Jews, and the oppression and blatant discrimination of people of colour and, historically, the Jews.⁹² He warns against telling a story of a static Antisemitism, because "modern forms of antisemitism are not more subtle means of achieving the historic goals of antisemitism."⁹³ His concerns allude to the necessity of an alternative terminology for these phenomena, which takes account of "insensitive inconveniences", yet without linking them uncritically to the centuries of violent Jewish persecution. Overstretching Antisemitism may take from the term its analytical edge, a worry Graber shares with critical scholars in the field of Jewish studies.⁹⁴

An approach that addresses many of Graber's concerns, while acknowledging both the persistence of Jewish racialisation and its historical variations, is Didi Herman's and Davina Cooper's work on representations of Jews, Jewishness, and Judaism.⁹⁵ Although they do not locate their work within critical race theory, Herman and Cooper place the concept of racialisation at the heart of their analyses of the legal encounter with Jewishness. In particular, their work examines the construction of Jewish

⁹⁰ Steve Garner speaks of degrees of belonging, see Steve Garner, "The Uses of Whiteness: What Sociologists Working on Europe Can Draw from US Research on Whiteness," *Sociology* 40, no. 2 (2006): 257-75, at 268.

⁹¹ Graber, "Jewish Voices and Religious Freedom. A Jewish Critique of Critical Jewish Thinking," 279.

⁹² Graber is rather blunt in his criticism of Feldman, whom he accuses of over-relying on the tools and rhetoric of critical race and feminist theory. Graber argues that "put far too polemically, he [Feldman] and other critical legal scholars are more capable of discerning the subtle similarities than describing the obvious differences between a culture that celebrates holidays by accusing Jews of ritual murder and a culture that celebrates holidays by wishing Jews 'a merry Christmas.'" (ibid., 284.).

⁹³ Ibid., 286.

⁹⁴ See e.g. Tony Kushner, "Anti-Semitism in Britain: Continuity and the Absence of a Resurgence?," *Ethnic and Racial Studies* 36, no. 3 (2013): 434-49; Bryan Cheyette, "English Anti-Semitism: A Counter-Narrative," *Textual Practice* 25, no. 1 (2011): 15-32. I discuss this literature and its approach in the next section.

⁹⁵ Herman, *An Unfortunate Coincidence*; Herman, "'The Wandering Jew Has No Nation';" Herman, "'An Unfortunate Coincidence': Jews and Jewishness in Twentieth-Century English Judicial Discourse;" Cooper and Herman, "Jews and Other Uncertainties: Race, Faith and English Law."

identity and difference through legal discourse.⁹⁶ By critically analysing English court decisions involving Jews, they observe that “regardless of whether or not Jews are actually defined as race, their depiction as a people joined by culture, ancestry and blood constructs them according to a racialized discourse of difference.”⁹⁷ Moreover, Herman’s and Cooper’s works confirm that the racialisation of Jewishness is not simply a phenomenon of the past. As Herman concludes in her study of twentieth century English case law, there is a coherent thread running through the legal discourse – that “the character of ‘the Jew’ remains one alien to ‘the English’.”⁹⁸

Both Cooper and Herman highlight the peculiarities of Jewish racialisation. Herman in particular notes that this racialisation has taken a distinct trajectory not adequately captured by dominant scholarly theorising of difference and alterity exclusively based on post-colonialism or through the lens of nation/empire, into which internal Others, such as Jews, cannot be easily integrated.⁹⁹ In England, the historical presence of Jews and the Christian antagonism to them shaped this trajectory in significant ways. Jewish racialisation is, for example, often intertwined with an orientalisating gaze and discussed in an implicit contrast to Christianity, whereby Jewishness is depicted as inferior to Christianity.¹⁰⁰ This speaks to the importance of ‘the Jew’ in the Orientalist imagination.¹⁰¹ In one of her discussions of contemporary English case law, Herman shows how judges interpreted Jewish law as archaic and discriminatory, whereas they presented the secular law of the state, whose majority is Christian, as modern, just, and protective of the individual.¹⁰² Judaism and Jewish law are thus placed on a civilisational continuum at a lower step than Christianity and the law of the Christian majority society. Although scholars usually tend to treat these categories as analytically distinct, Herman and Cooper’s work illustrates how discourses of race, religion, and nation intersect with and shape each other. Moreover, by describing law as racialised, they avoid labelling it as Christian-biased or Antisemitic. Such an approach avoids the assumption that all legal encounters with Jewishness inevitably take a discriminatory or hostile form, as for example in the work of Stephen Feldman.

⁹⁶ Legal scholars’ concern with discourse and representation has been critiqued by critical race theorists, such as Richard Delgado who thinks that this “idealist approach” focusses too much on the power of narratives and images at the expense of “power, history, and similar material determinants of minority-group fortunes.” See Richard Delgado, “Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race,” *Texas Law Review* 82 (2003): 121-52, at 122.

⁹⁷ Cooper and Herman, “Jews and Other Uncertainties: Race, Faith and English Law,” 340.

⁹⁸ Herman, ““An Unfortunate Coincidence”: Jews and Jewishness in Twentieth-Century English Judicial Discourse,” 300.

⁹⁹ *Ibid.*, 280.

¹⁰⁰ See e. g. Herman’s analysis of Orientalist arguments in the UK Supreme Court decision *R v. Governing Body of JFS* [2010] IRLR 136 concerning the admission policy of a Jewish school in England: Herman, *An Unfortunate Coincidence*, 163-65.

¹⁰¹ Ivan Davidson Kalmar and Derek Jonathan Penslar, *Orientalism and the Jews* (Hanover; London: Brandeis University Press, 2005).

¹⁰² Herman, *An Unfortunate Coincidence*, 163-70.

Arguing for historical sensitivity, Herman and Cooper challenge the assumption “that *all* constructions of Judaism in English are necessarily negative and derogatory.”¹⁰³

II. Approaching Jewish Difference in Legal Discourse

a. Research Question

The critical literature on law, religion, and race exposes law’s complicity in the construction and regulation of racial and religious difference, but it has paid little attention to the Jewish experience. While the studies by Didi Herman and Davina Cooper are a notable exception, in other work, Jews have often either been largely absent from analysis, acknowledged only as historical examples, or uncritically lumped together with the dominant group. On the other end of the spectrum, such as in the approach that Feldman takes, the relation between Jewish identity and law is reduced to Antisemitism, which, in turn, leaves little space for historical specificity. In this thesis, I aim to expand on this existing scholarship, while acknowledging both its contributions and limitations. Drawing on literature in the humanities, in history, literary, and Jewish studies and following the work of Davina Cooper and Didi Herman, I take an approach that is attentive to the particular nature of how Jewish difference is constructed.

My research question is this: How are Jews constructed in legal conflicts concerning practices that mark them as distinct? I approach this question through exploring, on the one hand, how legal discourse constructs Jews as different. What are the images, narratives, and rhetoric through which Jews are represented as different? Since different means always different from a norm, this is also an inquiry into the imagined ‘we’, from whom Jews are distinguished. Rather than approaching law as a set of abstract, neutral, and objective rules, I am interested in the identitarian dynamics running through legal encounters with those who are perceived as different. This thesis hereby builds on the insight of scholars such as David Nirenberg who highlight the centrality of the figure of ‘the Jew’ for the Western imagination in which Jews constituted the Other.¹⁰⁴ Moreover, this thesis also explores the tension around Jewish difference, which oscillates today between inclusion and exclusion and is evidenced by questions about Jewish whiteness or their belonging to the religious-cultural

¹⁰³ Cooper and Herman, “Jews and Other Uncertainties: Race, Faith and English Law,” 341. Emphasis in original.

¹⁰⁴ David Nirenberg, *Anti-Judaism: The Western Tradition* (New York; London: WW Norton, 2013). On Western thought and ideas about Jews, Jewishness, and Judaism see also Sander L. Gilman, *The Jew’s Body* (New York; London: Routledge, 1991); James Shapiro, *Shakespeare and the Jews* (New York: Columbia University Press, 2016). On perceptions of Jewish women in British culture see Nadia Valman, *The Jewess in Nineteenth-Century British Literary Culture* (Cambridge: Cambridge University Press, 2007).

mainstream. This is an inquiry into how we conceptualise Jewish difference beyond stark binaries. Such a conception requires sensitivity to the dynamic, malleable, and complex ways in which societies create hierarchies of those it deems different. The aim is here to understand the particular positions of Jews in this hierarchy and the implications of their status, without resorting to assumptions about stable privilege or outright hostility.

b. Jewish Difference, Semitic Discourse, and Ambivalence

My focus in this thesis is on the construction of *Jewish difference*. However, I do not approach Jewish difference through the lens of racialisation, as has been the predominant framework in the relevant literature to date.¹⁰⁵ Racialisation shifts too much of our attention away from the specifics of Jewish religiosity, potentially neglecting how the historical encounter between Christianity and Judaism resonates with contemporary notions of secularism in predominantly Christian societies.¹⁰⁶ This is a problem similar to the one encountered by Mayanthi Fernando in her study of Muslims in France, *The Republic Unsettled*. Fernando argues for a framework of difference that privileges neither race nor religion, cautioning that:

Using a framework that flattens race, religion, and culture or that considers religion epiphenomenal to race and class often leads us to misconstrue the specific nature of certain forms of public religiosity and to misunderstand both the secular republican state's exclusions and the kind of counterclaims that Islamic revivalists make.¹⁰⁷

Attentive to the continuities and discontinuities of colonial as well as postcolonial constructions of religion and race, this approach allows Fernando to trace “how racialization and secularization intersect to produce contemporary forms of Muslim alterity.”¹⁰⁸ As the literature shows, the Jewish Other is also not produced by one discourse alone, even though one may predominate at a certain time. Historically, various discourses of difference, among them race and religion, constantly and frequently intersect, depending on the particular context, thereby upsetting any narrative which tries to explain Jewish difference through just one lens. “Jewishness”, Daniel Itzkovitz observes,

¹⁰⁵ Racialisation is the approach used by Herman and Cooper. See the discussion of their work in the section above.

¹⁰⁶ Note, when I describe a society as predominantly Christian I do not mean an actual level of observance. Rather, I acknowledge the historical legacy of Christianity which has shaped European societies and societies of European descent, such as Australia. Moreover, by using the term Christianity I do not aim to essentialise Christianity or to ignore its conflicted history and internal rifts. Nonetheless, as Didi Herman notes, “it is possible to acknowledge Christianity’s heterogeneity, while at the same time highlighting its dominating, imperial, cross-cultural, and transnational dimensions”. See Herman, *An Unfortunate Coincidence*, 19.

¹⁰⁷ Fernando, *The Republic Unsettled*, 16. For a similar argument see Schirin Amir-Moazami, “Investigating the Secular Body: The Politics of the Male Circumcision Debate in Germany,” *ReOrient* 1, no. 2 (2016): 147-70, at 149-50.

¹⁰⁸ Fernando, *The Republic Unsettled*, 18.

“fundamentally troubles the boundaries of numerous, ostensibly discreet, categories of identity (so every claim that the Jews are a race, for instance, is matched by claims that ‘religion,’ or ‘nation,’ best describes what Jews ‘are’)”.¹⁰⁹ Jewish history illustrates that “discourses of religion, race and rights are interrelated, dynamic and co-constitutive of each other.”¹¹⁰

A suitable lens through which to connect these various discourses of alterity is the idea of *semitic discourse*, a concept which I borrow from literary scholar Bryan Cheyette. A reading based on attention to semitic discourse “views the figure of ‘the Jew’ through the lens of certain dominant discourses – whether they be nation, religion or race.”¹¹¹ The work that semitic discourse does is to “define ‘the self’ in relation to a semitic ‘other’”, which gives these narratives the power “to segregate and exclude in the name of a higher ‘culture’.”¹¹² Moreover, Cheyette emphasises the “lack of a fixed meaning in the constructions of ‘semitic’ difference”¹¹³, which in turn suggests an openness to fluid constructions of difference. Semitic discourse has the advantage of being attentive and flexible enough to approach Jewish difference within disparate contexts, such as Germany and Australia, two societies with their own distinct trajectory of constructing difference.

A focus on semitic discourses does not limit the analysis to Antisemitism, thereby leaving open the possibility that representations of Jews and Judaism may take a form which is not hostile or outright discriminatory. Narrowing the focus to Antisemitism as an analytical concept may in fact conceal more than reveal. As Bryan Cheyette points out, traditional accounts of Antisemitism tend to “stress mainly hostile and ‘persecutory’ images and violent acts against Jews”, as Feldman’s analysis shows.¹¹⁴ What I find when analysing my two case studies is far more subtle and less extreme: a persistent ignorance, an uneasiness, a lack of understanding and reflection, a historical amnesia, and an aversion with regard to Jewish difference.¹¹⁵ This is not to say that the debates about male circumcision or the *eruv* were free of antisemitic language. They were not. Yet, such language represented just one end of a more complex spectrum of attitudes.

¹⁰⁹ Daniel Itzkovitz, “Race and Jews in America: An Introduction,” *Shofar: An Interdisciplinary Journal of Jewish Studies* 23, no. 4 (2005): 1-8, at 2.

¹¹⁰ Darian-Smith, *Religion, Race, Rights*, 3.

¹¹¹ Bryan Cheyette and Nadia Valman, “Introduction: Liberalism and Anti-Semitism,” *Jewish Culture and History* 6, no. 1 (2003): 1-26, at 5.

¹¹² Bryan Cheyette, *Constructions of ‘the Jew’ in English Literature and Society. Racial Representations 1875-1945* (Cambridge: Cambridge University Press, 1995), 9.

¹¹³ *Ibid.*, 8.

¹¹⁴ Cheyette, “English Anti-Semitism: A Counter-Narrative,” 24.

¹¹⁵ This resonates with Didi Herman analysis of English judicial discourse in which she observes “not ‘hatred’, but *distaste*, not ‘malice’, but *unease* and *confusion*.” Herman, *An Unfortunate Coincidence*, 25. Emphasis in original.

Critical Jewish studies scholars, such as Bryan Cheyette, propose that the term *ambivalence* may be better suited to capture this range of attitudes towards Jewish difference.¹¹⁶ “Ambivalence towards Jewish particularity, rather than unequivocal hostility,” David Cesarani points out, “is probably a more useful category with which to explore such a spectrum of attitudes.”¹¹⁷ His suggestion is similar to Zygmunt Bauman’s proposed term ‘Allosemitism’. For Bauman, Allosemitism – a term originally coined by the literary historian Artur Sandauer and derived from the Greek word ‘allus’ for ‘other’ – refers to a “radically ambivalent attitude” towards Jews and Judaism, all along the spectrum from Antisemitism to Philosemitism, both of which single out Jewish people for special treatment.¹¹⁸ Allosemitism describes the process of “setting the Jews apart as people radically different from all the others, needing separate concepts to describe and comprehend them and special treatment in all or most social intercourse”.¹¹⁹ Antisemitism is thus just one, albeit extremely hostile, variation of this general sentiment which conceives of the Jew as Other. Ambivalence, as Tony Kushner notes, allows us to better understand the complex and at times apparently contradictory attitudes towards Jews, which could take the “form of praising westernized, assimilated Jews and rejecting those who were deemed foreign”.¹²⁰ Thinking in terms of ambivalence sensitises us to the nuances and multiplicity of attitudes that may surface in encounters with Jewish identity and allows us to understand how Jews are represented “as both inherently Other or as potential citizens”.¹²¹ My interest is thus not whether the legal discourse is Antisemitic, but rather how it produces images of Jews as different from an imagined ‘we’ through semitic discourse, bringing to the fore ambivalent perceptions of Jews, Jewishness, and Judaism.

III. A Cultural Study of Law

My approach in this thesis is a cultural study of law.¹²² A cultural study of law is particularly attuned to investigating the link between law and identity. As Sarat, Anderson, and Frank write, a cultural

¹¹⁶ Cheyette, “English Anti-Semitism: A Counter-Narrative.” Didi Herman also draws on the notion of ambivalence to describe the relationship between English culture and Jewishness, see Herman, *An Unfortunate Coincidence*, 25.

¹¹⁷ David Cesarani, “Comment on Reinhard Rürup, Jewish Emancipation in Britain and Germany,” in *Two Nations: British and German Jews in Comparative Perspective*, eds. Michael Brenner, Rainer Liedtke, and David Rechter, *Schriftenreihe Wissenschaftlicher Abhandlungen des Leo Baeck Instituts* (Tübingen: Mohr Siebeck, 1999), 63-66, at 66.

¹¹⁸ Zygmunt Bauman, “Allosemitism: Premodern, Modern, Postmodern,” in *Modernity, Culture, and ‘the Jew’*, eds. Bryan Cheyette and Laura Marcus (Cambridge: Polity Press, 1998), 143-56.

¹¹⁹ *Ibid.*, 143.

¹²⁰ Kushner, “Anti-Semitism in Britain: Continuity and the Absence of a Resurgence?,” 441.

¹²¹ Cheyette, “English Anti-Semitism: A Counter-Narrative,” 22.

¹²² For approaches to a cultural study of law see e. g. Naomi Mezey, “Mapping a Cultural Studies of Law,” in *The Handbook of Law and Society*, eds. Austin Sarat and Patricia Ewick (Wiley, 2015), 37-55; Paul W. Kahn, “Freedom, Autonomy, and the Cultural Study of Law,” *Yale Journal of Law & the Humanities* 13, no. 1 (2001): 141-71; Naomi Mezey, “Law as Culture,” *Yale Journal of Law & the Humanities* 13, no. 1 (2001): 35-67; Austin

approach to law is apt to “unearth the privileged identity categories that comprise law’s taken-for-granted world”.¹²³ Although the term ‘cultural studies of law’ covers a rather diverse array of scholarly approaches, these inquiries are connected by their shared understanding of the relation between law and culture. This understanding departs from a traditional notion of law and culture as two separated realms. Instead, as Naomi Mezey summarises, a cultural study of law considers the relation between law and culture as

dynamic, interactive, and dialectical – law is both a producer of culture and an object of culture. Put generally, law shapes individual and group identity, social practices as well as the meaning of cultural symbols, but all these things (culture in its myriad manifestations) also shape law by changing what is socially desirable, politically feasible, legally legitimate.¹²⁴

From the perspective of cultural studies of law, to use Clifford Geertz’ phrase, law is “one way of imagining the real.”¹²⁵ One trajectory that a cultural analysis of law has taken is to examine the narratives, representations, and images that underlie legal discourse, public perception, and scholarly writings and through which identity and difference are constructed.¹²⁶ Such a focus on narratives is different from a doctrinal inquiry, as it requires looking at legal discourse from a stance outside law and its personnel.¹²⁷ This has a number of methodological implications, which I set out below.

a. Narratives, Images, Representations, and ‘the Jew’

Exploring how the law constructs Jewish difference through semitic discourses stresses the constitutive role of law. Echoing the argument of literary and Jewish studies scholarship,¹²⁸ Davina Cooper and Didi Herman argue that legal discourse “does not encounter a fully formed Judaism that it simply reflects but rather it discursively produces its own Jews”.¹²⁹ In their analysis, they draw on

Sarat and Jonathan Simon, “Cultural Studies & the Law: Beyond Legal Realism?,” *Yale Journal of Law & the Humanities* 13, no. 1 (2001): 3-32; Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago; London: Chicago University Press, 1999). Eve Darian-Smith uses a cultural study of law to write a different history of race, religion, and rights, see Darian-Smith, *Religion, Race, Rights*.

¹²³ Austin Sarat, Matthew Anderson, and Cathrine O. Frank, “Introduction: On the Origins and Prospects of the Humanistic Study of Law,” in *Law and the Humanities: An Introduction*, eds. Austin Sarat, Cathrine O. Frank, and Matthew Anderson (Cambridge: Cambridge University Press, 2009), 1-46, at 13.

¹²⁴ Mezey, “Law as Culture,” 46.

¹²⁵ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 184.

¹²⁶ See e.g. Leti Volpp, “Blaming Culture for Bad Behavior,” *Yale Journal of Law & the Humanities* 12 (2000): 89-116; Carol Weisbrod, *Emblems of Pluralism: Cultural Differences and the State* (Princeton: Princeton University Press, 2002); Cheryl I. Harris, “Whiteness as Property,” *Harvard Law Review* 106, no. 8 (1993): 1707-91.

¹²⁷ Weisbrod, *Emblems of Pluralism: Cultural Differences and the State*, 2.

¹²⁸ See the discussion of the work of Bryan Cheyette and others above.

¹²⁹ Cooper and Herman, “Jews and Other Uncertainties: Race, Faith and English Law,” 341.

the work of feminist scholar Carol Smart, who investigated how law produces gendered differences instead of responding to preconfigured differences. Smart's argument is that "Woman is a gendered subject position which legal discourse brings into being."¹³⁰ It would, however, be unwise to overstate the power of the law to create social realities.¹³¹ While law may discursively limit the way in which Jews can speak about their own practices or shape the way they relate their identity to the available categories of liberal law, it does, of course, not replace the way Jews understand themselves. What legal discourse can produce is an image of 'the Jew'. As Sander Gilman, whose extensive work examines the myriad images of 'the Jew' in social and cultural discourse, notes: we are "not speaking about 'realities' but about their representations and the reflection of these representations in the world of those who stereotype as well as those who are stereotyped."¹³²

However, 'the law' is not a monolithic block that produces a unified set of images and narratives about 'the Jew'. Rather, I understand legal discourse as inherently plural and legal meaning-making as an activity not confined to the high priests of the legal profession. By describing law as plural, I mean that legal discourse is an assemblage of many, sometimes competing, narratives. With this, I do not refer to legal pluralism in its classic conception. While there are many definition of legal pluralism, in essence, a legal pluralist approach decentralises state law and acknowledges the co-existence of two or more legal systems in the same social field.¹³³ A dominant perspective in the field conceptualises the relation between these different forms of law as a relation between different legal orders.¹³⁴ From this vantage point, the debates about male circumcision and the eruv could be interpreted as conflicts between two normative orders – the law of the state and Jewish law (*halakha*). An analysis would then focus on how the two systems relate to one another and if and how they can co-exist.¹³⁵ However, participants – Jewish and non-Jewish alike – in the debates that I analyse disagreed about *what* the law meant and *how* it should or should not accommodate Jewish difference. Jews did not merely

¹³⁰ Carol Smart, "The Woman of Legal Discourse," *Social & Legal Studies* 1, no. 1 (1992): 29-44, at 34.

¹³¹ Cooper and Herman, "Jews and Other Uncertainties: Race, Faith and English Law," 341. See also Rita Kesselring, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa* (Redwood City: Stanford University Press, 2016), 7.

¹³² Gilman, *The Jew's Body*, 1. See also Sander L. Gilman, *Jewish Frontiers: Essays on Bodies, Histories and Identities* (New York; Hampshire: Palgrave Macmillan, 2005); Sander L. Gilman, *Multiculturalism and the Jews* (London; New York: Taylor & Francis, 2006); Sander L. Gilman, *Jewish Self-Hatred: Antisemitism and the Hidden Language of the Jews* (Baltimore: Johns Hopkins University Press, 1986).

¹³³ Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869-96, at 870. For a discussion of different approaches to legal pluralism and the scholarly debates about the concept, see Miranda Forsyth, *A Bird That Flies with Two Wings: The Custom and State Justice Systems in Vanuatu* (Canberra: ANU E Press, 2009), chapter 2.

¹³⁴ See e.g. Sally Falk Moore's concept of the semi-autonomous field in Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973): 719-46. For such an analysis of the relation between minority legal orders and state law see Maleiha Malik, "Minorities and Law: Past and Present," *Current Legal Problems* 67, no. 1 (2014): 67-98.

¹³⁵ See e.g. Fournier, "Halacha, the 'Jewish State' and the Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders;" Stone, "Religion and State: Models of Separation from within Jewish Law."

invoke Jewish law, but also engaged in a discussion of state law, as much as non-Jews offered their own interpretation of both Jewish and state law. In short, they disagreed about the interpretation of laws.

In order to capture the competing visions of the law, I draw on the work of Robert Cover, who highlights the competing existence of multiple narratives. In his seminal essay *Nomos and Narrative*, which has inspired much work in the cultural studies of law, Cover argues that, even though we might share the same laws, we do not necessarily inhabit the same normative world, as we may differ in our understandings of what the law means. This normative world, the *nomos*, is a culture that shapes how we give meaning to law through narratives.

We inhabit a *nomos* – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.¹³⁶

For Cover, law and narrative cannot be separated; law is essentially located in and dependent on discourse from which it derives its meaning, a process which he terms *jurisgenesis*. Narratives are a vision of our normative world and they create the link between the law and the way we construct social reality.¹³⁷ The creation of legal meaning is not the exclusive domain of the state or legal professionals.¹³⁸ Rather it is social and collective activity occurring as much at the level of communities as in the chambers of the court. As Cover notes in his example, “the Amish, the Shakers, and the judge are all engaged in the task of constitutional understanding.”¹³⁹ The existence of different interpretative communities makes law inherently plural. Although their stories and their power to enforce these stories are not the same – Cover calls courts *jurispathic* given their power to enforce one particular normative vision¹⁴⁰ – they all create narratives which can potentially shape the shared *nomos* or become a source for resistance to and change of dominant narratives.

¹³⁶ Robert M. Cover, “The Supreme Court 1982 Term. Foreword: Nomos and Narrative,” *Harvard Law Review* 97, no. 4 (1983): 1-68, at 4-5. Emphasis in original.

¹³⁷ *Ibid.*, 10.

¹³⁸ *Ibid.*, 11.

¹³⁹ *Ibid.*, 33.

¹⁴⁰ *Ibid.*, 40.

Cover's vision of law resonates with other subject-centred approaches to law, such as critical legal pluralism, which draws our attention to the narrating selves of legal subjects.¹⁴¹ Critical legal pluralism, as Martha-Marie Kleinhans and Roderick Macdonald conceive it, does not focus on how legal orders see legal subjects, but instead asks: "What do legal subjects see in any given normative order?"¹⁴² Such an approach foregrounds the law-inventing capacities of legal subjects and locates the law and its interpretation within all members of society.¹⁴³ Plurality, then, is the result of a plurality of legal interpretations and the coexistence of many different, often competing narratives about the normative world. Thus, when I speak of the narratives and images of legal discourse, I focus on just one strand of legal meaning making which constructed Jews as different. In each case, several narratives came together and negotiated the nature of Jewish difference and the belonging of Jews. In each case, many participants spoke out in support of the practices in question and some opponents did not engage in the othering discourse. The construction of Jews as different, then, forms just one contested, yet significant, narrative about the shared normative world and the tenuous inbetween place it affords to Jewish difference – and it is this narrative that I am interested in.

b. A Note on Case Selection and Method

Two cases are at the heart of this thesis – the German debate regarding the legality of male circumcision and an Australian dispute over the construction of an eruv in Sydney. My aim, however, is not to compare these two cases, but to investigate them as two instances of the legal construction of Jewish difference. Both practices concern the outward manifestation of Jewish identity and have been understood as emblematic of Jewish cultural practice, of Jewish difference.¹⁴⁴ Both the body and the public space are classic sites for the production and regulation of identity and difference.¹⁴⁵

¹⁴¹ Margaret Davies emphasises that "Law does not *do* or *say* anything, and it is not even an identifiable thing – all of these are shorthands for the actions of human beings enmeshed in material contexts who use an imaginary of law to relate and engage." Emphasis in original. See Margaret Davies, *Law Unlimited. Materialism, Pluralism, and Legal Theory* (Milton Park; New York: Routledge, 2017), 30.

¹⁴² Martha-Marie Kleinhans and Roderick A. Macdonald, "What Is a Critical Legal Pluralism?," *Canadian Journal of Law and Society* 12, no. 2 (1997): 25-46, at 46.

¹⁴³ In their introductory paper to critical legal pluralism, Kleinhans and Macdonald write: "By highlighting the dynamics of reciprocal construction, a *critical* legal pluralism legitimates interpretations of law apart from those endorsed by legal officials – whether these be institutional office-holders such as judges within a political State, or whether they be empirically identified community spokespersons, or whether they be the scholastic investigators themselves. The law is within all members of any society that purports to recognize them as legal subjects." Ibid. Emphasis in original.

¹⁴⁴ The observance of circumcision, of Shabbat (to which the practice of the eruv is linked), and of *kashrut*, the dietary laws, have been thought of by both Jews and non-Jews as signifying the particularity of Jews. Obviously, the practice of kosher slaughter, *shechita*, would have been another suitable case study as its discussion shares many discursive similarities with the two cases selected here. However, I have limited this research to two case studies in order to keep the project feasible as a thesis.

¹⁴⁵ See e.g. Doreen Massey, *Space, Place and Gender* (Cambridge; Malden: Polity Press, 2013); Akhil Gupta and James Ferguson, "Beyond 'Culture': Space, Identity, and the Politics of Difference," *Cultural Anthropology* 7, no. 1 (1992): 6-23; Benedict R. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*

Moreover, as the discipline of anthropology has stressed, rituals and their discussion in society provide insights into how people “make and remake” their world.¹⁴⁶

In each case, I trace how participants in the debate responded to this display of Jewish identity and how they constructed these practices as signs of Jewish differences, which they sought to contain and manage through law. There are some methodological differences between how I approach these two cases, which result from their particular spatiolegal context. The controversy in Germany regarding the legality of male circumcision was a national debate. The major legal events were the initial court decision declaring male circumcision a criminal assault and the subsequent drafting of a new law through the German parliament. The period between these two events, as well as the time after the drafting of the new law, saw not only an intense public debate unfold in newspapers, online spaces, and TV talk shows, but also a proliferation of legal and medicolegal commentary on the subject, which investigated the doctrinal questions of male circumcision in the various relevant areas of German law. In my reading of this case, I am interested in the way in which these powerful social discourses responded to Jewish difference. The initial decision itself is not expansive enough to deduce the way the Court thought about these issues. Given this, my reading focusses in particular on the academic debate around the controversy, as legal scholars continue to play an important role in the systematisation of German legal doctrine.¹⁴⁷ However, I also include statements made by parliamentarians, medical professionals, lobby groups, and the national ethics council, whose views had authoritative weight in the debate and shaped the way the practice was perceived and described legally. A handful of interviews with mohalim, rabbis, politicians, and representatives of Jewish political organisations provided me with background information and gave me some insight into the complex reality of Jewish male circumcision in Germany.¹⁴⁸ Thus, given the national scale of the debate, my focus here is more on the traditional site of legal meaning-creation.

In my second case study, the eruv dispute, I move to the level of the local, where legal discourse and legal meaning-making takes a different form. Unlike in Germany, the Australian case was not accompanied by any major elaboration on legal doctrine. The eruv was very much a moment of law in action where neighbours wrestled on the terrain of planning law with competing visions about space, community, and difference. My focus is here on how Councillors and ordinary neighbours constructed Jewish difference through reference to legal categories, such as planning regulations, the Australian Constitution, and the country’s multicultural policy. Given the democratic nature of the

(London; New York: Verso, 1991); Zilla R. Eisenstein, *The Female Body and the Law* (Berkeley; Los Angeles; London: University of California Press, 1988).

¹⁴⁶ Catherine Bell, *Ritual Theory, Ritual Practice* (Oxford: Oxford University Press, 2009), 3.

¹⁴⁷ See for a similar approach to the scholarly construction of female genital cutting Kate Green and Hilary Lim, “What Is This Thing About Female Circumcision? Legal Education and Human Rights,” *Social & Legal Studies* 7, no. 3 (1998): 365-87.

¹⁴⁸ Even though many interviewees consented to being attributed with their names, I decided to omit all names. The ANU Human Research Ethics Committee approved this research in July 2016 (Protocol 2016/040).

local planning regime, the views of citizens fed into the planning process through public consultations, thereby giving normative weight to these visions of space, community, and difference. In my reading of the eruv case, I consider submissions to the local Council, a survey conducted by the Council,¹⁴⁹ reporting in local and national media, and letters sent to the editors of those newspapers.¹⁵⁰ I also draw on documents prepared by the Council, the planning authority responsible for the legal fate of the eruv. In addition, as in the German case, I conducted a small number of interviews with politicians as well as with rabbis and representatives of Jewish organisations, to clarify facts and to better understand the halakhic background of the eruv.¹⁵¹

IV. Main Arguments and Thesis Structure

a. Main Arguments

In this thesis, I advance three interrelated arguments.

Argument One: Despite persistent claims about its neutrality and objectivity, the law is not immune to semiotic discourses. Ambivalence towards Jews, Jewishness, and Judaism continues to resonate within certain legal encounters. Law provides the language, tools, and arguments to construct Jews as different, as not equals, as not belonging to the dominant majority. This othering has a distinct Christian normative flavour, echoing the concerns of critical secularism studies about the pervasiveness and power of Christian sensibilities in the legal encounter with the religious Other.

¹⁴⁹ The Council published the survey results on its website in 2016, see Ku-ring-Gai Council, Agenda for Ordinary Meeting, 8 November 2016, at GB.6, Appendix No. 2 (Survey Information Send to Residents) and Appendix No. 3 (Eruv Responses Submissions via Returned Survey Form), available from https://eservices.kmc.nsw.gov.au/Infocouncil.Web/Open/2016/11/OMC_08112016_AGN_AT_WEB.htm.

¹⁵⁰ I focus on submissions sent to the *Letters to the editor* section of the local newspaper. Although scholars have long praised this section as “a key institution of the public sphere,” (see Karin Wahl Jorgensen, “Understanding the Conditions for Public Discourse: Four Rules for Selecting Letters to the Editor,” *Journalism Studies* 3, no. 1 (2002): 69-81, at 69.), it is unclear to which extent these letters can in fact be considered as a barometer of public opinion, given that the demographic and socio-economic background of letter writers is often not representative of the wider community. In addition, letter writers often feel strongly about a topic, which may make the views presented more extreme and polarised. (See on this e.g. Karin Wahl-Jorgensen, “A “Legitimate Beef” or “Raw Meat”? Civility, Multiculturalism, and Letters to the Editor,” *The Communication Review* 7, no. 1 (2004): 89-105, at 4.) However, in the case of St Ives, the letters reflect and spell out similar themes to the Council survey and do not appear more extreme. Moreover, keeping these limitations in mind, my aim is not to provide a representative account of all opinions against the eruv, but rather I seek to understand the construction of Jews as different as one important aspect of the opposition to the practice in question.

¹⁵¹ Although I contacted eruv opponents for interviews, they were not willing to talk to me. This attitude is reflected in newspaper reporting where reporters often stated that they contacted opponents who declined to comment. Their reluctance to comment publicly may be due to the increased tensions between the different camps and public accusations of racism and Antisemitism.

Argument Two. Contrary to public perception and, at times, academic reasoning, which situates Jews as uncontested members of the dominant majority society, Jews continue to inhabit a liminal space. They are still placed in a tenuous position, vulnerable to sudden demands to comply with dominant majority norms. My case studies show that, despite commonly held ideas about Jews being white or belonging to the Judeo-Christian mainstream, these categories of privilege often still rely on an exclusion of Jewishness. The encounter with Jewish difference makes visible the fragile and tacit state of tolerance that governs the conditional Jewish inclusion and reveals the boundaries of acceptable Jewish difference.

Argument Three. My third argument concerns the way that the literature on law and its Others has (insufficiently) considered Jewish past and present. While there are many reasons for this blind spot, without paying attention to both Jewish history and the present Jewish experience, our understanding of how societies create hierarchies of Others must remain incomplete. As Didi Herman observes in her study of English judicial discourse on Jews, failing to consider how legal discourse engages with Jewishness leaves us with a very partial picture of the various othering processes to which the law contributes.¹⁵² Moreover, it implicitly perpetuates the idea that ambivalent attitudes towards Jews are only a problem of deviant individuals, thereby ignoring the enduring significance of ‘the Jew’ as Other.

b. Thesis Structure

I develop these arguments over the course of six chapters. Following this first introductory chapter, the *second chapter* provides a brief historical account of how Jews have been brought into Western societies. This chapter discusses the legal conditions placed onto Jews in order to be accepted into Western societies and traces how ambivalence towards Jewishness has shaped this pathway.

The following chapters investigate the perceptions of Jews as different on legal terrain by exploring two contemporary encounters between the law and Jewish identity. As noted, the cases I consider concern legal debates about male circumcision and the construction of an eruv. I devote two chapters to each practice, each time moving from the general to the particular. Male circumcision is the subject of the third and the fourth chapters. *Chapter three* sets out to explore the particular context in which opposition to this tradition is growing today. After revisiting how historical debates about male circumcision have served as central arenas for the encounter with Jewish particularity, I analyse how this dimension has been muted in contemporary discussions, which frame the practice as a problem of human rights and medical ethics without acknowledging how, in largely non-circumcising societies, the circumcised penis retains its meaning as a symbol of Otherness. *Chapter four* then takes a closer look at what happens when a society engages with the Jewish Other through the discussion of this

¹⁵² Herman, *An Unfortunate Coincidence*, 14.

tradition. Taking the German dispute over the legality of male circumcision as my vantage point, I show how seemingly neutral legal arguments against this practice create an image of Jews as not only different, but violent, stuck in tradition, and in need of reform; shedding light on the fragility of tolerance in German society for those it perceives as Others.

The next two chapters, five and six, also form a pair and explore dynamics between Jews and non-Jews in the public space through the fraught construction of an eruv in the Sydney suburb of St Ives. *Chapter five* begins with an account of the eruv as a technique of ‘diaspora cartography’ which maps Jewish identity through wires, poles, and imagination onto a public space dominated by non-Jews. I then discuss the ways that this confident, yet almost invisible, assertion of Jewish Orthodox identity has been contested through means of law. In these instances, the eruv is often presented as a violation of the principles of secular neutrality, framings which mask how claims to spatial hegemony drive these conflicts. In the *sixth chapter*, I take a closer look at the opposition to an eruv in order to map the ways in which opponents presented the eruv as a space out of place. My reading of the St Ives eruv dispute traces the way that opponents drew on planning regulations and liberal norms in order to contain the presence of their Jewish neighbours, ultimately revealing their ambivalence about Jews as equally rightful inhabitants of their city.

The *seventh and final chapter* summarises the legal techniques which construct Jews as different and discusses the implications of these findings for the literature on the legal construction on religious and racial difference. I conclude by highlighting the importance of integrating the Jewish experience into scholarly theorising of the relation between law, religion, and race, which allows us to better understand the dynamic nature of exclusion and inclusion as well as the role of law as a site for resistance to exclusion.

2 FROM OUTSIDE TO INSIDE

A Brief Jewish History

For centuries, European societies have grappled with the question of Jewish difference and how to relate to a group they perceived as fundamentally different to themselves, as their Others. Often in contradictory and fluid ways, Jews were seen as an antithesis to Christendom, to the Aryan white race, and to secular modernity.¹ But the Jewish question in its many manifestations is not a mere relict of the past. Reflecting on the Jewish experience in the United States, Laura Levitt notes that “to remain marked as other even in the process of becoming citizens, of becoming incorporated into the nation, still haunts contemporary Jewish experience as well as efforts to explain Jewish difference.”² In order to understand how the past continues to shape the present legal encounter with Jewishness, this chapter revisits some of the historical and more contemporary Jewish questions by providing an historical account of how Jews entered modern societies. The aim is to identify some of the legal conditions placed onto Jews in order to be accepted into Western societies and to trace how ambivalence towards Jewishness has shaped this pathway.

Beginning in the era of the Enlightenment, the first part of the chapter examines the emancipation of Jews, which brought about a fundamental shift for the legal and social status of European Jews by granting them access to citizenship. Citizenship, however, came at a price as it required the remaking of traditional Jewish identity. Additionally, the racialisation of Jewish difference soon shattered the

¹ Nirenberg, *Anti-Judaism: The Western Tradition*. Nirenberg shows the centrality of the figure of ‘the Jew’ for Western thought from antiquity well into modernity.

² Laura Levitt, “Impossible Assimilations, American Liberalism, and Jewish Difference: Revisiting Jewish Secularism,” *American Quarterly* 59, no. 3 (2007): 807-32, at 807.

hope of equal belonging. The second part of the chapter takes a closer look at the legal and cultural integration of Jews in two particular Western societies – Germany and Australia – which provides the context for the case studies of this thesis.

I. Turning Jews into Citizens of the Mosaic Faith

a. The Offer of Emancipation

After the destruction of the Second Temple in 70 CE (common era), Jews found themselves dispersed outside their national homeland in diaspora. For Jews, this raised complicated questions about cultural survival under the rule of non-Jews, who were often hostile to their presence. European Christian societies in particular wrestled with the question of how to deal with Jews, a group so closely tied to Christianity through origin, yet a theological puzzle because of their continuous existence. Since the early days of Christendom, Christian theology had been preoccupied with drawing a boundary between itself and Judaism, in which Jews took on the role of the Other of Christianity.³ Jews were an oddity, neither heathens who could be converted, nor heretics who had fallen from grace.⁴ As Zygmunt Bauman argues, this made Jews a particularly disturbing presence in the Christian world, which constituted “a permanent challenge to the certainty of Christian evidence.”⁵

During the Middle Ages and early modern period, Jews had lived as autonomous communities, depending on the tolerance of the local ruler who granted them the permission to reside in their country. Christian societies viewed these Jewish communities in their midst with deep ambivalence, as foreigners inside. Christian rulers regulated Jewish residence and their professions, imposed special taxes on them, and, through spatial and social segregation, limited Christian interactions with Jews to a minimum. But Zygmunt Bauman suggests that these seemingly antagonistic measures were simultaneously “vehicles of social integration” for the reason that Christians still needed the Jews for their own self-identification, a self-identification that was premised on the rejection of the Jews as Other:⁶

Christianity could not reproduce itself, and certainly could not reproduce its ecumenical domination without guarding and reinforcing the foundations of Jewish estrangement – the view

³ See Boyarin, *Border Lines: The Partition of Judaeo-Christianity*.

⁴ Lopez, “Beyond Eurocentrism and Orientalism: Revisiting the Othering of Jews and Muslims through Medieval Canon Law,” 455-456.

⁵ Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989), 37.

⁶ *Ibid.*, 36-38.

of itself as the heir and the overcoming of Israel... Their [the Jews'] distinctiveness was not like that of any other minority group; it was an aspect of Christian self-identity.⁷

Although the Middle Ages are often described as a dark time for Jews marked by Christian anti-Judaism, by pogrom, expulsion, and restrictions, it was also a time that allowed the flourishing of autonomous communal life in the *kehillah*, a Jewish communal self-governing organisation. The *kehillah* provided both legal as well as educational institutions based on Jewish law to the communities.⁸ In the *kehillah*, Jewish law was supreme and governed the lives of Jews in ritual and everyday matters. As a result of Christian exclusion, Jews therefore enjoyed a relative autonomy, allowing them to retain a high degree of self-preservation by ensuring the rule of Jewish law and the perpetuation of Jewish culture and tradition. The Talmudic⁹ principle of *dina de-malkhuta dina* (the law of the land is the law) stipulated the relation between the community of Jews and the non-Jewish ruler. Developed during the early years of diaspora in antiquity, the principle aimed to make Jewish law, the *halakha*, fully functional under the conditions of exile and foreign rule, thereby providing a Jewish inspiration for the separation for religion and state.¹⁰ *Dina de-malkhuta dina* allowed for the imposition of taxes by the ruler of the land, yet it also foresaw the possibility of resistance in order to safeguard the integrity of Jewish law,¹¹ which in practice could of course be thwarted by power-inequalities.

The gradual dissolution of the feudal order in the early modern period and the emergence of the modern nation state raised new questions about self-governing groups such as Jews, who were now seen as a threat to the political authority of the state.¹² Moreover, the American and French revolutions in 1775-83 and 1789 brought the Enlightenment ideals of universal rights, equality, and liberty to political fruition. In light of these ideals, the exclusion of groups such as Jews seemed increasingly contradictory and brought the Jewish question into starker relief. All across Europe, societies debated if and how Jews should be granted citizenship, which would require them to become emancipated from their marginalised status. Gradually and often unevenly, the process of

⁷ Ibid., 38.

⁸ On the *kehillah* see Jacob Katz, *Tradition and Crisis. Jewish Society at the End of the Middle Ages*, trans. Bernard Dov Cooperman (New York: New York University Press, 1993). See also Nomi Maya Stolzenberg and David N. Myers, "Community, Constitution, and Culture: The Case of the Jewish *Kehillah*," *University of Michigan Journal of Law Reform* 25 (1991): 633-70.

⁹ The Talmud is the summary of oral law that evolved from the scholarly works by the sages that lived in Babylonia and Palestine. It comprises two parts, the Mishnah and the Gemarah: The Mishnah contains the *halakha* (law) and is followed by the commentary on the Mishnah, the Gemarah. The Talmud has been described as the most important book in Jewish culture, as the "backbone of creativity and national life", see Adin Steinsaltz, *The Essential Talmud*, trans. Chaya Galai (New York: Basic Books, 2006), 3.

¹⁰ Stone, "Religion and State: Models of Separation from within Jewish Law," 657.

¹¹ Martha Minow, "The Constitution and the Subgroup Question," *Indiana Law Journal* 71, no. 1 (1995): 1-25, at 4-5.

¹² Stolzenberg and Myers, "Community, Constitution, and Culture," 637.

emancipation unfolded all across Europe, thereby turning Jews into citizens.¹³ Emancipation gave Jews not only access to citizenship, but also involved the lifting of professional restrictions, the ending of residential segregation, and different taxation. Jews became integrated as equal citizens after centuries of marginalisation.

Although the Enlightenment formed the intellectual background of the Jewish question, the emancipation of Jews was less motivated by tolerance and ideals of human rights than by another birth child of the Enlightenment: the romantic idea of the nation. This romantic ideal demanded a certain uniformity from its citizens and the particularism of groups such as Jews was seen as disrupting this uniformity. Writing in the context of France, David Vital explains: “It was conceivable that such groups might be tolerated as strangers. It was inconceivable that they be admitted to full membership in society and to full regular membership in the Republic as free and equal citizens.”¹⁴ Citizenship thus came at a cost for Jews. Their change in legal status was frequently premised on a profound transformation of traditional notions of Jewishness, requiring Jews to shed both their cultural particularities and their communal structures in order to assimilate into the new nation-state, as Wendy Brown summarises:

To be brought into the nation, Jews had to be made to fit, and for that they needed to be transformed, cleaned up, normalized, even as they were still marked as Jews. These triple forces of recognition, remaking, and marking – of emancipation, assimilation, and subjection; of decorporatization as Jews, incorporation as nation-state citizens, and identification as different – are what characterize the relation of the state to Jews in nineteenth-century Europe and constitute the tacit regime of tolerance governing Jewish emancipation.¹⁵

Jews would not be emancipated as Jews, at least not in the way they had defined their Jewishness before. This is what Hannah Arendt meant when she wrote that emancipation essentially demanded Jews to cease to be Jews.¹⁶ Emancipation thus entailed the creation of a form of Jewishness that could be tolerated – and it was not a Jewishness on Jewish terms.

¹³ Emancipation was not a uniform and linear process but involved many different pathways and responses, often involving temporary setbacks, when recently granted rights were revoked again. See the edited volume by Pierre Birnbaum and Ira Katznelson, eds., *Paths of Emancipation: Jews, States, and Citizenship* (Princeton: Princeton University Press, 1995).

¹⁴ David Vital, *A People Apart. A Political History of the Jews in Europe 1789-1939* (Oxford; New York: Oxford University Press, 1999), 50.

¹⁵ Brown, *Regulating Aversion*, 89.

¹⁶ Hannah Arendt, “The Jew as Pariah: A Hidden Tradition,” *Jewish Social Studies* 6, no. 2 (1944): 99-122, at 107.

b. The Invention of Judaism as a Religion: The Price of Emancipation

One crucial site for the remaking of Jewish identity was religion. In the debate about Jewish emancipation, the question of whether Judaism was a religion or a nation had taken a centre stage. If Jews constituted a separate nation, they could not be integrated into the nation-state. But if Judaism was a religion like Christianity, Jews would be able to become citizens of the Mosaic faith. The problem, however, was that before modernity, Judaism had been neither a religion nor a nationality, as Leora Batnitzky notes: “Rather, Judaism and Jewishness were all these at once: religion, culture, and nationality.”¹⁷ Jewish life had been governed by Jewish law and, as Batnitzky emphasises, “adherence to law, ... is at least partially, if not largely, public in nature”.¹⁸ Judaism’s claim to the public identity of Jews was perceived by some as advancing a “state within a state”¹⁹ and therefore as an obstacle to Jewish integration into the modern nation-state. German Orientalist Johann David Michaelis, for example, argued in 1782 that Jewish law was designed to keep Jews as a separate nation. Taking aim at Jewish dietary laws, he claimed that halakhic rules were designed

to preserve the Jews as a people separated from all other peoples, ... and as long as the Jews retain the laws of Moses, as long as they for example do not dine with us... they will never melt with us – like the Catholic and Lutheran, the German, Wend and Frenchman, who all live in a single state.²⁰

The view of Jewish law as a competing authority and therefore obstacle to Jewish emancipation was not confined to the German lands. In his speech to the French National Assembly in December 1789, Count Stanislas Clermont-Tonnerre not only advocated for the granting of rights to Jews as individuals while withholding all rights from Jews as a nation.²¹ His speech in fact continued with a staunch attack on Jewish communalism:

We must withdraw recognition from their judges; they should only have our judges. We must refuse legal protection to the maintenance of the so-called laws of their Judaic organization; they should not be allowed to form in the state either a political body or an order. They must be citizens individually.²²

¹⁷ Leora Batnitzky, *How Judaism Became a Religion: An Introduction to Modern Jewish Thought* (Princeton: Princeton University Press, 2011), 2.

¹⁸ *Ibid.*, 1.

¹⁹ *Ibid.*, 16.

²⁰ Quoted in Jonathan M. Hess, “Johann David Michaelis and the Colonial Imaginary: Orientalism and the Emergence of Racial Antisemitism in Eighteenth-Century Germany,” *Jewish Social Studies* 6, no. 2 (2000): 56–101, at 58.

²¹ For the quote see chapter one, section “The Trouble with Jewish Difference.”

²² For the full speech see *The French Revolution and Human Rights. A Brief Documentary History*. 86–88. It is important to stress that the attack on Jewish communalism was part of a broader campaign aimed at redefining the relation between citizen and the state which required the dissolution of the corporate and guild

In 1806, the French state under Napoléon called an Assembly of Jewish Notables, composed of more than one hundred rabbinical leaders and Jewish lay people, to Paris. They were asked to answer twelve questions in order to eradicate any doubts about Jewish loyalty to the French nation. These questions concerned the compatibility of Jewish law with French civil law and Jewish commitment to the empire.²³ The Jewish Assembly confirmed that “[our] religion orders that the law of the prince be regarded as the supreme law in civil and political matters”.²⁴ Satisfied by the Assembly’s reassurance, Napoléon’s offer to the Assembly in return echoed the words of Stanislas Clermont-Tonnerre. They were to privatise their differences, to practice their Jewishness only at home or in the synagogue.²⁵ Michael Galchinsky described this bargain, the privatisation of Jewish identity, as the offer of the melting pot, an offer made in similar ways to Jews all across Europe in exchange for citizenship:

Come, melt your public aspect into ours, and become a part of our nation. And the vast majority of Jews did melt. They melted in France, they melted in England, they melted in America, and they tried very hard to melt in Germany, with more or less success, until the Holocaust.²⁶

In March 1812, Prussia followed suit and declared Jews citizens of the state after abolishing the category of *Schutzjuden*.²⁷ The Prussian state lifted several occupational restrictions, special taxes levied on Jews and granted Jews the right to settle in both towns and the country. These changes were not the success of Prussian advocacy for Jewish emancipation, rather they resulted from Napoléon I’s defeat of Prussia in 1806. Yet, the Prussian edict did not grant Jews the same full or equal civil status as in France. While it permitted them to access academic positions, it did not allow them to hold government office. The Prussian edict, however, relied on a similar notion of nationality as its French counterpart, requiring the subordination of communal identity and the privatisation of religion.²⁸ It thus repeated the dictum of Count Clermont-Tonnerre, laying down a vision of Judaism as a religion that does not conflict with the sovereignty of the modern nation-state.

structures of the feudal order. See David Feldman, “Was Modernity Good for the Jews?,” in *Modernity, Culture and ‘the Jew’*, eds. Bryan Cheyette and Laura Marcus (Cambridge: Polity Press, 1998), 171-87, at 177.

²³ Esther Benbassa, *The Jews of France. A History from Antiquity to the Present*, trans. M. B. DeBevoise (Princeton: Princeton University Press, 1999), 88.

²⁴ Ibid.

²⁵ Only a year later, Napoléon revoked many of these reforms. Emancipation was in fact a long process where the granting of rights was often followed by their revocation. Across Germany, Jews only achieved equal status in 1869 and in the Austro-Hungarian Empire in 1867.

²⁶ Michael Galchinsky, “Glimpsing Golus in the Golden Land: Jews and Multiculturalism in America,” *Judaism* 43, no. 4 (1994): 360-68, at 361.

²⁷ *Schutzjuden* refers to a status for German Jews granted to them by the imperial and royal court that included both imperial protection and the right of the emperor to levy special taxes on Jews, an important source of income for the ruler. Jews had no right of residence, unless granted by imperial decree, and thus faced a constant threat of expulsion. I return to this spatial management of Jews in chapter five.

²⁸ Batnitzky, *How Judaism Became a Religion*, 33.

The recognition and emancipation of the Jews therefore became premised on a process of secularisation in which a line was drawn between the public sphere of politics and the private sphere of religion. The process of secularising Jewishness not only involved the dissolution of Jewish communal structures but also led to what Batnitzky calls the invention of Judaism as a religion within the discourse of world religions.²⁹ Scholars, such as Tomoko Masuzawa and Talal Asad, argue that the notion of religion that predominates in Western thought emerged in the period after the Reformation.³⁰ Scholars of the time began to sort Islam, Hinduism, Buddhism, Judaism, and Christianity into this paradigm that was meant to describe a shared human experience. But despite its ambition to capture a universal phenomenon, the notion of religion that underpinned this paradigm was informed by Christian normativities and sensibilities. Christianity, in particular in its Protestant variant,³¹ provided the blueprint for religion as a separate sphere of life, mainly private and not public, non-coercive and voluntary.³² The secularisation of Europe, in which the public realm of politics and the private realm of religion were to be separated, relied on this prevailing notion of religion and consequently “refashioned other ‘religions’ into forms analogous with Christianity.”³³ By demanding the secularisation of Judaism as a prerequisite for citizenship, the process of emancipation thus required Judaism to mould itself into a religion in “mimicry of Christianity.”³⁴

Although emancipation was largely a state-driven process, Jewish commentators intervened significantly in the debate, thereby advancing their own vision about the relation between citizenship, state, and Judaism. An early famous interlocutor in the debate about the nature of Judaism as a religion was the philosopher Moses Mendelssohn, an important member of the Haskalah, the Jewish Enlightenment movement. In his 1783 text *Jerusalem: Or on Religious Power and Judaism*, Mendelssohn formulated his own vision of Judaism, a Judaism that resembles Protestant Christianity and is therefore compatible with the secular order of the modern state. The question with which Mendelssohn grapples in this text is how Judaism, as a religion of law, can be reconciled with the demands of secular rule, which requires religion to be a voluntary and private matter. As Mendelssohn had already asserted in an earlier work, “True, divine religion needs neither arms nor fingers to be

²⁹ Ibid.

³⁰ Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam*; Tomoko Masuzawa, *The Invention of World Religions. Or, How European Universalism Was Preserved in the Language of Pluralism* (Chicago: University of Chicago Press, 2005).

³¹ See on this (contested) genealogy Yelle, “Imagining the Hebrew Republic.”

³² Batnitzky, *How Judaism Became a Religion*, 13.

³³ Fernando, *The Republic Unsettled*, 133.

³⁴ Susannah Heschel, “Revolt of the Colonized: Abraham Geiger’s Wissenschaft Des Judentums as a Challenge to Christian Hegemony in the Academy,” *New German Critique*, no. 77 (1999): 61-85, at 61-62. At the same time, the discourse of secularism allowed to secure the cultural hegemony of Christianity, see Gil Anidjar, “Secularism,” *Critical Inquiry* 33, no. 1 (2006): 52-77. Anidjar argues that “secularism is a name Christianity gave itself when it invented religion, when it named its other or others as religion.” (Ibid., 62)

effective. It is all mind and heart.”³⁵ The vision of Judaism that Mendelssohn then presents is a Judaism without coercive power – a power unique to the state – in which the corporate status of Judaism is dismantled, and Judaism thereby denationalised.³⁶ This means, for example, that rabbis are not able to excommunicate members – a power they had held within the *kehillah* in order to enforce compliance with Jewish law. For Mendelssohn, Jewish law’s coercive character was grounded in the social contract of the Jewish state, but in diaspora, Jews had to obey the law of the land.

Not everyone agreed with Mendelssohn’s vision, which radically broke with traditional understandings of Judaism. The Jewish traditionalists rejected the view that Judaism was a religion in this sense and thereby laid the foundations for what is today known as Orthodox Judaism. Samson Raphael Hirsch, one of the most important proponents of this Orthodox view, argued in 1854 in opposition to the Jewish Reform movement, which had been inspired by Mendelssohn’s ideas,³⁷ that

Judaism is not a religion, the synagogue is not a church, and the Rabbi is not a priest. Judaism is not a mere adjunct to life: it comprises all of life. To be a Jew is not a mere part, it is the sum total of our task in life. To be a Jew in the synagogue and the kitchen, in the field and the warehouse, in the office and the pulpit, as father and mother, as servant and master, as man and as citizen, with one’s thought, in word and in deed, in enjoyment and privation, with the needle and the graving-tool, with the pen and the chisel – that is what it means to be a Jew.³⁸

Although Hirsch rejected Mendelssohn’s view of Judaism, Leora Batnitzky points out, he still emphasised the apolitical nature of Judaism by stressing the “purely spiritual nature of Israel’s nationhood” which allowed Jews to “tie themselves fully to the various states in which they live.”³⁹ While Hirsch disagreed with Reformist Jews, he still advanced a vision of Judaism that would be compatible with the modern secular state. The period of emancipation and secularisation thus not only gave rise to the notion of Judaism as a religion in a Protestant sense, but also to modern Jewish sectarianism with both Orthodox and Reform Judaism offering different answers to how Jews should relate to secular modernity, yet without ever completely resolving the tensions that result from the fashioning of Judaism as a religion.⁴⁰

³⁵ Quoted in Alexander Altmann, “Introduction,” to *Jerusalem. Or on Religious Power and Judaism*, by Moses Mendelssohn (Waltham: Brandeis University Press, 1983), 1-29, at 5.

³⁶ Jonathan M. Hess, *Germans, Jews and the Claims of Modernity* (New Haven; London: Yale University Press, 2002), 96.

³⁷ Mendelssohn is sometimes heralded as the founder of Reform Judaism, although he himself followed an observant lifestyle. Formed during the time of Jewish emancipation, Reform Judaism is a liberal strand of Judaism that regards – other than Orthodox Judaism – Jewish law as non-binding and places less emphasis on ritual observance.

³⁸ Quoted in Batnitzky, *How Judaism Became a Religion*, 41.

³⁹ For the quote by Hirsch and a discussion of his argument see *ibid.*

⁴⁰ Thus, despite its self-understanding as continuity, Orthodox Judaism it is in fact a modern phenomenon – although, as we will see in the case of the St Ives *eruv*, it becomes often associated with pre-modernity by non-Jews who see Orthodoxy a backward version of Judaism.

The invention of Judaism as a religion highlights the way that Protestant-based notions of religion have come to be imposed on religions that do not easily fit this model; an imposition that also justified their denigration and devaluation by Christian thinkers throughout the debate. Susannah Heschel observes that by depicting Judaism as incompatible with the secular modern nation state, Christian thinkers created in fact their own 'Judaism', a religion of legalism, literalism, marked by an absence of morality".⁴¹ In contrast, Christianity was not only the true faith, but also the religion perfectly compatible with modernity. Judaism, therefore, had to modernise – which meant, to become more like Christianity. Secularism, Raz-Krakotzkin notes, cannot be separated from Christian ambivalence toward the Jews.⁴² The story of Judaism's invention as a religion is, however, as Leora Batnitzky reminds us, not "a quaint story relevant to Jews alone."⁴³ In contemporary discussions, she observes, this question has become again critical to Jews, Muslims, and some Christian groups alike as they formulate their relationship to the modern secular nation-state and its demands,⁴⁴ reminding us of the importance of Jewish history for the critique of secularism.⁴⁵ Today's discussions about religious family laws, about headscarves, minarets, and turbans all touch upon the question of public religious difference as it had already been raised during the emancipation of Western Europe's Jews.

c. The Racialisation of Jews: The Curse of Emancipation

During the nineteenth century, many Jews century believed in emancipation's promise that acculturation and secularisation would lead to full and equal inclusion. Their hopes, however, would soon be shattered. The continuing existence of Jews remained a puzzle for those who had hoped that assimilation into the nation would eliminate all traces of Jewishness. Ambivalence caught up with Jews and appeared in new guise: the language of race.⁴⁶

It is a great irony of the Enlightenment period that it gave birth not only to the idea of universal human rights and of the equality of all people, but that the same period also saw another idea gaining ground which stipulated the fundamental biological difference of humans.⁴⁷ Nineteenth century

⁴¹ Heschel, "Revolt of the Colonized," 62.

⁴² Raz-Krakotzkin, "Christian Ambivalence toward the Jews," 278.

⁴³ Batnitzky, *How Judaism Became a Religion*, 190.

⁴⁴ *Ibid.*, 191.

⁴⁵ See my discussion in chapter one.

⁴⁶ The racialisation of Jews did in fact not begin with the racial discourse of the nineteenth century. As early as in the Middle Ages, Jews were described as a different race, see Eric L. Goldstein, "The Unstable Other: Locating the Jew in Progressive-Era American Racial Discourse," *American Jewish History* 89, no. 4 (2001): 383-409, at 386.

⁴⁷ For a history of the emergence of the pseudo-science of race, its perception of the Jew as Other, and the responses of Jewish scientists see John M. Efron, *Defenders of the Race. Jewish Doctors and Race Science in Fin-De-Siècle Europe* (New Haven; London: Yale University Press, 1994).

European colonialism, nationalism, and the increasing contact with other people had given rise to a new ideology, the belief in the existence of different races. The Enlightenment's emphasis on reason had challenged religion as an authoritative source of knowledge and given way to the scientific explanation of human differences. The pseudo-science of race that drew on biology, anthropology, and statistics explained human differences as a matter of racial hierarchy and provided the arguments both for racist nationalism and for the colonising of other people, grounded in the belief of European racial superiority. In this racial hierarchy, Jews also figured as inferior Others. As science overtook religion as the authoritative source of knowledge, it thereby also changed the discourse on Jewish difference from theological Christian Anti-Judaism into a belief in the biological difference of Jews. Racialized thinking imagined Jews as a different race and thereby explained the continuing existence of 'the Jew' despite emancipation: "Race enabled (indeed required) the Jew to be a Jew no matter how fully assimilated, no matter how secular."⁴⁸ If Jewish difference was a matter of race, then neither secularisation nor conversion could overcome this difference, as nothing could "wipe away the taint of race."⁴⁹

In this racial framework, the difference between Jew and Christian turned into one between Aryan/European and Jew. In European racial discourse, Jews were now seen as both 'Asiatic people' and 'Blacks'. Jonathan Hess, for example, shows how Enlightenment thinkers, even those in favour of Jewish emancipation, described Jews as 'Asiatic refugees,' hinting at the role of Jews in the Oriental imagination.⁵⁰ Ann Pellegrini on the other hand describes how Antisemites traced Jewish difference back to Africa in order to explain the putative blackness of the Jew as "a sign of racial mixing and, so, racial degeneration."⁵¹ Yet, this did not prevent other racial thinkers of the time to also point to Jews as illustrating the "perils of *inbreeding*."⁵² Despite these numerous, often contradictory pseudo-scientific justifications, the conclusion was always the same: Jews were a different race, alien to Europe.

Racial Antisemitism,⁵³ however, did not break as radically with the religiously motivated anti-Judaism as it purported through its biological language.⁵⁴ During the Jewish emancipation, Christian

⁴⁸ Brown, *Regulating Aversion*, 91.

⁴⁹ Gilman, *The Jew's Body*, 179.

⁵⁰ Hess, *Germans, Jews and the Claims of Modernity*. See also Hess, "Johann David Michaelis and the Colonial Imaginary;" Heschel, "Revolt of the Colonized."

⁵¹ Ann Pellegrini, "Whiteface Performances: 'Race,' Gender, and Jewish Bodies," in *Jews and Other Differences. The New Jewish Cultural Studies*, eds. Daniel Boyarin and Jonathan Boyarin (Minneapolis; London: University of Minnesota Press, 1997), 108-49, at 111.

⁵² *Ibid.*, 112. Italics in original.

⁵³ The term Antisemitism was in fact popularised in the late nineteenth century by the German publicist Wilhelm Marr. Originally, the term Semitic described a family of languages but in the language of Antisemites, the term Semitic came to refer to Jews alone.

⁵⁴ On the pitfalls of distinguishing religious anti-Judaism from Antisemitism see Jeanne Favret-Saada, "A Fuzzy Distinction: Anti-Judaism and Anti-Semitism," *HAU: Journal of Ethnographic Theory* 4, no. 3 (2014): 335-42

ambivalence had already been gradually translated into a discourse about culture and civilisation, in which Judaism was described in Orientalist terms. Christian thinkers depicted Jews and Judaism as in need of regeneration and reform – with white Christian Europeans operating as the benchmark for this process. “From the Enlightenment onward, the discussion of the civil status of the Jews has been formulated in clearly Orientalist terms, while Orientalist images have played an important role in the reshaping of Jewish identity,” argues Amnon Raz-Krakotzkin.⁵⁵ The Protestant theologian and Orientalist Michaelis, for example, who had not only declared Jewish law an obstacle to Jewish integration, also maintained that Jews were an “unmixed race of a more Southern people.”⁵⁶ In the idea of Jews as different race, theological, biological, and anthropological elements became fused to support an ideology of Jewish difference. The European discourse on Jewish difference thereby provides insights into the complex intersections between secularist, Orientalist, and Antisemitic discourse.⁵⁷

What brought about racial Antisemitism? Scholars suggest that the growth of racial Antisemitism from the 1870s onwards was in part an attempt to reconstruct and reassert ethnic hierarchies that had been rapidly disintegrating. Indeed, by the late nineteenth century, many Jews had become almost indistinguishable from non-Jews. They dressed and spoke like Gentiles, had obtained a secular education, and engaged in professions previously forbidden to them. Casting the Jew as racially, and thereby eternally, different sought to rebuild and reinforce the porous boundaries that had kept the Jewish stranger at bay.⁵⁸ Pseudoscientific racism, Neil MacMaster argues, offered the lure of a rational technique to identify the disguised Other who was masquerading as one of ‘us’ through assimilation, conversion, and economic integration – “but his true nature was irrevocably stamped in biology, to be revealed by the scalpel, the microscope and the anthropologist’s callipers.”⁵⁹ Racial Antisemitism purported to have discovered the ‘essence of the Jew,’ thereby suggesting scientific certainty for the suspicion of Jewish difference and its threat to the project of an ethnically pure nation. In Germany, which had ventured late onto a bumpy road to nation-building, fears of the Jewish racial outsider became particularly pronounced.⁶⁰ The racial politics of Nazi-Germany took the belief of the Jewish outsider ultimately to the extreme. More than six million Jews and millions of others were murdered during the Holocaust because of their supposed inferiority. Many of the surviving Jews left

40. Favret-Saada also cautions against the idea that race has replaced religion in Antisemitic thought and reminds us, for example, of the role of the Church in the Holocaust.

⁵⁵ Raz-Krakotzkin, “Christian Ambivalence toward the Jews,” 286.

⁵⁶ Hess, “Johann David Michaelis and the Colonial Imaginary,” 86.

⁵⁷ For a discussion of this link see Anidjar, “Secularism,” 62 et passim.

⁵⁸ Neil MacMaster, *Racism in Europe 1870-2000* (Basingstoke; New York: Palgrave, 2001), 96.

⁵⁹ Ibid.

⁶⁰ The rise of Antisemitism in Germany has been analysed widely in the literature, see e.g. Hannah Arendt, *The Origins of Totalitarianism* (London: Allan & Unwin, 1967) and Max Horkheimer and Theodor W. Adorno, *Dialectics of Enlightenment*, ed. Gunzelin Schmid Noerr, trans. Edmund Jephcott (Stanford: Stanford University Press, 2002), 137-172.

Europe and found a new home in other parts of the world, leaving behind the ruins of Jewish culture in Europe.

II. Entering the Mainstream

Although the Holocaust brutally exposed the precarious nature of the liberal promise of inclusion, many Jews in the West kept their faith in the “liberal nationalist solution to the Jewish question”.⁶¹ On 14 May 1948, David Ben-Gurion proclaimed the establishment of the state of Israel, providing a national home to Jews after almost two millennia. At the same time in the Diaspora, Jews were now increasingly seen as a ‘model minority,’ as examples of successful integration and acceptance into their societies.⁶² After centuries of Christian ambivalence, Judaism began to benefit from its perceived affinity to the Christian denominations⁶³ and became incorporated into a new narrative about the West’s shared heritage as Judeo-Christian.⁶⁴ On the surface, it seems today that societies have now finally embraced Jews as equal members. Antisemitism has become socially unacceptable and Jews have enjoyed immense upward mobility, both in economic and social terms. What does this mean for perceptions of Jews as different? This second part of the chapter takes a closer look at the legal and cultural integration of Jews into two contemporary Western societies – Germany and Australia – the countries which form the context of the case studies in this thesis. In Germany, I focus on the country’s attempts to come to terms with its past, a process during which the acceptance of Jews came to be seen as proof for Germany’s successful democratic transition after 1945. In Australia, where Jews did not have to undergo a process of formal emancipation due to the specific history of the country as a British colony, I travel a bit further back in time in order to trace the way that Jews have figured in the country’s complex search for a national identity.

a. Quest for Normalisation: Jews in Germany

At the end of the Second World War, only around 30,000 Jews had been left in West-Germany.⁶⁵ Only a few of them were actually German Jews – most were displaced persons from Eastern Europe

⁶¹ Geoffrey Brahm Levey, “Jews and Australian Multiculturalism,” in *Jews and Australian Politics*, eds. Geoffrey Brahm Levey and Philip Mendes (Brighton; Portland: Sussex Academic Press, 2004), 179-97, at 181.

⁶² On the idea of Jews as model minority see Freedman, “Transgressions of a Model Minority;” Kudenko and Phillips, “The Model of Integration? Social and Spatial Transformations in the Leeds Jewish Community.”

⁶³ Eszter B. Gantner and Jay Koby Oppenheim, “Jewish Space Reloaded: An Introduction,” *Anthropological Journal of European Cultures* 23, no. 2 (2014): 1-10, at 6-7.

⁶⁴ For references and a critical account of the narrative of Judeo-Christianity see the discussion in chapter one.

⁶⁵ I focus my discussion on West Germany as its policy and attitude continues to shape the situation in unified Germany. East Germany, the German Democratic Republic (GDR), took a different approach to dealing with the Holocaust and its small remaining Jewish population. A discussion of this history would go

who saw their stay in Germany as temporary. While small in numbers, the symbolic significance of these remaining communities was immense. The international community watched the German attitude towards these communities closely, seeing them, as the High Commissioner for the United States in West Germany at the time expressed it, as “one of the real touchstones and the test of Germany’s progress towards the light.”⁶⁶ This international attention led to a complete reversal of the way Germany saw its Jews. Antisemitism became replaced with an almost obsessive Philosemitism. In Germany’s quest for repairing the country’s international reputation, Jews became “moral hostages”⁶⁷ and the centrality of Jews as a measuring stick for the country’s democratic progress has shaped German attitudes towards Jews until today.⁶⁸

The Philosemitism of the early Bonn Republic was a manifestation of the desire to present something as completed that was still at its beginning: the making of a truly democratic and liberal Germany, committed to tolerance of minorities such as Jews. Studies of the time show that there was still a lingering Antisemitism among the German population,⁶⁹ however the Nazi-past was banished behind a “wall of silence” as it did not fit with the way that Germans wanted to see themselves.⁷⁰ The government embraced Jews as *Mitbürger* (fellow citizens) to signal their full inclusion as equals into post-war Germany, but at the same time, it remained reluctant to prosecute war criminals or dismiss ex-Nazis from prominent positions in the administration.⁷¹ Moreover, politicians showed little interest in inviting back expelled German Jews, even if only as a symbolic gesture, leaving the impression that the remaining Jews in fact lived as “undesired guests” in the country.⁷²

This lip-service Philosemitism only began to erode during the late 1960s, when the German Left began to push for a more profound engagement with the country’s atrocious past, setting into motion an ongoing process of *Vergangenheitsbewältigung* (coming to terms with the past). This process included not only a more profound public engagement with the Holocaust but also a growing interest in Jewish culture in media, museums, public as well as private historical research activity, and even the

beyond the scope of this chapter. See instead the review of German-language historical scholarship on Jews in the GDR in Peter Monteath, “The German Democratic Republic and the Jews,” *German History* 22, no. 3 (2004): 448-68.

⁶⁶ John McCloy, high commissioner for the United States in Germany from 1949 to 1955, quoted in Michael Brenner, “Introduction,” in *A History of Jews in Germany since 1945. Politics, Culture, and Society*, ed. Michael Brenner (Bloomington: Indiana University Press, 2018), 1-6, at 2.

⁶⁷ Ruth Ellen Gruber, *Virtually Jewish. Reinventing Jewish Culture in Europe* (Berkeley; Los Angeles; London: University of California Press, 2002).

⁶⁸ I am aware of the problems involved when speaking of ‘the Jews’ and ‘the Germans’. These are of course in themselves increasingly heterogeneous and often contested identities.

⁶⁹ Ibid.

⁷⁰ Gruber, *Virtually Jewish. Reinventing Jewish Culture in Europe*, 52.

⁷¹ Robert S. Wistrich, *Antisemitism. The Longest Hatred* (London: Thames Methuen, 1991), 81.

⁷² Micha Brumlik, “The Situation of the Jews in Today’s Germany,” in *Jews, Germans, Memory. Reconstructions of Jewish Life in Germany*, ed. Y. Michal Bodemann (Ann Arbor: University of Michigan Press), 1-16, at 8.

conversion of individuals to Judaism.⁷³ The sudden interest in Jewish culture also ended the invisible existence of the country's Jewish communities which had, despite the ostensible state-endorsed Philosemitism, kept a low profile with synagogues often hidden in courtyards.⁷⁴

The fall of the Berlin Wall in 1989 and the lifting of the Iron Curtain brought about another major change for German Jews. During its last days, the East German government opened its doors to Jews from the Soviet Union as part of its belated efforts at *Wiedergutmachung* (reparation and redemption).⁷⁵ During the process of reunification, the East German delegation pressured the initially reluctant Federal Republic to maintain this policy – with success. The reunified Germany introduced a law that granted Jews from the now former Soviet Union permanent residency as *Kontingentsflüchtlinge* (quota refugees).⁷⁶ Between the early 1990s and 2005, around 200,000 people of Jewish descent made their new home in Germany. Both the Jewish communities in Germany and the German government had a vital interest in Jewish migration from those countries – despite the fact that, at the time, German society had been rather reluctant towards migration in general. For the small and ageing Jewish communities, the migrants from the former Soviet Union brought the promise of demographic growth and rejuvenation. During this period, membership in Jewish communities more than tripled.⁷⁷

The new immigrants did not only revive the existing communities, but instigated a shift in the political, cultural, and religious life of German Jewry. Many of them were more secular minded and contributed to a pluralisation of Jewish-German life. The German government, on the other hand, saw an opportunity to revive Jewish life in the country and to improve German-Jewish relations in a benevolent act of *Vergangenheitsbewältigung*. As Jonathan Laurence shows, Jewish quota refugees were favoured over other refugees because of their presumed ties to the German culture, although many

⁷³ On the conversion of non-Jewish Germans to Judaism see Barbara Steiner, *Die Inszenierung des Jüdischen. Konversionen von Deutschen zum Judentum nach 1945* (Wallstein: Göttingen, 2015).

⁷⁴ Brenner, "Introduction," 4.

⁷⁵ Yfaat Weiss and Lena Gorelik, "The Russian-Jewish Migration," in *A History of Jews in Germany since 1945. Politics, Culture, and Society*, ed. Michael Brenner (Bloomington: Indiana University Press, 2018), 379-416.

⁷⁶ Quota refugees are admitted outside of the formal asylum process. They receive a visa on humanitarian grounds. In the 1980s, Germany admitted Vietnamese refugees under this law and in the 1990s refugees from Albania. From 1991 until 2005, the law was applied to persons of 'Jewish nationality' from the former Soviet Union. The law thus relied on an ethno-national understanding of Jewish identity, like in the Soviet Union where their nationality was marked as Hebrew in their passport with the father's nationality as the central criterion. This means that persons who qualified for migration to Germany as quota refugees were not necessarily accepted as members by Jewish communities, who applied a halakhic understanding of Jewish identity. Jewish migrants from the former Soviet Union thus faced similar problems in Germany as in Israel where the Law of Return also does not apply a halakhic definition.

⁷⁷ In 1991, the Jewish communities had 29,089 members. By 2002, this number had risen to 98,335. Not all quota refugees qualified as Jewish under halakha and therefore for official community membership (see note above). For an overview of this episode in German-Jewish history see Barbara Dietz, "Jewish Immigrants from the Former Soviet Union in Germany: History, Politics and Social Integration," *East European Jewish Affairs* 33, no. 2 (2003): 7-19, at 20.

of those Jews lacked any such cultural connection to Germany.⁷⁸ Their belonging and cultural affinity to Germany was simply assumed, underscoring the significance of Jews in German self-understanding.⁷⁹

The privileged position of the Jewish community in Germany is further reflected in the way Jews are granted religious rights as compared to Muslims. The Jewish community enjoys the same legal status as the Christian denominations, that of a *Körperschaft des öffentlichen Rechts* (corporate body under public law).⁸⁰ This status confers certain powers to the religious community such as the right to levy church tax from their members and the right to employ public servants. It is a status that evolved from the organisation and structure of relations between the Christian churches and the various German states as a matter of *Staatskirchenrecht* (state law for the churches).⁸¹ The Jewish community had obtained this status across Germany in 1919 and in some states already earlier, cementing the idea of Jewishness as a matter of religion.⁸² Jews lost this status in 1938 under Nazi rule and it was subsequently restored shortly after the Second World War. Muslims, with the exception of the Ahmadiyya community in some German states, have so far not been able to obtain this status for various reasons.

The Jewish practice of *shechita* (kosher slaughter) is exempted from animal protection laws which normally require the mandatory stunning of animals for slaughter.⁸³ This exemption only came under greater public scrutiny when Muslims demanded the same exemption for halal slaughter which the German Constitutional Court ultimately granted.⁸⁴ The different treatment of Jews and Muslims is also reflected in laws banning religious dress for teachers in public schools. In 2005, the state of North-Rhine Westphalia introduced a law that explicitly excluded the Jewish kippah and the Christian nun habit from this ban as part of the “Christian and occidental cultural and educational tradition”.⁸⁵

⁷⁸ Jonathan Laurence, “(Re)Constructing Community in Berlin: Turks, Jews, and German Responsibility,” in *Transformations of the New Germany*, ed. Ruth A. Starkman (New York; Houndmills: Palgrave Macmillan, 2006), 199-232, at 206.

⁷⁹ *Ibid.*, 228.

⁸⁰ Michael Demel, *Gebrochene Normalität. Die Staatskirchenrechtliche Stellung der Jüdischen Gemeinden in Deutschland* (Tübingen: Mohr Siebeck, 2011). For an introduction to this rather unique legal arrangement for relations between State and religion see Christine R. Barker, “Church and State: Lessons from Germany?,” *The Political Quarterly* 75, no. 2 (2004).

⁸¹ *Staatskirchenrecht* refers to a body of German public law concerning the relations between the state and religious communities. The literal name translates as state-church law. However, this does not mean that Germany has a state religion.

⁸² On the history and legal implications of how Jews obtained this status across Germany see Demel, *Gebrochene Normalität. Die Staatskirchenrechtliche Stellung der Jüdischen Gemeinden in Deutschland*.

⁸³ Section 4(a) *Tierschutzgesetz* (TierSchG, Animal Protection Law).

⁸⁴ Bundesverfassungsgericht (BVerfG, German Federal Constitutional Court), 15 January 2002 – 1 BvR 1783/99.

⁸⁵ Gesetzesentwurf der Fraktion der CDU und der Fraktion der FDP: Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen, Drucksache 14/569, 31. Oktober 2005 (Draft Law proposed by the CDU and FDP: First Law in Order to Amend the Education Act for the State of North-Rhine Westphalia, Doc. 14/769, 31 October 2005).

Although the law was overturned by the German Constitutional Court,⁸⁶ the different legal treatment of Jews and Muslims feeds into the perceptions that Jews have passed on the role of the Other to Muslims.⁸⁷

There are, however, doubts about this new German-Jewish symbiosis.⁸⁸ The perception of Jews as different from Germans still manifests in subtle legal ways. Alongside the Jewish quota refugee programme, another law permitted ethnic Germans from Russia (*Spätaussiedler*) to settle in Germany. Although both migrant groups came from the same country, the former Soviet Union, they were treated differently in law, depending on their perception as either already German or as Jewish, disadvantaging those who had arrived as Jews. Whereas Russian Germans were immediately granted citizenship upon arrival and were thereby assumed to be already German, Jewish quota refugees had to wait for six to eight years in order to obtain German citizenship.⁸⁹ Moreover, differently to Jewish migrants, Russian Germans had both their professional degrees as well as their previous work experience (for the calculation of pension entitlements) automatically recognized,⁹⁰ making their economic integration into the German labour market and welfare state much easier.

The Holocaust still remains a determining factor for the relations between Jews and Germans today. Despite the growing numbers of Jews in Germany – today, around 200,000 Jews live in Germany (out of a total population of more than 82 million) of whom 98,594 are members of organised Jewish communities⁹¹ – normalisation of German-Jewish relations has remained an elusive goal.⁹² Part of the problem, scholars and commentators argue, is the limited role that Jews are afforded within the imagined community of Germany with its overt Philosemitism. Jews are still seen as the litmus test for Germany's democratic transition, pressing them into the role of the victim and perpetuating yet

⁸⁶ Bundesverfassungsgericht (BVerfG, German Federal Constitutional Court), 27 January 2015 - 1 BvR 471/10.

⁸⁷ For a comparison of the religious rights of Jews and Muslims in Germany see Gökçe Yurkadal and Y. Michael Bodemann, "'We Don't Want to Be the Jews of Tomorrow.' Jews and Turks in Germany after 9/11," *German Politics and Society* 24, no. 2 (2006): 44-67.

⁸⁸ The term German-Jewish symbiosis was coined by Gershom Scholem to deny that there had ever been a special relation between Jews and Germans before Hitler, see Gershom Scholem, "Against the Myth of German-Jewish Dialogue," in *On Jews and Judaism in Crisis. Selected Essays*, ed. Werner J. Dannhauser (New York: Schocken Books, 1976), 61-64. Dan Diner speaks of a 'negative symbiosis' in order to describe the German-Jewish relations after 1945, see Dan Diner, "Negative Symbiose: Deutsche und Juden nach Auschwitz," *Babylon* 1 (1986): 9-20.

⁸⁹ Weiss and Gorelik, "The Russian-Jewish Migration," 398.

⁹⁰ Ibid.

⁹¹ See the statistics for 2016 provided by Zentralwohlfahrtsstelle der Juden in Deutschland <http://zwst.org/de/service/mitgliederstatistik/>. It is difficult to estimate the exact number of Jews in Germany as there is no officially agreed definition of who is Jewish and synagogue membership would be an insufficient criterion.

⁹² Ruth A. Starkman, "Perpetual Impossibility? Normalization of German-Jewish Relations in the Berlin Republic," in *Transformations of the New Germany*, ed. Ruth A. Starkman (New York; Houndmills: Palgrave Macmillan, 2006), 233-49.

another binary between Jews and Germans.⁹³ Overt Philosemitism prevents a more thorough public engagement with German perceptions of Jews beyond their status as victims of the Holocaust. As the writer Esther Dischereit remarks: “The Jewish question has been *the* taboo subject in a young republic that seeks to polish its reputation.”⁹⁴

b. Untroubled Acceptance? Jews in Australia

Today, around 91,022 Australians identify as Jewish according to the 2016 census, making up 0.4 per cent of the population.⁹⁵ Some estimations put these numbers even higher suggesting that in fact between 130,000 to 150,000 Jews live in Australia.⁹⁶ On the other side of the globe, Jews were able to find a welcoming home far away from the perils of European nationalism, in which Jews were frequently seen as quintessential Others. However, although Australia is often presented as a “Jewish success story”,⁹⁷ the country’s search for its national identity posed its own challenges for Jews and their inclusion into this collective narrative.

Jewish history in Australia dates back to the arrival of the first European settlers on Australian shores in January 1788. On board of the First Fleet, alongside other British convicts, a handful of Jews came to the continent. This simultaneous arrival of displaced foreigners contributed to the impression of an unheard-of “normalcy” of Jewish life in the country.⁹⁸ In Australia, no settler was able to claim a genuine connection to the land that could have served as a base for national identity. Consequently, as Jon Stratton points out, Jews, British, and Irish were all displaced in the colonies, which initially prevented the perception of Jews as Others, as was still the case in European societies at the time. The role of the threatening Others was instead assigned to Indigenous Australians and to Asians whose immigration the early British settlers observed with great suspicion.⁹⁹

⁹³ Y. Michael Bodemann, *„Gedächtnistheater“: Die jüdische Gemeinschaft und ihre deutsche Erfindung*. (Berlin: Rotbuch, 1996).

⁹⁴ Esther Dischereit, “No Exit from ‘This Jewry,’” in *Reemerging Jewish Culture in Germany. Life and Literature since 1989*, eds. Sander L. Gilman and Karen Remmler (New York; London: New York University Press, 1994), 266-81, at 270.

⁹⁵ See the Australian census data on religious affiliation from 2016: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Article~80>.

⁹⁶ Raphael Ahren, “JAFI Reforms May Hurt Australian Immigration to Israel, Leader Says,” *Ha’aretz*, 25 March 2011, <https://www.haaretz.com/1.5141713>.

⁹⁷ Evan M. Zeusse, quoted in Malcolm J. Turnbull, “Safe Haven: Records of the Jewish Experience in Australia,” (National Archives of Australia, 2000).

⁹⁸ *Ibid.*, chapter 6: Aspects of Jewish Life in Australia, sub-chapter: Antisemitism in Australia.

⁹⁹ Jon Stratton, *Coming out Jewish* (London: Routledge, 2000), 200. The role of the Other was instead assigned to the Chinese and outside the migration context to Aboriginal people.

Because of Australia's status as a settler-colony, Australian Jews did not have to undergo a formal process of emancipation – they secured, quite similar to American Jews, legal and political emancipation by virtue of their arrival.¹⁰⁰ In the Australian colonies, Jews were eligible to stand for office, even before they were able to do so in Great Britain.¹⁰¹ Sir Isaac Isaacs, the first Australian born Governor-General, and several senior military figures, such as Sir John Monash, the commander of the Australian corps during World War I, were Jewish. Although small in numbers, Jews played an active and significant role in Australian public life. Nonetheless, they still followed the conventional path that Jews had taken in other countries of the West, whereby emancipation demanded that Jews become citizens of the Jewish faith. The Jewish settlers in Australia too labelled Jewishness as a matter of personal belief, while regarding themselves primarily as British subjects. In order to integrate into Australian society, they were Jews only on the Shabbat and members of the general population on all other days of the week, as historian Suzanne Rutland describes.¹⁰² Downplaying their differences to the Christian British settlers proved a successful strategy for Jews in Australia. The peculiar context of colonialism enabled Jews from Britain to pass as white as other British settlers. Economic factors helped them too, as they rose quickly into the middle and upper classes of Australian society.¹⁰³ This was not only the result of skin-colour but of a conscious effort. by Australian Jews, who put much effort into emulating their non-Jewish neighbours, eventually becoming “more English than the Jews in England.”¹⁰⁴

Although Australia did not have a history of major legal impediments for Jews, the country was not free from ambivalence towards Jews, which surfaced at the end of the nineteenth century. Attempts to strengthen a national Australian identity by tying it to a racial notion of ‘Britishness’ began to challenge the status of Jews whose identity did not easily fit into categories of race and descent that came to underpin Australia's legal migration regime. In the late nineteenth century, fear of an influx of impoverished Russian Jews led to a surge of Antisemitic discourse and marked the beginning of an ambivalent racialization of Jews. While the highly assimilated Anglo-Jewry were accepted as white and British, Jews from the Eastern Europe seemed to constitute a different case. Although they shared the same faith as Anglo-Jews, racially they were viewed with ambivalence as somewhere in-

¹⁰⁰ Ira Katznelson, “Between Separation and Disappearance: Jews on the Margins of American Liberalism,” in *Paths of Emancipation. Jews, States, and Citizenship*, eds. Pierre Birnbaum and Ira Katznelson (Princeton: Princeton University Press, 1995), 157-205, at 158.

¹⁰¹ In the United Kingdom, Jews were gradually freed from their civil disabilities during the 1830s. In 1858, the Jews Relief Act finally removed the barriers that had prevented Jews from entering Parliament.

¹⁰² Suzanne D. Rutland, “Reflections on ‘Culture Mavens’ from an Australian Jewish Perspective,” in *Jews at Home. The Domestication of Identity*, ed. Simon J. Bronner (Oxford; Portland: Littman Library of Jewish Civilization, 2010), 307-15, at 307.

¹⁰³ Levey, “Jews and Australian Multiculturalism,” 181.

¹⁰⁴ Reverend John Landau, cited in Suzanne D. Rutland, *Edge of the Diaspora: Two Centuries of Jewish Settlement in Australia*, 2nd rev. ed. (Rose Bay: Brandl & Schlesinger, 1997), 413.

between ‘Asiatic’ and ‘European,’¹⁰⁵ echoing the Orientalist view of Jews as alien ‘Asiatics’ as German Enlightenment thinkers had already expressed.¹⁰⁶ The increasing racialisation of Jews in Australia at the turn of the century did of course not happen in a vacuum, but rather reflected the general trend across Western societies to perceive of Jewish difference as one of race.¹⁰⁷

The ambivalent attitude towards Jews became apparent in the way Jews were treated under the White Australia policy. The White Australia Policy describes a set of policies that, since the introduction of the Immigration Restriction Act in 1901, effectively prevented persons of non-European descent from migrating to Australia. The policy lasted until it was gradually dismantled by 1973. The policy’s aim was to secure Australia’s identity as a predominantly white nation by preserving an Anglo-Celtic majority¹⁰⁸ and thereby raised complicated questions about the whiteness of Jews from Russia and the Middle East. Were those Jews as white as their British kin? Or were those Jews in fact Asiatic who just happened to share the same faith as Australian Anglo-Jewry? Under the White Australia Policy, Jews posed a racial conundrum, “a group that could not be clearly pinned down according to the prevailing racial categories.”¹⁰⁹

Ambivalences about Jewish identity also surged when European Jews sought refuge in Australia from Nazi Germany. At the 1938 refugee conference in the French town of Evian, the Australian delegate declared that Australia did not have a racial problem, but the country also would not want to import one by accepting Jewish refugees from Germany.¹¹⁰ Moreover, after the Second World War, many Australians were highly wary of Jewish migration to the country, which they saw as threatening the Australian way of life and as unwanted competition in the labour and housing market. The media fuelled anxieties over Jewish refugees taking away jobs from returning ex-servicemen¹¹¹ and portrayed Jews as unable to integrate, as sticking together and “clannish in their behaviour.”¹¹² Jews were not only seen as an economic problem, but also as a cultural threat. Fears radiated that Jewish migration would undermine Australian culture and its ties to Christianity, bringing to the surface the often-muted links between Britishness and Christianity in the formation of Australian identity. Media and public discourse depicted Jews as “godless people, lacking in moral principles and threatening to

¹⁰⁵ Stratton, *Coming out Jewish*, 195-219.

¹⁰⁶ For a detailed account of the relation between Jews and Orientalism see Kalmar and Penslar, *Orientalism and the Jews*.

¹⁰⁷ Stratton, *Coming out Jewish*, 198.

¹⁰⁸ Garner, *Whiteness*, 68.

¹⁰⁹ Eric L. Goldstein, *The Price of Whiteness: Jews, Race, and American Identity* (Princeton: Princeton University Press, 2006), 1. Goldstein’s comment refers to America and the black-white paradigm of race, however, in a way, Australian Jews faced similar problems to clearly fit into racial dichotomies.

¹¹⁰ Suzanne D. Rutland, *The Jews in Australia* (Cambridge: Cambridge University Press, 2005), 57.

¹¹¹ Suzanne D. Rutland, “Postwar Anti-Jewish Refugee Hysteria: A Case of Racial or Religious Bigotry?,” *Journal of Australian Studies* 27, no. 77 (2003): 69-79, at 72-73.

¹¹² *Ibid.*, 76.

Christianity.”¹¹³ Anxieties over Jewish refugees were not restricted to non-Jews. Australia’s anglicised Jewish community too was sceptical of the newly arrived, seeing them as a threat to their own status.¹¹⁴ Between 1939 and 1953 quotas were placed on Jewish passengers travelling to Australia,¹¹⁵ with the quota affecting anyone belonging to the ‘Hebrew race’ and ‘Hebrew faith.’¹¹⁶ By collapsing race and religion in definitions of Jewishness, the quota overcame the uncertainties around Jewish identity in order to restrict the migration of both religious and secular Jews. Yet, despite anxieties around Jewish refugees, Australia accepted more Holocaust survivors per capita than any other nation apart from Israel.¹¹⁷

The complex relationship between Jewishness and whiteness is not unique to Australia but reflects the ambiguous racialisation of Jews elsewhere, most notably in the United States. Today often counted as white,¹¹⁸ the historical racial status of American Jews has been much more uncertain. Legally, Jews had been considered white since the early days of the American republic. The US American Naturalization Act of 1790 counted Jews as “free white persons” eligible for citizenship. But culturally, Jews were viewed with suspicion, in particular those Jewish immigrants who spoke Yiddish and adhered to Jewish traditions. Certain clubs restricted Jewish membership and universities such as Harvard placed quotas on Jewish applicants who were seen as threatening the white Anglo-Saxon Protestant dominance among the elite universities’ student body¹¹⁹ – a policy reminiscent of today’s accusation by Asian-American students against the same elite universities.¹²⁰

Karen Brodtkin’s work on the Jewish pathway to whiteness in the United States shows how both changing public perceptions and upward mobility helped Jews to be gradually accepted as white during the 1940s and 1950s.¹²¹ Brodtkin argues that the war against fascism had led to a more inclusive

¹¹³ Ibid.

¹¹⁴ Rutland, *Edge of the Diaspora: Two Centuries of Jewish Settlement in Australia*, 184-85.

¹¹⁵ Rutland, “Postwar Anti-Jewish Refugee Hysteria.”

¹¹⁶ Ibid., 78.

¹¹⁷ International Holocaust Remembrance Alliance, <https://www.holocaustremembrance.com/news-archive/reflecting-holocaust-remembrance-australia>.

¹¹⁸ The question of Jewish whiteness has come up again in the context of the rise of the White Supremacy Movement in the United States but also in the context of the Jewish relation to the Black Lives Matter Movement. See e.g. Emma Green, “Are Jews White?” *The Atlantic*, 5 December 2016, <https://www.theatlantic.com/politics/archive/2016/12/are-jews-white/509453/>. On the relation between the Black Lives Matter movement and Jews see e.g. Akinyi Ochieng, “Black-Jewish Relations Intensified and Tested by Current Political Climate,” *NPR*, 23 April 2017, <https://www.npr.org/sections/codeswitch/2017/04/23/494790016/black-jewish-relations-intensified-and-tested-by-current-political-climate?t=1543918727539>.

¹¹⁹ Jerome Karabel, *The Chosen. The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* (Boston; New York: Houghton Mifflin, 2005), 86-109.

¹²⁰ See Anemona Hartocollis, “Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says,” *New York Times*, 15 June 2018, <https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html>.

¹²¹ Brodtkin, *How Jews Became White Folks and What That Says About Race in America*.

notion of whiteness, while Antisemitism and racism against other ‘off-white’ European immigrants lost respectability. Theories of nature and biology were replaced by theories of nurture and culture,¹²² allowing for the emphasis of the commonalities between the Christian denominations and Judaism as embodied in the emerging narrative of the United States as a Judeo-Christian nation. At the same time, post-war economic prosperity enabled class mobility from which Jews benefitted,¹²³ allowing them to settle in the predominantly white suburbs and thereby becoming increasingly accepted as white themselves.¹²⁴ Yet, as Eric Goldstein remarks, for some Jews, understanding themselves as undoubtedly white sat uneasily with their own commitment to a distinctive identity which “often cut against their attempts to claim whiteness.”¹²⁵ One problem concerned their own relation to African Americans.¹²⁶ On the one hand, Jews strived to eradicate the ambivalence of their own racial status by asserting the colour line. But on the other hand, their own experience of oppression and Antisemitism led to an identification with the plight of black people.¹²⁷ Another source of tension had been their commitment to Jewish peoplehood and the language of race that enabled Jews to refer their own distinctiveness in terms of race. Jews in fact often described themselves as a different Hebrew race.¹²⁸

Australian Jews too have grappled with the question of their own identity, and its relation both to the dominant white mainstream of society and to other minority groups. After the end of the White Australia Policy in 1973, the country began introducing multicultural policies, whereby groups were no longer defined in racial but in ethnic terms. The move to multiculturalism posed its own challenge for Australian Jews, who had so far downplayed their difference as a matter of faith. As Geoffrey Brahm Levey writes

by sanctioning the acceptability and even the public support and celebration of cultural difference, Australian multiculturalism invited Jews to discard their time-honoured mode of political quietism and of publicly downplaying their Jewish distinctiveness as much as possible. It held out an opportunity to exchange their traditional quest for ‘invisibility’ before the law for group visibility

¹²² Karen Brodtkin, “How Did Jews Become White Folks?,” in *Race*, eds. Steven Gregory and Roger Sanjek (New Brunswick: Rutgers University Press, 1996), 78-102, at 87.

¹²³ Ibid.

¹²⁴ Ibid., 97.

¹²⁵ Goldstein, *The Price of Whiteness*, 2. See also Brodtkin, *How Jews Became White Folks and What That Says About Race in America*, 182.

¹²⁶ On Jewish-Black relations see e.g. Itzkovitz, “Race and Jews in America.”

¹²⁷ Jon Stratton notes the similarities between the partial racialisation of Jews in both the United States and Australia but argues that Australian Jews only tentatively identified with the plight of the Aboriginal peoples, see Stratton, *Coming out Jewish*, 237.

¹²⁸ Goldstein, *The Price of Whiteness*, 11-31.

and a public profile, which, in Jewish historical experience, had been associated with persecution and invidious discrimination.¹²⁹

While it invited Jews to become more visible alongside other minority groups, multiculturalism also raised the question of how to describe Jewish difference. Levey argues that multiculturalism challenged Jews in Australia in a different way compared to American Jews. In the United States, the main voices of multiculturalism excluded Jews by assuming them to be part of the dominant white majority. This put American Jews themselves into a difficult position, as Michael Galchinsky describes:

Jews are caught betwixt and between the liberal white dominant culture and the multicultural minority world. If we attempt to follow the old liberal model we need to continue to ‘mainstream’ ourselves, to pass, to lead a double life. On the other hand, since we can pass, Jews cannot be included in the emerging culture of diversity.¹³⁰

In Australia, however, the question of how Jews might fit into the categories of multiculturalism remained open. Originally, there had been a strong emphasis on ethnic groups in Australian multicultural policy. Those groups were defined by their common national origin and a shared language. Australian Jews, however, possessed none of these features as they hailed from all across the world. Moreover, those of British descent in particular continued to stress their identity as a matter of religion.¹³¹ Defining themselves as ‘ethnic’ had its perils as it meant to officially acknowledge a precarious whiteness. After all, the term ‘ethnic’, Christopher Kelen notes, referred to “other than Australian of Anglo-Celtic decent.”¹³² For Jews, to assume the label as ‘ethnic’ thus meant to acknowledge their difference beyond the narrow category of faith, marking them as ‘not quite white’. Whereas for some previously marginalised groups, such as Greeks and Italians, multiculturalism offered a more prominent place in Australian society, for Jews, the process of becoming more visibly different was marked by some discomfort. Australian Jews therefore remained reluctant to define themselves as an ethnic group,¹³³ although they eventually joined the various Ethnic Communities Councils, the peak bodies for the ethnic communities in Australia.

Over time, Australian Jews grew more accustomed to multiculturalism and identity politics, yet without eroding their longstanding acceptance of the “dominant Anglo-Protestant ethos” of

¹²⁹ Levey, “Jews and Australian Multiculturalism,” 184-85.

¹³⁰ Galchinsky, “Glimpsing Golus in the Golden Land,” 365.

¹³¹ Andrew Markus, “Multiculturalism and the Jews,” in *New under the Sun. Jewish Australians on Religion, Politics & Culture*, eds. Michael Fagenblat, Melanie Landau, and Nathan Wolski (Melbourne: Black), 93-107, at 99.

¹³² Christopher Kelen, “Hymns for and from Australia,” in *Postcolonial Whiteness. A Critical Reader on Race and Empire*, ed. Alfred J. López (Albany: State University of New York Press, 2005), 201-30, at 204.

¹³³ On the relation between the category ‘ethnic’ and Jewishness in England see Herman, “‘The Wandering Jew Has No Nation.’”

Australian society.¹³⁴ Instead of expecting the dominant culture to change, the Jewish approach has been to ask this dominant culture to make room for Jews, as Geoffrey Levey notes.¹³⁵ Australian Jews, Levey argues, inhabit “twin worlds,” oscillating in their self-description between affirmations of their Australianness they share with other Australians, on the one hand, and insistence on their Jewishness that marks them as particular and potentially different, on the other.¹³⁶

III. Conclusion: Still Different?

The Jewish journey into Western societies is a remarkable one, in which an emblematic outsider group has moved closer to the inside. However, it is also a journey in which Western societies, often defining themselves as Christian and/or white, repeatedly tried to come to terms with Jewishness which they perceived as fundamentally different from themselves – theologically, racially, culturally, and therefore, legally. Law played an important role in the attempts of European societies to manage the presence of the Jewish Other, providing many of the means to construct, remake, and contain Jewish difference. The remaking of Jewishness into a religion in the Protestant-Christian sense marked a particularly important turning point as it allowed Jews not only access to equal rights, but also as created a tension around Jewishness by requiring Jews to downplay the more public aspects of their identity – a requirement that will play a crucial role throughout this thesis.

Today, Jews as a group face few legal obstacles in Germany and Australia. Neither country enforces policies or laws that directly discriminate against Jews. From a formal legal perspective, Jews have been accepted and are well-integrated. Culturally, however, acceptance has been more complex as the second part of this chapter has illustrated. In both Germany and Australia, subtle ambivalences around Jewishness have remained, shaped by the particular trajectories of the two countries, albeit in much more muted ways than was historically the case. Whereas the Jewish position in Germany is significantly shaped by the country’s atrocious past, creating the image of the ‘victim Jew’, the Australian search for a national identity posed particular challenges for Jews in the former British colony, as it raised complex questions about the relation between Jewishness and the dominant white identity.

What does this mean for a law as a site for the construction of Jewish difference? Writing on the relation between law and race in the US, Ian Haney López argues that until the early twentieth century, law constructed race directly and formally. But the end of the official endorsement of directly and formally racialising laws does not mean the end of law as a means to construct race. Rather, the law constructs race today informally and indirectly “by relying on, promulgating, and giving force ...

¹³⁴ Levey, “Jews and Australian Multiculturalism,” 189.

¹³⁵ *Ibid.*, 193.

¹³⁶ *Ibid.*, 188.

to particular ideas about the nature of race, races, and racism.”¹³⁷ Similarly, Kimberlé Crenshaw observes that the move to formal equality in the United States has not ended the subordination of black people as the racist assumptions about black people as Others still permeate US society.¹³⁸ Law, according to critical race theorists such as Crenshaw and López, continues to replicate assumptions about human differences by perpetuating these deeply entrenched ideas.¹³⁹ Seen from this vantage point which emphasises the link between law and culture, law and legal discourse need to be considered as a site to give expression to the persistent cultural ambivalences around Jews as different. Keeping the historical significance of the Jew as Other and its legacy in mind, the following chapters thus turn to law and how it constructs Jews today by exploring legal encounters with two practices that have marked Jews as distinct – male circumcision and the eruv.

¹³⁷ López, *White by Law: The Legal Construction of Race*, xv.

¹³⁸ Kimberlé Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,” *Harvard Law Review* 10, no. 7 (1988): 1331-87, at 1370-81.

¹³⁹ *Ibid.*, 1352-52; López, *White by Law: The Legal Construction of Race*, xv-xvi.

3 CONTENTIOUS CUT: MALE CIRCUMCISION

Circumcision – Part One

“The sign of circumcision is, as I think so important, that I could persuade myself that it alone would preserve the [Jewish] nation forever,” wrote Baruch Spinoza.¹ The Jewish philosopher who lived in seventeenth century Amsterdam was well aware of the unifying nature of male circumcision,² the rite that held together the dispersed Jewish communities all over the world across space and time outside a national home where they lived under non-Jewish rule. As the indispensable and distinguishing mark of the Jewish male, the tradition continues to hold a special place in Jewish culture, as one of the few commands that even those Jews who are indifferent towards religion almost universally still observe. Over the last decades, however, the practice of male circumcision has come increasingly under legal, political, and medical scrutiny. Critics argue that the procedure, if performed for non-medical reasons such as religion, violates the human rights of the child – warranting tighter regulation or even a ban. While critics claim that children’s rights and medical ethics are their sole concerns, Jewish commentators are sceptical of the motives behind this criticism. Many of them tend to interpret these attacks on circumcision within the long history of the ritual as a contested trope of Jewish difference.³ From this perspective, the attacks on male circumcision appear as yet another attempt to end Jewish particularity.

¹ Benedictus Spinoza, *The Chief Works of Benedict De Spinoza: Volume I: Introduction, Tractatus Theologico-Politicus, Tractatus Politicus*, trans. Robert Harvey Monro Elwes (London: George Bell and Sons, 1891), 3/56.

² Throughout this and the following chapter, I use both the terms ‘male circumcision’ and ‘circumcision’ to refer to the practice of male circumcision.

³ See e.g. Iddo Porat, “The Problem with Iceland’s Proposed Ban on Circumcision,” *EUROPP Blog*, 27 April 2018, <http://blogs.lse.ac.uk/europpblog/2018/04/27/the-problem-with-icelands-proposed-ban-on-circumcision/>; Ben Cohen, “The Drumbeat against Jewish Ritual in Europe Sounds Once More,” *The*

This is the first of two chapters in which I explore legal debates about male circumcision and their relation to ideas about Jews as different. The aim of this chapter is to establish the historical and legal context of the current legal and political disputes about male circumcision as a human rights issue. I begin this chapter with a brief overview of brit milah and its significance in the Jewish tradition. In the second part, I trace the history of brit milah as a trope for Jewish difference in the Western imagination. The third part examines how male circumcision has emerged as a human rights issue and discusses the legal arguments against male circumcision. This chapter concludes with the argument that the mounting legal debate about male circumcision as a human rights issue cannot be easily detached from its cultural-historical baggage.

I. An Age-Old Surgery

For millennia, societies have engaged in the practice of male circumcision making it one of the oldest and most common surgeries worldwide. The Greek historian Herodotus, who lived in the fifth century BCE (before common era), assumed its origins in Egypt.⁴ Indeed, artwork in Egyptian tombs dating back to around 2400 BCE shows a circumcision being performed on a standing adult man.⁵ It is estimated that today around 30 per cent of men worldwide are circumcised.⁶ If the procedure is performed for medically indicated reasons such as phimosis (the non-retractability of the foreskin), it is referred to as therapeutical circumcision. All other types fall into the camp of non-therapeutical circumcisions. The vast majority of circumcisions occur for non-medically indicated reasons such as religion, culture, social norms, aesthetics, general health, and hygiene. Muslims who form the largest circumcising group derive their obligation to circumcise from the Sunnah, the sayings and teachings of the Prophet Mohammed. In Africa, many ethnic groups such as the Xhosa practice circumcision as a rite of passage into manhood.⁷ For a number of Australian indigenous communities, circumcision

Algemeiner, 12 May 2017, www.algemeiner.com/2017/05/12/the-drumbeat-against-jewish-ritual-in-europe-sounds-once-more/; Tanya Gold, "A Ban on Male Circumcision Would Be Antisemitic. How Could It Not Be?" *Guardian*, 12 October 2013, <https://www.theguardian.com/commentisfree/2013/oct/11/ban-male-circumcision-antisemitic>; Alan Dershowitz, "J'acuse [Sic!]: Shame on Germany for Circumcision Ban," *Huffington Post*, 9 June 2012, https://www.huffingtonpost.com/alan-dershowitz/jacuse-shame-on-germany-f_b_1861252.html.

⁴ Geoffrey P. Miller, "Circumcision: Cultural-Legal Analysis," *Virginia Journal of Social Policy & the Law* 9 (2001): 497-585.

⁵ For a reproduction of the artwork see e.g. Tablet Mag: <https://www.tabletmag.com/scroll/176348/bas-relief-depicts-circumcision-in-ancient-egypt>.

⁶ For a comprehensive overview of circumcision around the world see the report compiled by WHO and UNAIDS, "Male Circumcision: Global Trends and Determinants of Prevalence, Safety and Acceptability." (Geneva 2007).

⁷ Louise Vincent, "'Boys Will Be Boys': Traditional Xhosa Male Circumcision, HIV and Sexual Socialisation in Contemporary South Africa," *Culture, Health & Sexuality* 10, no. 5 (2008): 431-46.

has also been an important cultural ceremony.⁸ The procedure is popular in South Korea, where it has become associated with economic progress,⁹ and in the United States, where it has been one of the most frequently performed surgeries since the early twentieth century.¹⁰ Although the term male circumcision seems to suggest a uniform procedure, there are in fact differences in practice, such as the age at which circumcision occurs. In Islam, the timing is rather flexible, ranging from childhood to early puberty, similar to South Korea where most boys are circumcised between the age of six and the late teenage years.¹¹ Young Xhosa men, on the other hand, are circumcised in late puberty. In the United States, routine neo-natal circumcision occurs shortly after birth when the child is only a few days old. The Jewish practice of brit milah is similar, with the newborn undergoing circumcision eight days after his birth.

a. Sign of the Covenant

Today, almost all Jewish males all over the world are circumcised, making it the most widely observed command even among those Jews who describe themselves as secular or atheist and neither follow a kosher diet, nor observe Shabbat or attend synagogue. While no exact numbers exist, it is estimated that around 98 per cent of Jewish Israeli men are circumcised.¹² Estimations are similar for Great Britain, with 99 per cent of Jewish males circumcised¹³ and 98 per cent in the United States.¹⁴ Jews trace their obligation to circumcise back to Abraham, the first Jewish man to undergo the procedure in the Jewish tradition. In Genesis, the Torah tells that

God said to Abraham, “As for you, you are to keep my covenant, you and your seed after you, throughout their generations. This is my covenant that you are to keep, between me and you and your seed after you: every male among you shall be circumcised. You shall circumcise the flesh of your foreskin, so that it may serve as a sign of the covenant between me and you. At eight days

⁸ Some Aboriginal people have practised subincision, which is a more severe form of genital alteration in which the underside of the penis is incised, see Ivor H. Jones, “Subincision among Australian Western Desert Aborigines,” *British Journal of Medical Psychology* 42 (1969): 183-90.

⁹ Myung-Geol Pang and DaiSik Kim, “Extraordinarily High Rates of Male Circumcision in South Korea: History and Underlying Causes,” *British Journal of Urology International* 89, no. 1 (2008): 48-54.

¹⁰ David L. Gollaher, “From Ritual to Science: The Medical Transformation of Circumcision in America,” *Journal of Social History* 28, no. 1 (1994): 5-36, at 5.

¹¹ Richard A. Shweder, “Shouting at the Hebrews: Imperial Liberalism v Liberal Pluralism and the Practice of Male Circumcision,” *Law, Culture and the Humanities* 5, no. 2 (2009): 247-65, at 257.

¹² Ilan Youngster and Ben Z. Katz, “Tradition... Tradition,” *Journal of the Pediatric Infectious Diseases Society* 4, no. 2 (2014): 132-33, at 132.

¹³ Sangeeta S. Dave et al., “Male Circumcision in Britain: Findings from a National Probability Sample Survey,” *Sexually Transmitted Infections* 79, no. 6 (2003): 499-500.

¹⁴ WHO and UNAIDS, “Male Circumcision: Global Trends and Determinants of Prevalence, Safety and Acceptability.” (Geneva 2007), at 3.

old, every male among you shall be circumcised, throughout your generations, including one who is born in the house, or acquired with money from any foreigner, who is not of your seed. One who is born in your house, and one who is acquired with your money, must be circumcised; and my covenant shall be in your flesh for an everlasting covenant. But a foreskinned male who does not circumcise the flesh of his foreskin, that person shall be cut off from his people, he has violated my covenant.¹⁵

In the biblical story, Abraham fulfils this command immediately. After swiftly circumcising himself, he cuts the foreskin of all male members of his household. Given the size of Abraham's household, which was said to have numbered more than three hundred members, this was the first mass circumcision in Jewish history.¹⁶ The cutting of the foreskin sealed the covenant – hence the Hebrew name, *brit milah*, with 'brit' meaning 'covenant' and 'milah' meaning 'circumcision': the covenant of circumcision.¹⁷

What is the rationale behind circumcision? The Torah itself does not state any other reason for circumcision other than that it is the sign of the covenant. Jewish thinkers throughout the time have discussed this question and arrived at a number of different, sometimes contradictory, explanations for this divine command.¹⁸ Many medieval Jewish thinkers, much like their Christian counterparts, were rather sceptical about sexuality and they tried to make sense of the practice as a way to foster sexual modesty.¹⁹ In his *Guide for the Perplexed*, Moses Maimonides, a Sephardic Torah scholar and physician who lived and worked in the twelfth century in Morocco and Egypt, notes that circumcision brings "about a decrease in sexual intercourse and a weakening of the organ in question, so that this activity be diminished and the organ be in as quiet a state as possible."²⁰ According to this view, the purpose of circumcision was to reduce the faculty for sexual excitement and pleasure and to prevent desire and lust that go beyond what is necessary for procreation. Human intervention was thus necessary to achieve sexual moderation. This moral dimension was important for Maimonides as it related to an earlier assertion that all of God's creatures "are most perfect, that no deficiency at all is commingled with them, that there is no superfluity in them and that nothing is needed."²¹ Clearly

¹⁵ Genesis 17: 9 – 14.

¹⁶ Elizabeth Wyner Mark, "Wounds, Vows, Emanation. A Phallic Trope in the Patriarchal Narrative," in *The Covenant of Circumcision: New Perspectives on an Ancient Jewish Rite*, ed. Elizabeth Wyner Mark (Hanover; London: Brandeis University Press, 2003), 3-15, at 7. See also Genesis 14:14.

¹⁷ Brit is the Sephardic pronunciation, but the Ashkenazi pronunciation *bris* is also common, in particular in the United States.

¹⁸ On this topic see Shaye J. D. Cohen, *Why Aren't Jewish Women Circumcised? Gender and Covenant in Judaism* (Berkeley; Los Angeles; London: University of California Press, 2005).

¹⁹ On Jewish attitudes towards sexuality over time see Louis Jacobs, *The Jewish Religion: A Companion* (Oxford; New York: Oxford University Press, 1995), 453-55.

²⁰ Moses Maimonides, *The Guide of the Perplexed*, trans. Shlomo Pines (Chicago: University of Chicago Press, 1963), III 49, at 609.

²¹ Ibid., II 28, at 335-36.

from this perspective circumcision seems contradictory. If God's creations are perfect and each male is born with a foreskin, why cut it off?

Another Talmudic interpretation of circumcision understands the cutting of the foreskin as a way to create further perfection. A midrashic anecdote²² recounts how Turnus Rufus, the Roman Governor of Palestine, once challenged Rabbi Akiba with this question: "If God dislikes a man having a foreskin, why did He create him with one in the first place?"²³ For rabbinic Judaism, the answer is clear: circumcision is the further perfection of the human body. Rabbinic interpretations compare the foreskin to a stalk on a fig or a fingernail in need of manicure.²⁴ The penis needs some human intervention by cutting off the foreskin as much as the fig needs the plucking off the stalk in order to be enjoyed. Another midrashic story makes this even clearer by letting a sage ponder this question: "If circumcision is so precious, why was it not given to Adam?"²⁵ To which the sage wisely responded: "Whatever was created in the first six days requires further preparation, for example mustard needs sweetening, vetches need sweetening, wheat needs grinding, and man too needs improvement."²⁶ Cutting the prepuce thus leads to a state of further perfection, a perfection that sanctifies the human body by correcting an "excess of creation".²⁷

b. Sign of Cultural Continuity

Scholars note that theological explanations alone cannot account for the remarkable commitment that Jews have shown towards the practice of circumcision. Many Jews, especially those who are indifferent to religion, are probably not even aware of the rabbinical discussions. Scholars in Jewish Studies suggest that the commitment to the rite needs to be understood within the context of the Jewish experience of minority existence and life in the Diaspora where Jewish cultural survival was often threatened or precarious facing pressure to assimilate. Circumcision marked Jews as different in non-circumcising societies, a mark that was often the target of scorn, derision, and ridicule. But instead of surrendering to cultural pressure, the rite came to signify perseverance and pride. "There

²² The Midrash is a genre of rabbinic literature containing early commentaries on and interpretations of the Written Torah and the Oral Torah.

²³ Jacobs, *The Jewish Religion: A Companion*, 81.

²⁴ Quoted in Cohen, *Why Aren't Jewish Women Circumcised?*, 149.

²⁵ Adam as the first man was obviously not circumcised. This tradition only began with Abraham.

²⁶ Quoted in Cohen, *Why Aren't Jewish Women Circumcised?*, 149.

²⁷ Jonathan Boyarin and Daniel Boyarin, "Self-Exposure as Theory: The Double Mark of the Male Jew," in *Rhetorics of Self-Making*, ed. Debbora Battaglia (Berkeley; Los Angeles; London: University of California Press, 1995), 16-42, at 24. Interestingly, some Jewish parents who decide not to circumcise their sons make the exact opposite argument to justify their decision. One woman explained that "noncircumcision stems from my appreciation of nature and its laws in all its spheres." Quoted in Ephraim Tabory and Sharon Erez, "Circumscribed Circumcision. The Motivations and Identities of Israeli Parents Who Choose Not to Circumcise Their Sons," in *The Covenant of Circumcision: New Perspectives on an Ancient Jewish Rite*, ed. Elizabeth Wyner Mark (Hanover; London: Brandeis University Press, 2003), 161-76, at 167.

is an element of defiance, a refusal to feel ashamed, a proud proclamation of Jewish difference that disempowers the mockers and the Jew-haters,” Elizabeth Wyner Mark explains.²⁸ This cultural-historical baggage contributed to circumcision’s ambivalent status as “the positive assertion of a Jewish refusal to surrender to antisemitism” and the “physical marking of possibly stigmatizing difference” particularly in non-circumcising societies.²⁹

Although the Jewish response to circumcision has been overwhelmingly positive, some have begun to question this commitment. The push by Jewish feminists for enhancing women’s participation in Judaism, with its traditional gendered roles, has raised new questions about brit milah. For Jewish feminists, it can be hard to reconcile ideas of gender equality with a tradition that is so obviously focussed on the male body. Elyse Goldstein, a feminist Rabbi, describes brit milah bluntly as a “ceremony of male bonding”.³⁰ She complains about the difficulties for Jewish feminists in the United States to have their voices heard, which is further complicated by the strong support for male circumcision among non-Jewish segments of society:

While the mostly male establishment still debates the physical usefulness of circumcision, the Jewish people hold to its spiritual usefulness. Feminists have yet to enter that discussion in full power, and on those occasions when they do, they are often accused of being traitors for merely questioning the centrality of circumcision.³¹

Jewish feminists find themselves in the midst of debates about the relation between gender equality and cultural difference. Theorising this relationship has not been easy for feminists and for Jewish feminists this tension gains practical relevance while navigating the particularities of Jewish identity and their aim to promote gender equality within Judaism. This has contributed to an interest in a new tradition, *brit shalom* (the covenant of peace), as an alternative to circumcision. The naming ceremony does not involve the cutting of the foreskin and is similar to the naming ceremony already used for baby girls (sometimes called *brit bat*). The motivation for brit shalom, however, does not stem necessarily from opposition to circumcision *per se*, although some of those celebrants offering the ceremony belong to Jewish movements against circumcision. Rather it reflects an emphasis on gender equality and choice, and parents are not automatically discouraged from circumcising their children. As a 2002 resolution of the Leadership Conference of Secular and Humanistic Jews, a US-based organisation of Humanistic Judaism, stated: “It is a tradition of the Jewish people to celebrate the

²⁸ Elizabeth Wyner Mark, “Crossing the Gender Divide: Public Ceremonies, Private Parts, Mixed Feelings,” in *The Covenant of Circumcision: New Perspectives on an Ancient Jewish Rite*, ed. Elizabeth Wyner Mark (Hanover; London: Brandeis University Press, 2003) xiii-xxvi, at xxiv.

²⁹ Éva Kovács and Júlia Vajda, “Circumcision in Hungary after the Shoa,” in *The Covenant of Circumcision. New Perspectives on an Ancient Jewish Rite*, ed. Elizabeth Wyner Mark (Hanover; London: Brandeis University Press, 2003), 177-87, at 187.

³⁰ Elyse Goldstein, *ReVisions: Seeing Torah through a Feminist Lens* (Woodstock: Jewish Lights, 2001), 122.

³¹ Ibid.

arrival of sons with Brit Milah (ritual circumcision or ‘Bris’), yet our commitment to the equality of men and women inspires us to create new welcoming ceremonies.”³²

Although these initiatives exist, they should not be read as a widespread turn away from brit milah. Little is known about how many parents actually opt for this ceremony instead of circumcision, but numbers appear to be marginal compared to those parents who still follow the traditional path.³³ While this phenomenon remains minor within Judaism, it resonates with the growing concerns about male circumcision more generally and the call of activists, scholars, and medical professionals to reconsider the relevance of the practice in light of medical ethics, human rights, and gender norms.

II. A Leitmotif of Difference

While Sigmund Freud described male circumcision as Judaism’s *Leitfossil*, for non-Jews,³⁴ brit milah has always been a leitmotif in their thinking about Jews, Judaism, and Jewishness. Pressure to assimilate culturally was often directed at this visible and overt sign of Jewish difference, thereby emphasising circumcision not only as a sign of the covenant but as a “mark of difference and history”.³⁵ For many later Western thinkers, male circumcision was the odd sign of a people “out of their correct ‘space’ and ‘time’”³⁶ – a verdict which made Jews at times question the rite themselves. This part of the chapter explores how the sign of circumcision has figured as a site for the construction of Jewish difference over the course of history and examines the legal, political, and social responses this construction has entailed.

a. (Jewish) Bodies as a Site of Difference

The body of the male circumcised Jew, anthropological scholarship notes, is an image which is “crucial to the very understanding of the Western image of the Jew at least since the advent of Christianity.”³⁷ It is indeed remarkable how much discourse about Jewish difference has focussed on the circumcised penis. As Sander Gilman observes, the circumcised penis, the distinct marker of the

³² Resolution of the Leadership Conference of Secular and Humanistic Jews, “Circumcision and Jewish Identity,” April 2002, available from: <https://iishj.org/lcshj/lcshj-resolutions/>. Humanistic Judaism is a non-theistic Jewish movement, emphasising Jewish culture, history, and identity.

³³ Jonah Lowenfeld, “Little-Known Non-Cutting Ritual Appeals to Some Who Oppose Circumcision,” *Jewish Journal*, 2 August 2011, https://jewishjournal.com/news/los_angeles/community/94746/.

³⁴ Jay Geller, “A Paleontological View of Freud’s Study of Religion. Unearthing the Leitfossil Circumcision,” *Modern Judaism* 13 (1993): 49-70.

³⁵ Boyarin and Boyarin, “Self-Exposure as Theory,” 23.

³⁶ Gilman, *The Jew’s Body*, 91.

³⁷ *Ibid.*, 5.

male Jewish body, has been a central site for the “social construction of the Jewish body within the mythopoesis of Western culture.”³⁸ The absence of the foreskin, Gilman argues, has thereby functioned as a crucial metaphor of the difference of the Jewish male.³⁹

Western imagination has not only been preoccupied with the meaning of brit milah, but more broadly with the Jewish body as a site of difference.⁴⁰ There have been myths about the Jewish nose and the Jewish voice, about the Jew’s feet and gait, about the Jewish mind, about Jewish sickness, and of course, about the Jew’s circumcised penis. This preoccupation with the Jewish body is a reminder of how bodies in general have always been sites for the construction of the racialised, colonised, and gendered Other in relation to the “fictive rational self of universal, and so unmarked, species man, a coherent subject.”⁴¹ Medical anthropologists, such as Emilie Venables and Lenore Manderson, emphasise “how the body is a canvas that allows either social inclusion or exclusion; how bodies are tied to identity; or how the state shapes how bodies are used”.⁴² Highlighting the role of the body and bodily practices for the formation of collective identities, Mary Douglas writes that

The human body is always treated as an image of society and . . . there can be no natural way of considering the body that does not involve at the same time a social dimension. Interest in its apertures depends on the preoccupation with social exits and entrances, escape routes and invasions. If there is no concern to preserve social boundaries, I would not expect to find concern with bodily boundaries.⁴³

The bodily boundary of circumcision has historically served as such a social boundary. But while the decision of non-circumcision, to leave the body uncircumcised is often represented as the neutral state of being, it is, in fact, a decision equally loaded with culture, history, and tradition. “(Un)circumcision,” James Boon writes, “involves signs separating an ‘us’ from a ‘them’ entangled in various discourses of identity and distancing.”⁴⁴ Richard Shweder reminds us that the “peoples of the world are quite divided in their social norms for genital cutting; and the typical European pattern

³⁸ Ibid., 4.

³⁹ See e.g. the chapter on the construction of the Jewish male in Sander L. Gilman, *Freud, Race, and Gender* (Princeton: Princeton University Press, 1993), 49-92.

⁴⁰ Sander Gilman’s extensive work provides an insightful account of these phantasies, the stereotypes and their social and political implications, see in particular Gilman, *The Jew’s Body*.

⁴¹ Donna Haraway, “The Biopolitics of Postmodern Bodies: Determination of Self in Immune System Discourse,” in *Feminist Theory and the Body. A Reader*, eds. Janet Price and Margrit Shildrick (New York: Routledge, 1999), 203-14, at 210.

⁴² Emilie Venables and Lenore Manderson, “Exploring Bodies in Southern and East Africa,” *Medical Anthropology* 34, no. 4 (2015): 297-304, at 297.

⁴³ Mary Douglas, *Natural Symbols. Explorations in Cosmology*. (London; New York: Routledge, 2010), 78.

⁴⁴ James Boon, “Circumscribing Circumcision/Uncircumcision: An Essay Amidst the History of Difficult Description,” in *Implicit Understandings. Observing, Reporting and Reflecting on the Encounters between Europeans and Other Peoples in the Early Modern Era.*, ed. Stuart B. Schwartz (Cambridge: Cambridge University Press, 1994), 556-86, at 556.

(where neither boys nor girls modify their genitals) is not a cultural universal.”⁴⁵ Circumcision and non-circumcision are just one of the many habits characterising societies.⁴⁶ Attitudes towards the foreskin – whether cut or not – are linked to a society’s collective identity and enmeshed in differentiating the in-group from others. The history of Jewish male circumcision sheds light on these dynamics. Moreover, it illustrates how the drawing of bodily boundaries cannot be separated from the drawing of social and political boundaries, often linked to broader questions of the time.

b. Early Perceptions of Brit Milah

There is a story in the Talmud that alludes to the old question of how Jews can live as Jews within other nations and in which circumcision plays a central role. In this story, Caesar extends a kind invitation to Rabbi Tanhum. Caesar says: “Come, let us all become one people.” To which the Rabbi politely replies: “Very well! We who are circumcised cannot be like you. You become circumcised and be like us.”⁴⁷ The story in fact continues and a couple of people are thrown to the lions including the Rabbi, who miraculously survives this vicious revenge for challenging the emperor, probably proving not only that he was right but also the Talmud’s sense for drama. There is, in light of Jewish history, a bitter irony in Rabbi Tanhum’s story, too, as it turns around the way this dialogue usually happened. Historically, it was rarely the Jews who proposed that the people with whom they lived could be a bit more like them. Rather, the question has always been if the Jews could ‘be like us.’

As early as in Greco-Roman antiquity, circumcision was seen as one of the Jews’ most distinctive practices and functioned as a visible mark of their difference. John Gager notes that for Roman satirists during the first century, circumcision became a synonym for Judaism.⁴⁸ While Horace spoke of the “circumcised Jews,” Persius replaces the term Jewish with “the circumcised.”⁴⁹ The missing foreskin inscribed the Jews’ Otherness into the body at a time when societies valued public nudity and the perfection of the unaltered body.⁵⁰ Whereas Romans seemed to have perceived of the practice as strange or odd, for Greeks the sign of the Jewish male had a stronger political symbolism, as the first book of Maccabees records. This book recalls how Greek emperor Antiochus Epiphanes sought to Hellenise ancient Judea under his rule during the earlier part of the second century BCE.

⁴⁵ Richard A. Shweder, “The Goose and the Gander: The Genital Wars,” *Global Discourse* 3, no. 2 (2013): 348-66, at 351.

⁴⁶ Cohen, *Why Aren’t Jewish Women Circumcised?*, 7.

⁴⁷ Babylonian Talmud, Sanhedrin 39a.

⁴⁸ John G. Gager, *The Origins of Anti-Semitism. Attitudes toward Judaism in Pagan and Christian Antiquity* (New York; Oxford: Oxford University Press, 1985), 56.

⁴⁹ Ibid.

⁵⁰ Ra’anan Abusch, “Circumcision and Castration under Roman Law in the Early Empire,” in *The Covenant of Circumcision. New Perspectives on an Ancient Jewish Rite*, ed. Elizabeth Wyner Mark (Hanover; London: Brandeis University Press), 75-86, at 75-76.

In order to promote Hellenic culture among Jews through the spreading of Hellenic standards of beauty in which a cut foreskin was the source of scorn and ridicule, nude physical exercise was encouraged in Judean lands. The book of Maccabees tells how a gymnasium in the Hellenic fashion was installed in Judea's capital Jerusalem by "wicked men" who "made themselves uncircumcised, renounced the holy covenant, intermingled among the heathen and became the slaves of wrongdoing."⁵¹ But the undoing of the foreskin by a couple of aspiring Jewish athletes was not enough. Antiochus eventually banned the observance of Jewish law, such as the laws of Shabbat and circumcision, by threat of death in the hope to ultimately control the Jews who continued to follow their own laws. Banning circumcision amounted to a "symbolic denial of Judaism."⁵² Those who resisted the Greek ruler's command paid a terrible price:

The women who had their sons circumcised they put to death according to decree, hanging their babes from their mothers' necks and executing also their husbands and the man who had performed the circumcision.⁵³

Circumcision also made a difference for Jews living in the Roman Empire. Roman authorities inspected the genitals of Jewish men to collect the *fiscus Judaicus*, a Jew tax introduced following the Jewish-Roman War from 64 until 73 CE during which Jews had rebelled against the Roman Empire. The increased popularity of eunuchs and the practice of castration in the Roman Empire also drew attention to Jewish circumcision, which the Roman elites understood *on par* with genital mutilation.⁵⁴ Whether Jewish circumcision was later banned alongside castration under the Roman ruler Hadrian remains a contested issue among historians.⁵⁵ For those in favour of such an interpretation, the Jewish Bar Kokhba revolt under the messianic military leader Simon ben-Kosiba between 132 and 135 CE was a direct response to the alleged ban on brit milah and the revolt aimed at the restoration of Jewish legal authority, including the obligation to circumcise.⁵⁶

Circumcision, the hallmark of Jewishness, also served as the dividing symbol in early Christendom's attempt to distinguish itself from Judaism. The letters of Paul, who was "virtually obsessed with circumcision,"⁵⁷ set the tone for centuries of Christian condemnation of the rite, which was seen as

⁵¹ I Maccabees, 1:11-15.

⁵² Lawrence Hoffman, *Covenant of Blood. Circumcision and Gender in Rabbinic Judaism* (Chicago; London: University of Chicago Press, 1996), 9.

⁵³ I Maccabees, 1:60-61.

⁵⁴ Abusch, "Circumcision and Castration under Roman Law in the Early Empire," 76.

⁵⁵ See e.g. in support of this interpretation Alfredo M. Rabello, "The Ban on Circumcision as a Cause of Bar Kokhba's Rebellion," *Israel Law Review* 29, no. 1-2 (1995): 176-214. For a different view see Abusch, "Circumcision and Castration under Roman Law in the Early Empire."

⁵⁶ Hoffman, *Covenant of Blood*, 9. See also Rabello, "The Ban on Circumcision as a Cause of Bar Kokhba's Rebellion."

⁵⁷ Boyarin and Boyarin, "Self-Exposure as Theory," 21.

a powerful boundary marker between Jews and early Christians.⁵⁸ For Paul, the death and resurrection of Jesus had fundamentally changed Judaism and the belief in Christ was at the heart of this new Judaism. Paul was disturbed by the insistence of historical Judaism on bodily difference.⁵⁹ For him, true Jewishness – what would later be called Christianity – was about spirituality and inwardness and not about corporeal signs.⁶⁰ Jonathan Boyarin argues that “the true cultural issue dividing Christians from Jews by the second century was the significance of bodily membership in a kin-group for religious life.”⁶¹ Emphasising the significance of spiritual circumcision, Paul wrote

For he is not a real Jew who is one outwardly, nor is true circumcision something external and physical. He is a Jew who is one inwardly, and real circumcision is a matter of the heart, spiritual and not literal. This praise is not from men but from God.⁶²

In the Middle Ages, the interpretation of circumcision as a powerful sign of difference continued. In his study of Christian perceptions of Jews during medieval times, Irvén Resnick describes how for example the fifth century opus *Debate over the Law between a Jew, Simon, and a Christian, Theophilus* stated that “circumcision is not a sign of salvation but a sign of a [separate] race”⁶³ – reminding us that the idea of Jews as a different race is older than the invention of the science of race. Other Christian thinkers, too, rejected circumcision. Thomas Aquinas, the Dominican priest who lived in the thirteenth century, argued that the circumcision of the flesh constituted a mortal sin and the Ecumenical Council of Florence of the Roman Catholic Church proclaimed in 1442 that Christians who perform the tradition forfeit eternal salvation.⁶⁴ But Jews continued to insist as well on the boundary marker as a way to distinguish themselves from their non-Jewish surroundings. The *Pirke de Rabbi Eliezer*, an earlier Jewish text containing bible exegesis and recollections of biblical stories from between 630 and 1030, had already stated that “whosoever eateth with an uncircumcised person is as though he were eating flesh of abomination. All who bathe with the uncircumcised are as though they were bathed with carrion...”⁶⁵ Thus, throughout the Middle Ages, for both Jews and non-Jews, the question of circumcision remained a powerful boundary marker.

⁵⁸ Cohen, *Why Aren't Jewish Women Circumcised?*, 68-69. See also Daniel Boyarin, *A Radical Jew: Paul and the Politics of Identity* (Berkeley: University of California Press, 1994).

⁵⁹ Boyarin and Boyarin, “Self-Exposure as Theory,” 22.

⁶⁰ Cohen, *Why Aren't Jewish Women Circumcised?*, 69.

⁶¹ Boyarin, *A Radical Jew*, 36.

⁶² Romans 2:28-29.

⁶³ Irvén M. Resnick, *Marks of Distinction. Christian Perceptions of Jews in the High Middle Ages* (Washington, DC: Catholic University of America Press, 2012), 56. (Brackets in original.)

⁶⁴ *Ibid.*, 54-55.

⁶⁵ *Pirke De Rabbi Eliezer* (The Chapters of Rabbi Eliezer the Great. According to the Text of the Manuscript Belonging to Abraham Epstein of Vienna), trans. Gerald Friedlander (London: Kegan Paul, Trench, Trubner, 1916), 208.

c. The Two Trajectories of Circumcision in the West

The nineteenth century marked a fundamental shift in attitudes towards male circumcision, with the practice entering the mainstream of a number of Christian Western societies.⁶⁶ This development is remarkable given the deep ambivalence and hostility that Christian societies had harboured for centuries towards *brit milah*. A number of complex factors contributed to this shift, most notably the rise of science and medicine as authoritative sources of knowledge during the Enlightenment. Scientific and medical knowledge contributed to a marginalisation of religious explanations of the world that had previously shaped attitudes towards circumcision. In both Britain and the United States, the fierce advocacy of physicians gradually turned the procedure from an odd marker of religious minority identity into a cherished symbol of moral and physical health across the English-speaking world. However, in Germany and other continental European societies, the medical arguments for circumcision never gained traction. Whereas male circumcision was successfully rearticulated as a socially and medically beneficial practice in a number of Anglophone countries, in countries such as Germany it retained its status as a marker of Jewish difference. The diverging trajectories of male circumcision are not only testament to the power of medical knowledge, but also to the fact that medical knowledge itself needs to be understood as culturally and historically contingent.

aa. The Anglophone Countries: Circumcision as a Symbol of Morals and Health

“Christendom practically holds circumcision in horror,” wrote the Victorian explorer Sir Richard Burton in the 1870s,⁶⁷ reflecting a long-held attitude among Britons who had associated circumcision with ‘alien’ cultures such as Muslims and Jews and perceived of it as disfiguring and emasculating.⁶⁸ But soon the horror of masturbation, of pollution, and of disease would lead Britons and Americans to seek a solution in the previously shunned practice. Victorian physicians and doctors in the United States began to promote the procedure for its alleged hygienic and moral benefits, for its curative effects for a number of diseases, and as a means to hamper masturbation, the dreaded moral crime of the time. During this period preoccupied with morals, masturbation was not only seen as a moral ailment but as a disease in itself and as the cause of a number of other diseases. This view was mainly based on a theory called ‘reflex neurosis’ which claimed that irritation in one body part, such as the

⁶⁶ See on the rise of circumcision in Britain the case study by Robert Darby, *A Surgical Temptation: The Demonization of the Foreskin and the Rise of Circumcision in Britain* (Chicago: University of Chicago Press, 2013). For the United States see Gollaher, “From Ritual to Science: The Medical Transformation of Circumcision in America.”

⁶⁷ Quoted in Darby, *A Surgical Temptation*, 32.

⁶⁸ Laura M. Carpenter, “On Remedicalisation: Male Circumcision in the United States and Great Britain,” *Sociology of Health & Illness* 32, no. 4 (2010): 613-30, at 617.

genitals, could lead to pathologies in others.⁶⁹ In the late eighteenth century, physicians like the Swiss neurologist Samuel-Auguste Tissot had already argued that the loss of semen led to the waste of bodily energy, which was responsible for general debility, disturbance of the nerves, and deterioration of eyesight.⁷⁰ A cure was suggested: circumcision.

The obsessive concern about masturbation did not only target the foreskin as a source of moral evil.⁷¹ Some doctors, albeit controversially, promoted clitoridectomy as a means to tame female masturbation. But while this procedure was as quickly discredited as it had appeared, this did not end the popularity of male circumcision. The ‘reflex theory’ was discarded but the newly embraced germ theory provided another justification for the cutting of the foreskin which was perceived as a breeding ground for infection. Soon, circumcision became also the measure of choice to treat cancer and venereal diseases.⁷² Physicians focussed their efforts in particular on young boys. Since adult men were less likely to undergo the procedure, doctors opted instead for infant circumcision, as these patients could not object.⁷³

The enthusiasm for circumcision also raised interest in the Jewish tradition of brit milah because Jews constituted the only consistently circumcised group who could provide evidence for the procedure’s benefits. Reports stated lower rates of syphilis and penile cancer as well as less frequent masturbation among Jewish men and boys.⁷⁴ This difference was attributed to the absence of the foreskin. Soon circumcision was promoted as a prophylactic surgery often with praising reference to the ‘Hebrews’.⁷⁵ Norman Chapman, a neurologist in the United States, recommended the procedure to treat ‘nervous affections’ which he believed were caused by ‘neglected congenital phimosis’. Praising the Jews, he wrote in 1882: “Moses was a good sanitarian, and if circumcision was more generally practised at the present day, I believe that we would hear far less of the pollutions and indiscretions of youth...”⁷⁶ Yet, physicians in the English-speaking world were eager to distinguish their own practice of circumcision from brit milah which they regarded as “primitive, unsanitary, and potentially

⁶⁹ Gollaher, “From Ritual to Science: The Medical Transformation of Circumcision in America,” 8.

⁷⁰ Tissot’s work *On Onania* (1760) gave the masturbation anxiety a scientific veneer, see the discussion in Ornella Moscucci, “Clitoridectomy, Circumcision, and the Politics of Sexual Pleasure in Mid-Victorian Britain,” in *Sexualities in Victorian Britain*, eds. Andrew H. Miller and James Eli Adams (Bloomington; Indianapolis: Indiana University Press, 1996), 60-78, at 63.

⁷¹ See on this *ibid.*

⁷² Carpenter, “On Remedicalisation: Male Circumcision in the United States and Great Britain,” 618.

⁷³ Robert Darby, “Targeting Patients Who Cannot Object? Re-Examining the Case for Non-Therapeutic Infant Circumcision,” *SAGE Open* 6, no. 2 (2016): 1-16, at 2.

⁷⁴ Darby, *A Surgical Temptation*, 7.

⁷⁵ Leonard B. Glick, *Marked in Your Flesh. Circumcision from Ancient Judea to Modern America* (Oxford; New York: Oxford University Press, 2005), 154-55.

⁷⁶ Quoted in Gollaher, “From Ritual to Science: The Medical Transformation of Circumcision in America,” 10.

dangerous.”⁷⁷ They rejected in particular the practice of *metzitzah b’peh*, the oral sucking of the wound. Traditionally, Jewish male circumcision involves three steps: the cut of the foreskin (*milah*) is followed by *periah* (Hebrew for opening), the tearing of the underlying mucous membrane. Then the circumciser sucks the wound (*metzitzah b’peh*) and bandages it. British and American doctors perceived this aspect of Jewish circumcision as repulsive and the source of infections, concerns they shared with their German colleagues at the time who also debated the usefulness of circumcision, albeit with a different result, an aspect to which I turn in the next section.⁷⁸

Class was another factor for the rise of circumcision, since personal hygiene, robust health, and sexual restraint – the apparent benefits of circumcision – were associated with the privileged class.⁷⁹ By the 1930s at least two thirds of boys in English public schools were circumcised while only one tenth of working-class boys had undergone the procedure.⁸⁰ British imperialism played another role in this discrepancy. Since many British men stationed in India contracted venereal diseases in the tropical climate of the colony, physicians advocated for the removal of the foreskin, believing that such infections were growing beneath the foreskin. Circumcision was seen as helping to raise healthy members for the future ruling elite in the colonies overseas.⁸¹

In the United States, the procedure also took on the function of a mark of social and racial distinction, separating native-born whites from others.⁸² Through the medical shunning of the foreskin, this part of the body became associated with poverty, ignorance, and neglect: “As white middle class-gentiles adopted circumcision, those left behind were mainly recent immigrants, African Americans, the poor, and others at the margins of society,” David Gollaher observes.⁸³ Circumcision, despite its rearticulation in medical terms, retained its function as a means to draw social boundaries onto the body. The strong medical endorsement of the procedure helped to turn it into a widely supported social custom, making the practice almost as routine for newborn care as the cutting of the umbilical cord.⁸⁴ At the same time, the shared practice of circumcision began to eradicate the bodily differences between white Jews and white Christians in the United States, a difference which for so long had been seen as marking an unsurmountable theological and racial divide.

⁷⁷ Ibid., 16.

⁷⁸ Robin Judd, *Contested Rituals: Circumcision, Kosher Butchering, and Jewish Political Life in Germany, 1843-1933* (Ithaca: Cornell University Press, 2007), 148.

⁷⁹ Glick, *Marked in Your Flesh*, 150.

⁸⁰ Moscucci, “Clitoridectomy, Circumcision, and the Politics of Sexual Pleasure in Mid-Victorian Britain,” 61.

⁸¹ Glick, *Marked in Your Flesh*, 157.

⁸² Carpenter, “On Remedicalisation: Male Circumcision in the United States and Great Britain,” 618.

⁸³ Gollaher, “From Ritual to Science: The Medical Transformation of Circumcision in America,” 24. This is similar to the procedure’s association with economic development and progress in living standards in South Korea where the procedure also marks a distinction between South Koreans and their poorer neighbours, North Korea and China, see Pang and Kim, “Extraordinarily High Rates of Male Circumcision in South Korea: History and Underlying Causes,” 53.

⁸⁴ Gollaher, “From Ritual to Science: The Medical Transformation of Circumcision in America,” 5.

Soon circumcision also spread to other Anglo-descent societies such as Australia, Canada, and New Zealand and after 1945, to South Korea following the American military occupation.⁸⁵ But apart from the United States and, to some extent Canada, most of the countries lost their enthusiasm for circumcision soon after the Second World War. In Britain, the introduction of the National Health Service (NHS) in 1948, which offered universal medical coverage, led to a steep decline in circumcision rates. Given the growing disagreement among British medical professional about circumcision's benefits, the NHS dropped the procedure from its coverage and parents were less inclined to pay for the surgery themselves.⁸⁶ Rates have also fallen significantly in Australia after states withdrew Medicare support for the procedure.⁸⁷ The situation has remained different in the United States where a system of private insurance continued to cover the procedure based on the local medical consensus about circumcision's medical benefits,⁸⁸ making circumcision the most frequently performed surgery in the United States since the early twentieth century.⁸⁹

bb. The German Lands: Circumcision as a Symbol of Otherness

While Britain and the United States enthusiastically began to embrace circumcision during the nineteenth century, the procedure went on quite a different trajectory in the German-speaking lands. In fact, the first circumcision debate of modern times arose during the 1840s in Germany. What brought it about were two interrelated events. After several boys contracted infections and died following their circumcision, German authorities ordered the medical supervision of the procedure raising questions about the state's interference in religious affairs in the name of public health. However, a ban was never considered. This proposition came instead from within Judaism. Soon after the deadly complications, a number of Jewish fathers refused to have their sons circumcised, while still insisting on registering their children as Jews. Yet, many rabbis insisted on circumcision as a prerequisite for registration which brought those fathers into difficulties given the German authorities' insistence on the registration of all children with a religious community.⁹⁰

Whereas some fathers had justified their decision with health concerns, others explained their decision by reference to the position of the religious Reform movement. Reform Judaism, as

⁸⁵ Shweder, "Shouting at the Hebrews," 256.

⁸⁶ Gollaher, "From Ritual to Science: The Medical Transformation of Circumcision in America," 25.

⁸⁷ During the 1970s, newborn circumcision rates in Australia decreased from 50 to 40 per cent. In 2003, the rate was at 13 per cent with most of the circumcisions now for religious reasons. Angelika F. Na, Sharman P. T. Tanny, and John M. Hutson, "Circumcision: Is It Worth It for 21st-Century Australian Boys?," *Journal of Paediatrics and Child Health* 51 (2015): 580-83.

⁸⁸ Gollaher, "From Ritual to Science: The Medical Transformation of Circumcision in America," 25.

⁸⁹ *Ibid.*, 5.

⁹⁰ Robin Judd, "Circumcision and Modern Jewish Life. A German Case Study, 1843-1914," in *The Covenant of Circumcision. New Perspectives on an Ancient Jewish Rite*, ed. Elizabeth Wyner Mark (Hanover; London: Brandeis University Press, 2003), 142-56, at 145.

discussed in chapter two, was born out of the attempt to reconcile Judaism with modernity which required the reformulation of traditional notions of Jewishness – and circumcision provided one of the sites for this reformulation to take place. The *Reformfreunde* (Friends of Reform), a radical group formed in 1943 within the Reform movement, had published a manifesto against the rite calling for its abolition.⁹¹ They criticised the tradition as exclusionary and barbaric and worried that the bodily mark would separate Jews from non-Jews and thereby hinder Jewish integration into the emerging German nation state.⁹² Circumcision clashed with how some post-Enlightenment Jews wanted to see themselves, observes Lawrence Hoffman:

Since Christians in nineteenth century Germany rarely had their children circumcised, Jewish insistence on doing so had the necessary effect of setting Jewish men apart from non-Jewish men at the very time when Jews wanted to emphasize their similarities rather than differences – how a common Judeo-Christian tradition made all Germans practically the same.⁹³

But not all German Jews strove to eliminate their differences. Instead, they feared the dissolution of Jewish distinctiveness through growing assimilation. These traditionalists quickly condemned the radical Reformers' manifesto and underscored the importance of circumcision. The “war over circumcision” formed part of a larger struggle between the Orthodox and Reform streams against the background of Jewish emancipation which had brought Jews out of their closed communities and raised the question of Jewish difference with new urgency.⁹⁴ Circumcision, the physical mark of Jewishness, embodied these tensions more than any other Jewish rite. The rite and its future soon turned into a hotly debated topic among rabbis, scholars, and medical professionals, offering both Jews and non-Jews yet another forum to consider the questions of their time. How should Judaism respond to the promises and demands of emancipation? Should the state interfere in religious affairs? Is circumcision mandatory in order to be a Jew? Does it prevent Jews from integrating into society?

The latter question in particular alluded to the symbolic meaning of circumcision as a boundary between Jews and non-Jews, a question over which participants in the debate disagreed deeply. Those who embraced emancipation's demands and had become acculturated to German majority culture were sceptical of the rites and traditions that marked them as particular, fearing that it would prevent them from social and political integration. Jewish and non-Jewish opponents contended that circumcision's exclusionary character would hamper integration, as it maintained a bodily sign of difference between Jews and Gentiles. In German eyes, circumcision still marked Jews as different despite their emancipation, Leonard Glick remarks:

⁹¹ Ibid.

⁹² Ibid., 144.

⁹³ Hoffman, *Covenant of Blood*, 5.

⁹⁴ Cohen, *Why Aren't Jewish Women Circumcised?*, 209. See also chapter two for a discussion of the debate between Reform Judaism and Orthodoxy concerning the question if Judaism is a religion in the Protestant-Christian sense.

If many German Jews now supposed that they had become truly German, that was not the way most other Germans thought. They saw Jews – specifically male Jews – as categorically different breed, regardless of any amount of behavioural modification. For in the final analysis the distinction was physical. The ‘Jew’ ... was a peculiar kind of male – one whose body had been irreversibly disfigured by circumcision.⁹⁵

Many Germans who were sceptical of Jewish emancipation indeed shared this view. In 1831, Christian theologian Heinrich E. G. Paulus had already argued that circumcision represented a *Nationalabsonderungszeichen*, a symbol of national separation, which prevented Jewish integration.⁹⁶ Paulus stated that “who believes that he has to stay in national segregation, cannot complain that the other nation protects him, but not as what he is not, not as one of our nation.”⁹⁷ Samuel Holdheim, one of the most radical members of the Jewish Reform movement, took a similar view of circumcision as a sign of national distinction. In 1848, he declared himself as “opposed to circumcision on principle.”⁹⁸ For him, religious norms and obligations that were relevant for the idea of an exclusively Jewish state were no longer meaningful under the conditions of diaspora, where Jews were governed by “the laws of the state and church.”⁹⁹ He agreed that circumcision was necessary for membership in a Jewish state, but in his view, it was not a prerequisite for being a Jew by religion¹⁰⁰ - and being a Jew by religion and not by nationality was precisely what citizenship in the nation-state required. The fear was that circumcision would reinforce the political character of Judaism and thereby threaten Jewish emancipation, which was premised on Judaism being a religion.¹⁰¹ The discussion of brit milah therefore offered another site for the Enlightenment debate about the nature of Jewishness and Jewish difference.

Medical professionals also weighed into the debate and offered a very different view from their British and American counterparts. Sixty-six physicians from Vienna issued a statement in 1866 arguing that the procedure weakened Jewish men, made them prone to “Jewish diseases”, and shortened their life as compared to Christians.¹⁰² Many Jewish doctors objected to the practices carried out by mohalim, such as *metzitzah b’peh*, the oral sucking of the wound, as dangerous and repulsive.¹⁰³ Assimilated Jews

⁹⁵ Glick, *Marked in Your Flesh*, 118.

⁹⁶ Heinrich E. G. Paulus, *Die Jüdische Nationalabsonderung nach Ursprung, Folgen und Besserungsmitteln* (Heidelberg: Universitätsbuchhandlung Winter, 1831), 74.

⁹⁷ Ibid. In German: “...wer in einer Nationalabsonderung zu müssen glaubt, nicht einmal sich beklagen darf, wenn die andere Nation ihn zwar schützt, aber doch nicht als das, was er ist, nicht als einen ihrer Nation behandeln kann und will.”

⁹⁸ Quoted in Glick, *Marked in Your Flesh*, 123.

⁹⁹ Quoted in Judd, *Contested Rituals*, 43.

¹⁰⁰ Hoffman, *Covenant of Blood*, 8.

¹⁰¹ Judd, *Contested Rituals*, 35.

¹⁰² Cohen, *Why Aren't Jewish Women Circumcised?*, 209.

¹⁰³ Glick, *Marked in Your Flesh*, 127.

agreed and worried that such practices would attract suspicion from non-Jews,¹⁰⁴ thereby endangering their own precarious acceptance.

Proponents of circumcision, on the other hand, took a different view of circumcision's medical benefits. Several physicians contended that circumcision created healthier citizens as it prevented phimosis and lowered infant mortality rates.¹⁰⁵ They shared the opinion of their Victorian counterparts that sexual restraint and cleanliness were the markers of bourgeois life.¹⁰⁶ Others stressed circumcision's moral dimension and civic worthiness. Being circumcised would firmly ground Jews in moral and ethical foundations of Judaism, helping them to better integrate as moral and ethical citizens into the nation.¹⁰⁷

Although their interventions stirred significant controversy among German Jews, Jewish circumcision opponents always remained a minority. Despite the challenges from inside and outside the Jewish community, calls for an abolishment of the rite never succeeded. Even among the Reform movement, most Jews shared the view of Leopold Zunz, the founder of academic Jewish studies (who was in fact not affiliated with Jewish Reform) who declared that an abolition of the rite of brit milah would amount to Jewish suicide.¹⁰⁸ Reform rabbis too were reluctant to touch upon the issue. During a number of meetings between 1844 and 1846, the liberal German rabbis decided not to discuss brit milah in order to avoid the charged and emotional character of the topic. As Lawrence Hoffman observes, the reformist fervour may have changed wedding customs and mourning rites, declared the Talmud no longer binding, and discarded Hebrew as the liturgical language, yet when it came to circumcision, the Reform rabbis remained "adamantly tied to their past".¹⁰⁹ Two other Jewish Reform synods, held in Leipzig in 1869 and in 1871 in Augsburg, similarly declared the "supreme importance" of the rite for Judaism, although the participating rabbis were willing to accept an uncircumcised boy born to a Jewish mother as Jew.¹¹⁰ But they added a caveat. At the age of thirteen, the boy would have to decide whether to undergo circumcision or not. If not, the community was no longer obliged to welcome him in its institutions.¹¹¹ Despite the pressure to assimilate and non-Jewish suspicion towards the rite, the nineteenth century German circumcision debates ended with the reaffirmation of male circumcision as central to Jewish collective identity.

At the same time, male circumcision retained its meaning as a trope for Jewish difference for non-Jewish Germans. Sander Gilman argues that Jewish acculturation which had made Jews

¹⁰⁴ Judd, *Contested Rituals*, 35.

¹⁰⁵ Ibid., 31-33.

¹⁰⁶ Judd, "Circumcision and Modern Jewish Life," 150.

¹⁰⁷ Judd, *Contested Rituals*, 32.

¹⁰⁸ Wyner Mark, "Crossing the Gender Divide," xx.

¹⁰⁹ Hoffman, *Covenant of Blood*, 9.

¹¹⁰ Cohen, *Why Aren't Jewish Women Circumcised?*, 209.

¹¹¹ Judd, "Circumcision and Modern Jewish Life," 147.

indistinguishable from other Europeans in how they dressed, spoke, and resided contributed to an ongoing obsession with the circumcised penis as the only remaining marker of Jewish difference.¹¹² In line with the increasing racialisation of Jewish difference during the late nineteenth century, as the only remaining outward marker of Jewishness *brit milah* was seen as “the most evident sign of the racial difference of the Jew.”¹¹³ This view was not only held by Germans. The Italian physician-anthropologist Paolo Mantegazza for example, whose books were widely read at the time, described circumcision in 1885 as a “mark of racial distinction”.¹¹⁴ Much like the German theologian Paulus, Mantegazza interpreted circumcision as a means for Jewish separation and called upon Jews to:

Cease mutilating yourselves: cease imprinting upon your flesh an odious brand to distinguish you from other me; until you do this you cannot pretend to be our equal. As it is, you, of your own accord, with the branding iron, from the first days of your lives, proceed to proclaim yourselves a race apart, one that cannot, and does not care to, mix with ours.¹¹⁵

III. Male Circumcision as a Human Rights Issue

Male circumcision has not ceased to polarise. Over recent decades, the procedure has once again become a topic of debate across a number of disciplines and generated a towering body of literature, discussing its moral, legal, medical, and cultural implications.¹¹⁶ Critics of circumcision have adopted the language of human rights to call for an end to the practice. In this section, I take a closer look at male circumcision as a legal issue. After discussing the unclear legal status of the practice, I summarise the three main legal arguments against male circumcision.

¹¹² Sander L. Gilman, “Male Sexuality and Contemporary Jewish Literature in German: The Damaged Body as the Image of the Damaged Soul,” in *Reemerging Jewish Culture in Germany. Life and Literature since 1989*, eds. Sander L. Gilman and Karen Remmler (New York; London: New York University Press, 1994), 210-49, at 215.

¹¹³ *Ibid.*, 216.

¹¹⁴ Paolo Mantegazza, *The Sexual Relations of Mankind*, trans. Samuel Putnam (Honolulu: University Press of the Pacific, 1935; repr., 2001), 98. It was Sander Gilman in whose work I found out about Mantegazza’s views on circumcision. See his discussion of Mantegazza’s work in Gilman, *The Jew’s Body*, 88-95.

¹¹⁵ Mantegazza, *The Sexual Relations of Mankind*, 99.

¹¹⁶ For an overview of the legal debate see Jacobs and Arora, “Ritual Male Infant Circumcision and Human Rights.” I return to the legal literature in more detail and provide more references later in the chapter. For an anthropological approach to circumcision see Shweder, “Shouting at the Hebrews.” Circumcision is also discussed in the medical ethics, often alongside FGC, see e.g. Brian D. Earp, “Female Genital Mutilation and Male Circumcision: Toward an Autonomy-Based Ethical Framework,” *Medicolegal and Bioethics* 5 (2015): 89-104.

a. Legal Uncertainties

The legal status of male circumcision is not entirely clear. Few court decisions have addressed the issue, most of which concerned botched procedures, such as in Finland, where in 2010 the District Court of Helsinki found the Jewish parents of a boy guilty of conspiracy after their son had to be hospitalised following his circumcision by a British mohel, a traditional circumciser.¹¹⁷ However, the decision was overturned in 2011 by the Helsinki Court of Appeal, which declared that the parents could not have perceived their behaviour as a crime given the unclear legal status of male circumcision.¹¹⁸ Finland, like most other countries, has no law dealing specifically with male circumcision. Another set of cases addresses the validity of consent when parents disagree about whether to circumcise their son or not, usually involving parents from different religious backgrounds.¹¹⁹ Yet, in none of these cases have courts called the general legal permissibility of male circumcision into question¹²⁰ – with the exception of the German case that is the subject of chapter four. So far, there is no country in the world where male circumcision is illegal.

Next to complications and consent, another issue of legal contention is the practice of *metzitzah b'peh*, in which the mohel orally sucks the blood from the wound. The practice of *metzitzah b'peh* has been subject to significant legal controversy as it carries a high risk of transmitting germs and diseases such as herpes and syphilis. In ancient times, rabbis considered the oral sucking to be a health measure, but with the progress of medical research that linked the outbreaks of diseases, such as syphilis, among recently circumcised babies to the oral sucking, the practice was increasingly discouraged. Nowadays the vast majority of Jews does not practice *metzitzah b'peh* nor are even aware of it, but a small number of strictly observant Jews still regard the risky practice as an essential part of Jewish law. Since 2000, New York health authorities linked 17 cases of herpes in infants (of whom two children died) to the practice of oral sucking as practised by some of the city's strictly Orthodox communities.¹²¹ The city introduced legislation which required the mohel to obtain informed consent from the parents before performing *metzitzah b'peh*. But the law's application was compromised by the lobbying of rabbis who urged their community members to protect the tradition. The rabbis also

¹¹⁷ "Parents Ordered to Pay Circumcised Son 1,500 Euros," *Yle*, 24 February 2010, https://yle.fi/uutiset/osasto/news/parents_ordered_to_pay_circumcised_son_1500_euros/5516204.

¹¹⁸ "Charges Dismissed in Circumcision Case," *Yle*, 30 March 2011, available from https://yle.fi/uutiset/osasto/news/charges_dismissed_in_circumcision_case/5334530. The Finnish Supreme Court had already ruled in 2008 that religious male circumcision is not a crime. This case concerned the circumcision of a Muslim boy. For a discussion of this case see Heli Askola, "Cut-Off Point? Regulating Male Circumcision in Finland," *International Journal of Law, Policy and the Family* 25, no. 1 (2011): 100-19.

¹¹⁹ See e.g. in the UK the case of *Re J* [1999] 2 FLR 678; [2000] FLR 571, CA regarding a disagreement between a Christian mother and a Muslim father. For a critical discussion of the case see Herman, *An Unfortunate Coincidence*, 78-85.

¹²⁰ For a discussion of the US case law see Miller, "Circumcision: Cultural-Legal Analysis," 504-09.

¹²¹ Elon Gilad, "What is Oral Suction Circumcision and Where Does it Come From," *Ha'aretz*, 25 February 2015, <https://www.haaretz.com/jewish/.premium-what-is-oral-suction-circumcision-1.5311796>.

invoked their right to religious freedom when refusing to sign the form. Eventually the city's health department dropped the regulation, instead relying on education.¹²² Although *metzitzah b'peh* constitutes only a fringe phenomenon among a small minority of Jews, the failed attempts of regulating it illustrate the immense difficulties for state authorities to intervene in communal affairs that are religiously sensitive and closely tied to communal collective identity.

Jewish male circumcision is in general an under-regulated field. Both traditional circumcisers, *mohalim* (plural for mohel) as well as surgeons perform the procedure. Traditional mohalim receive religious and practical training from another experienced mohel. Some mohalim are also trained surgeons. But especially in the United States, non-practicing Jews may also opt for the routine surgery in the hospital without a religious component. In Israel, a joint committee of the Chief Rabbinate, the Health Ministry, and the Ministry of Religious Affairs monitors the training of mohalim and issues licenses.¹²³ Uncertified mohalim, however, are not banned from practising; they simply cannot be employed by hospitals. In many countries, mohalim can receive a certificate from a religious body to prove their qualification such as the Berit Mila Program of Reform Judaism in the United States that trains and certifies mohalim in the Reform tradition.¹²⁴ Orthodox mohalim in the UK are trained and licenced jointly by the London Beth Din (Rabbinical Court) and the Initiation Society of Great Britain, while British mohalim in the Liberal and Reform tradition receive their certificate from the Association of Reform and Liberal Mohalim.¹²⁵ In Germany, mohalim can receive a certificate from the Central Council of Jews in Germany after attending a workshop on legal and medical aspects of circumcision, although such a certificate is not a prerequisite for practicing as a mohel.¹²⁶ States too have intervened and introduced regulations for the performance of circumcision. Sweden was the first country to draft a law requiring mohalim to register with the National Board of Health and Welfare.¹²⁷ Moreover, the law makes pain relief compulsory and circumcisions performed on children older than two months may only be carried out by fully qualified medical professionals,¹²⁸ an obvious concession to the Jewish community to whom the age requirement caters.

¹²² "In New York, a Win and a Loss for Health," *New York Times*, 11 September 2015, <https://www.nytimes.com/2015/09/12/opinion/in-new-york-a-win-and-a-loss-on-health.html>.

¹²³ For a discussion of this system see "Report: 55 Complaints Against Ritual Circumcisers in 2017, Out of 75,000 circumcisions," *Jewish Press*, 2 July 2018, <http://www.jewishpress.com/news/israel/the-knesset/report-55-complaints-against-ritual-circumcisers-in-2017-out-of-75000-circumcisions/2018/07/02/>.

¹²⁴ See the Brit Milah Program of Reform Judaism and the National Organization of Mohalim: <https://beritmila.org>.

¹²⁵ Michael Rosen, "Anesthesia for Ritual Circumcision in Neonates," *Pediatric Anesthesia* 20, no. 12 (2010): 1124-27, at 1125.

¹²⁶ Heide Sobtotka, "Für das Wohl des Kindes. Interview mit Josef Schuster," *Jüdische Allgemeine*, 17 October 2013, <https://www.juedische-allgemeine.de/article/view/id/17311>.

¹²⁷ Sw. Lag (2001:499) om omskärelse. See also Johanna Schiratzki, "Banning God's Law in the Name of the Holy Body: The Nordic Position on Ritual Male Circumcision," *The Family in Law* 5 (2011): 35-53, at 37.

¹²⁸ Askola, "Cut-Off Point? Regulating Male Circumcision in Finland," 103.

b. Legal Arguments Against Male Circumcision

Decisions to introduce tighter regulations of circumcision or to question its permissibility, such as in the German and Finnish cases, reflect the general shift in attitudes to the practice as a human rights issue. Critics of the practice raise three main arguments.¹²⁹ Firstly, that the practice violates the right of the child to an open future. Secondly, that the practice infringes upon the child's right to bodily integrity, and finally, that the different legal responses to male circumcision and female genital cutting undermine the principle of gender equality. Critics of circumcision therefore conclude that the procedure is not in the best interests of the child. The best interests principle, as stipulated in Article 3(1) of the Convention of the Rights of the Child (CRC), provides a standard of interpretation for balancing conflicting rights, such as the rights of the parents.¹³⁰ By discussing these three arguments in the following sections, my aim is neither to contribute to the normative debate nor to present it in its entirety.¹³¹ One further clarification is necessary: All of these arguments concern non-medical circumcisions, that is, circumcisions performed for social, religious, and/or cultural reasons without a medical indication. Critics of male circumcision do not object to medical circumcisions but only question the legality of non-medical circumcisions.

aa. The Right to an Open Future

A core concern of circumcision critics is the impact of male circumcision on the child's right to an open future as the irreversible removal of the foreskin precludes the child from taking the decision about circumcision himself.¹³² The principle of the child's right to an open future was first suggested by Joel Feinberg, a legal philosopher.¹³³ Feinberg argued that children have rights-in-trust which are "anticipatory autonomy rights" held prematurely by children before they can exercise them themselves. These "rights-in-trust" need to be saved for children until they are capable of exercising

¹²⁹ The debate is not only a legal one, but also involves considerations of medical ethics, although the two areas frequently overlap.

¹³⁰ On the best interests principle in the CRC see Rhona Schuz, "The Dangers of Children's Rights' Discourse in the Political Arena: The Issue of Religious Male Circumcision as a Test Case," *Cardozo Journal of Law and Gender* 21 (2015): 347-91, at 352-54.

¹³¹ For an overview of legal arguments for and against male circumcision see Jacobs and Arora, "Ritual Male Infant Circumcision and Human Rights."

¹³² See e.g. Robert Darby, "The Child's Right to an Open Future: Is the Principle Applicable to Non-Therapeutic Circumcision?," *Journal of Medical Ethics* 39, no. 7 (2013): 463-68; Eldar Sarajlic, "Can Culture Justify Infant Circumcision?," *Res Publica* 20, no. 4 (2014): 327-43. Merkel and Putzke, "After Cologne: Male Circumcision and the Law." The concern about the child's ability to take future decisions is also implied in a "right to genital autonomy," as some scholars suggest, see e.g. Debra L. DeLaet, "Genital Autonomy, Children's Rights, and Competing Rights Claims in International Human Rights Law," *The International Journal of Children's Rights* 20, no. 4 (2012): 554-83.

¹³³ Joel Feinberg, "The Child's Right to an Open Future," in *Freedom and Fulfillment: Philosophical Essays*, (Princeton University Press, 1994), 76-97.

their free choice. Consequently, they can be violated in advance by foreclosing future options for when the child is an adult.¹³⁴ The right to an open future thus safeguards the autonomy of the child to make future decisions and thereby restricts the range of decisions that parents can take for their child: “Every child is a potential adult, and it is precisely that future adult whose autonomy and capacity for later choice must be protected now.”¹³⁵

Feinberg shows the implications of the right’s child to an open future through the discussion of the case *Wisconsin v. Yoder*, which concerned Amish parents’ refusal to send their children to public school after the eighth grade, thus violating Wisconsin’s laws of compulsory school attendance until the tenth grade. In this 1972 decision, the US Supreme Court found that Wisconsin’s compulsory school laws violated the parents’ rights under the Free Exercise Clause of the First Amendment.¹³⁶ Feinberg disagreed with the Supreme Court and argued that considering the Amish child’s right to an open future would mean to “send him out into the adult world with as many open opportunities as possible, thus maximizing his chances for self-fulfilment.”¹³⁷ For Feinberg, the refusal of another two years of school education deprives the Amish child unduly of future choices, which such an education would have made possible. Lacking an integral part of education, the child may thus not be able to access certain professions or consider particular career options outside of the Amish world. The child’s right to an open future, in Feinberg’s understanding, places restrictions on parental rights when those infringe upon the child’s ability to take certain future decisions.

The open future concept also provides an important argument against male circumcision of minors. Since the cutting of the foreskin is irreversible, critics argue that it deprives the child of the future choice whether to undergo the procedure or not later in life when he can make an informed decision himself.¹³⁸ They argue that “whenever a child is too young to express preferences, the imperative is to refrain from actions that unnecessarily and irreversibly close off options.”¹³⁹ Proponents of the open future argument understand the principle as a “corrective” to the “coercive paternalism” of adults who subject their child to circumcision.¹⁴⁰ They presume that boys are more likely to resent having been circumcised than having been left uncircumcised. Moreover, the assumption is that boys will value their own future decision-making over the fact that the procedure is less risky in early

¹³⁴ Ibid., 76-77.

¹³⁵ Darby, “The Child’s Right to an Open Future: Is the Principle Applicable to Non-Therapeutic Circumcision?,” 464.

¹³⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹³⁷ Feinberg, “The Child’s Right to an Open Future,” 84.

¹³⁸ Darby, “The Child’s Right to an Open Future: Is the Principle Applicable to Non-Therapeutic Circumcision?,” Sarajlic, “Can Culture Justify Infant Circumcision?,” Robert S. Van Howe, “Infant Circumcision: The Last Stand for the Dead Dogma of Parental (Sovereign) Rights,” *Journal of Medical Ethics* 39, no. 7 (2013): 475-481.

¹³⁹ Darby, “The Child’s Right to an Open Future: Is the Principle Applicable to Non-Therapeutic Circumcision?,” 466.

¹⁴⁰ Ibid.

infancy.¹⁴¹ While there is no empirical proof for this assumption, it seems that open future proponents derive it from their own observation of the “fact that very few men seek circumcision in adulthood.”¹⁴² But this fact could also result from the fact that most men, particularly in religious communities, have already been circumcised in infancy, leaving them little reason to undergo the procedure later in life.¹⁴³

bb. The Right to Bodily Integrity

A second argument against male circumcision states that the procedure violates the child’s right to bodily integrity. Since the removal of the foreskin “occurs intentionally, without adequate justification (such as in treating an illness or correcting a deformity), or without consent” it violates the right to bodily integrity, critics argue.¹⁴⁴ Debra DeLaet for example concludes that the practice is a “clear assault on bodily integrity” as it causes pain and involves a number of health risks that should not be neglected.¹⁴⁵ Acknowledging that international human rights law does not explicitly provide for such a right, DeLaet reads it into provisions of existing human rights treaties, such as the prohibition

¹⁴¹ Studies show that babies suffer less complications from the procedure than teenagers or adult males which suggests that the procedure is safer to perform in early infancy, see Charbel El Bcheraoui et al., “Rates of Adverse Events Associated with Male Circumcision in US Medical Settings, 2001 to 2010,” *JAMA Pediatrics* 168, no. 7 (2014): 625-34.

¹⁴² Darby, “The Child’s Right to an Open Future: Is the Principle Applicable to Non-Therapeutic Circumcision?,” 467.

¹⁴³ Joseph Mazor, “The Child’s Interests and the Case for the Permissibility of Male Infant Circumcision,” *Journal of Medical Ethics* 39, no. 7 (2013): 421-328, at 426-27. But see Tim Hammond and Adrienne Carmack, “Long-Term Adverse Outcomes from Neonatal Circumcision Reported in a Survey of 1,008 Men: An Overview of Health and Human Rights Implications,” *The International Journal of Human Rights* 21, no. 2 (2017): 189-218. This 2017 survey of 1,008 men conducted by Tim Hammond and Adrienne Carmack seems to support open-future-proponents’ sense that many men regret having been circumcised. In the self-selecting online survey these men expressed regret over their circumcision or reported that they have been harmed by the procedure. Five per cent of these men identified as Jewish and one per cent as Muslim. Hammond and Carmack note that Jewish men participated at a much higher rate than their representation in US society (about one per cent of the US population) and conclude from their observation that this finding undermines “arguments that circumcision is essential to, or that it must be preserved for, religious identity.” (Ibid., 198).

Hammond and Carmack also claim that their findings support the alleged conclusion of the UN special rapporteur on religious freedom that male circumcision contravenes the child’s right to religious freedom. However, they wrongly attribute a report by the research and advocacy network CRIN (Child Rights International Network) to the UN special rapporteur. As discussed earlier, the UN special rapporteur noted that religious male circumcision falls under parents’ right to religious freedom. For the CRIN statement cited by Hammond and Carmack see CRIN, “Call for Adequate Recognition of Children’s Right to Freedom of Religion or Belief,” November 2015, at 5, available from https://www.crin.org/sites/default/files/attachments/call_for_adequate_recognition_of_childrens_right_to_freedom_of_religion_or_belief.2.pdf.

¹⁴⁴ Van Howe, “Infant Circumcision: The Last Stand for the Dead Dogma of Parental (Sovereign) Rights,” 476.

¹⁴⁵ Debra L. DeLaet, “Framing Male Circumcision as a Human Rights Issue? Contributions to the Debate over the Universality of Human Rights,” *Journal of Human Rights* 8, no. 4 (2009): 405-26, at 412.

against torture, the right to privacy, the security of person, and the right to health.¹⁴⁶ Similarly, Steven Svoboda contends that male circumcision amounts to “medical violence” that infringes on the right to life, as enshrined for example in article 3 Universal Declaration of Human Rights, article 6 of the International Covenant on Civil and Political Rights, and article 6 of the Convention of the Rights of the Child (CRC).¹⁴⁷ Citing article 37(a) of the CRC that forbids states from permitting any child to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment, Svoboda further suggests that the deliberate infliction of pain through a circumcision meets the definition of torture.¹⁴⁸

Svoboda and others acknowledge that a violation of the child’s bodily integrity may be justified, such as in the case of medical indication, medical emergency, or when fully informed consent or proxy consent has been given. But in cases of non-medical circumcisions, there is neither a medical indication nor a medical emergency. Moreover, since infants are not able to consent in this way, proxy consent by his parents or guardians would be necessary. But many critics refuse the validity of proxy consent in the case of male circumcision, as it would not be in the best interest of the child. Steven Svoboda for example refutes any potential future medical benefits invoked by opponents who state lower rates of infection or the prevention of penile cancer that would be in the best interest of the child. Robert van Howe reaches a similar conclusion stating that

circumcision is harmful, painful, is not consensual, is not enjoyable, does not influence a child’s ability to develop into a good citizen, and is not an intervention on health grounds that the average individual would choose for himself if competent.¹⁴⁹

The debate about male circumcision’s impact on the child’s bodily integrity is further complicated by the lack of consensus on both the potential harms and benefits of the procedure. Proponents of circumcision compare the procedure to vaccination¹⁵⁰ or the piercing of earlobes¹⁵¹, and stress its medical benefits, such as lower rates of urinary tract infections during the first year of life, a lower risk of penile cancer, a potential lowering effect on cervical cancer rates among female partners of circumcised men, and a reduced rate of HIV infections in men. Indeed, the WHO even promotes

¹⁴⁶ Ibid. Such a right is also enshrined for example in Article 3 of the Charter of Fundamental Rights of the European Union and in national bill of rights, such as in Article 2(2) of the German constitution. See the discussion of German constitutional law in the next chapter.

¹⁴⁷ J. Steven Svoboda, “Circumcision of Male Infants as a Human Rights Violation,” *Journal of Medical Ethics* 39, no. 7 (2013): 469-74, at 470 and 73.

¹⁴⁸ Ibid., 472.

¹⁴⁹ Van Howe, “Infant Circumcision: The Last Stand for the Dead Dogma of Parental (Sovereign) Rights,” 477.

¹⁵⁰ See e.g. David A. Cooper, Alex D. Wodak, and Brian J. Morris, “The Case for Boosting Infant Male Circumcision in the Face of Rising Heterosexual Transmission of HIV,” *Medical Journal of Australia* 193, no. 6 (2010): 318-19.

¹⁵¹ Jacobs and Arora, “Ritual Male Infant Circumcision and Human Rights,” 35.

male circumcision as an effective measure to reduce the risk of HIV transmission by 60 per cent.¹⁵² As with any surgical procedure, circumcision carries the risk of complications such as bleeding or infection. More serious complications are however rare, especially among infants.¹⁵³ Data quality and quantity on the impact of circumcision remain limited,¹⁵⁴ yet, over all, the medical literature suggests that circumcision should be considered as a safe practice if performed by a trained and experienced person under sterile conditions.¹⁵⁵

Opponents, however, argue that the safety of a practice does not imply its necessity and question the medical rationales for circumcision since most of the alleged benefits, except for HIV transmission, only deal with rare illnesses.¹⁵⁶ They point out that urinary tract infections can easily be treated with antibiotics and there is no need to cut off the foreskin as a means of prevention.¹⁵⁷ Moreover, they note that despite the risk of breast cancer, no one would advocate for a removal of breasts among girls.¹⁵⁸ Circumcision critics reject the argument that the benefits outweigh the costs of the practice, and stress the potential harms of the practice, such as short-term risks like infection and long-term risks such as a potential decrease in sexual pleasure.¹⁵⁹ This sceptical view of circumcision's medical benefits is supported by many medical associations, such as in the Netherlands,¹⁶⁰ Denmark,¹⁶¹ and

¹⁵² WHO, "Male Circumcision for HIV Prevention," available from <http://www.who.int/hiv/topics/malecircumcision/en>.

¹⁵³ El Bcheraoui et al., "Rates of Adverse Events Associated with Male Circumcision in US Medical Settings, 2001 to 2010." The study notes that complications were least frequent for boys circumcised at an age younger than one year (Jewish male circumcision is performed when the newborn is eight days old), while incidences of complications were higher for boys circumcised beyond that age. The Royal Dutch Medical Association estimates that there is one death in 500,000, see KNMG (Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst), "Non-therapeutic circumcision of male minors" (2010), at 8, <http://www.i2researchhub.org/wp-content/uploads/storage/EC48XDC7/KNMG-viewpoint-Non-therapeutic-circumcision-of-male-minors-27-05-2010-v2.pdf>.

¹⁵⁴ Jennifer A. Bossio, Caroline F. Pukall, and Stephen Steele, "A Review of the Current State of the Male Circumcision Literature," *Journal of Sexual Medicine* 11, no. 12 (2014): 2847-64.

¹⁵⁵ Jacobs and Arora, "Ritual Male Infant Circumcision and Human Rights." See also the systematic review by Helen A. Weiss et al., "Complications of Circumcision in Male Neonates, Infants and Children: A Systematic Review," *BMC Urology* 10, no. 2 (2010), 1-13. Weiss et al. stress the importance of both adequate training for circumcisers and quality assurance. They note that complications are more frequent and more serious if the circumcision is undertaken by an inexperienced provider under non-sterile settings and without adequate equipment. They also note that neonatal circumcisions in Israel performed by non-medical professionals, i.e. mohalim, had low complication rates, see *ibid.*, 8.

¹⁵⁶ DeLaet, "Framing Male Circumcision as a Human Rights Issue?," 416.

¹⁵⁷ Van Howe, "Infant Circumcision: The Last Stand for the Dead Dogma of Parental (Sovereign) Rights," 478.

¹⁵⁸ DeLaet, "Framing Male Circumcision as a Human Rights Issue?," 416.

¹⁵⁹ *Ibid.*, 417.

¹⁶⁰ KNMG, "Non-therapeutic circumcision of male minors."

¹⁶¹ Eric McCann, "Danish Doctors' Group Wants to End Circumcision for Boys," *New York Times*, 8 December 2016, available from <https://www.nytimes.com/2016/12/08/world/europe/circumcision-boys-babies.html>

Germany.¹⁶² The American Association of Pediatrics' (AAP), on the other hand, stated in 2012, albeit more hesitantly than was previously the case, that "the health benefits of newborn male circumcision outweigh the risks, but the benefits are not great enough to recommend universal newborn circumcision... the final decision should still be left to parents to make in the context of their religious, ethical and cultural beliefs."¹⁶³ Although the German, Danish, and Dutch associations reach a different judgment regarding the weight of health risks than concluded by the AAP, they stop short of calling for a ban of the practice, acknowledging the religious significance of the procedure for Jews and Muslims.

cc. Gender Equality

A third argument against male circumcision is framed as a matter of gender. For critics, there is a gender bias at work with regard to male circumcision, which explains the vastly different public and legal responses to male circumcision as compared to practices of female genital cutting (FGC).¹⁶⁴ Whereas one practice is publicly shunned and criminalised, the other is ignored or even endorsed. Responses to FGC could indeed not be more different from the way that male circumcision has been treated in law and public discourse. This is particularly apparent in the United Nations' approach to the two practices. The United Nations Convention of the Rights of the Child calls upon state parties to "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."¹⁶⁵ Male circumcision is not included as such a practice as opposed to 'female genital mutilation', which is explicitly listed as a harmful practice in a joint statement by the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child.¹⁶⁶ Though the statement acknowledges "boys as victims of violence, harmful practices and bias," male circumcision is not mentioned. Instead, the United Nations sees male circumcision for religious reasons as a legitimate expression of religious freedom and parental rights. In his 2015 report to the General Assembly of the United Nations, the Special Rapporteur on Freedom of Religion or Belief, for example, noted that male circumcision, if performed under safe and adequate conditions, falls under the right of parents to manifest their

¹⁶² Deutsche Akademie für Kinder- und Jugendmedizin, "5 Jahre Beschneidungsgesetz," 11 December 2017, available from <https://www.dakj.de/pressemitteilungen/5-jahre-beschneidungsgesetz-rechtsfrieden-zu-lasten-von-kinder-und-menschenrechten/>.

¹⁶³ AAP policy statement on newborn male circumcision (2012), available from <https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/newborn-male-circumcision.aspx>.

¹⁶⁴ I use the less value-laden term FGC instead of FGM throughout this thesis, unless I refer to sources that use the term FGM.

¹⁶⁵ Article 24(3), UN Convention of the Rights of the Child.

¹⁶⁶ Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, UN Doc. CEDAW/C/GC/31-CRC/C/GC/18 (14 November 2014).

religion, which encompasses the initiation of children into religious life.¹⁶⁷ Moreover, the deliberate choice of the term ‘female genital mutilation’ by several UN bodies emphasises the perceived fundamental differences between the practices.¹⁶⁸

Whereas many proponents of male circumcision refuse any similarities between the two practices and are eager to distance themselves from FGC,¹⁶⁹ critics argue that the divergent approaches of national and international law to male circumcision as compared to female genital cutting are hard to justify. They note that to refuse any similarities between the two practices ignores the fact that female genital cutting refers in fact to a variety of practices of different severity.¹⁷⁰ The WHO indeed classifies female genital modifications into four different types, according to their level of severity.¹⁷¹ Male circumcision is comparable with one of the least severe forms where the clitoral hood is either cut or removed. Critics consequently question if male circumcision and this type of FGC are sufficiently dissimilar in order to justify such different legal approaches.¹⁷² The exclusive legal and political focus on women and girls as “victims of culture”, they argue, neglects the harms inflicted on boys who are being circumcised.¹⁷³ A shift in language signals this critical position. The deliberate use of the term ‘male genital mutilation’ parallel to the value-laden term ‘female genital mutilation’ is meant to “extend a sense of the horror of FGM to male circumcision”.¹⁷⁴

Scholars identify gender as the reason for this divergent treatment. “In health care, as in other legal disciplines, male bodies have functioned as the norm and therefore tended to be less political,” Marie Fox and Michael Thomson explain.¹⁷⁵ The gendered perception of bodies affects the way that harm

¹⁶⁷ Interim Report of the Special Rapporteur on Freedom of Religion or Belief, UN Doc. A/70/286 (5 August 2015), at 73.

¹⁶⁸ Heiner Bielefeldt, Nazila Ghanea, and Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (Oxford: Oxford University Press, 2016), 435.

¹⁶⁹ See e.g. Tanya Gold, “A Ban on Male Circumcision Would Be Antisemitic. How Could It Not Be?” *Guardian*, 12 October 2013, available from <https://www.theguardian.com/commentisfree/2013/oct/11/ban-male-circumcision-antisemitic>.

¹⁷⁰ Earp, “Female Genital Mutilation and Male Circumcision: Toward an Autonomy-Based Ethical Framework.” Dena S. Davis, “Male and Female Genital Alteration: A Collision Course with the Law?” *Health Matrix: The Journal of Law and Medicine* 11, no. 2 (2001): 478-570; Matthew Johnson, “Male Genital Mutilation: Beyond the Tolerable?,” *Ethnicities* 10, no. 2 (2010): 181-207.

¹⁷¹ See the WHO Fact Sheet on ‘Female Genital Mutilation’, available from <http://www.who.int/mediacentre/factsheets/fs241/en/>.

¹⁷² DeLaet, “Framing Male Circumcision as a Human Rights Issue?”; Sirkku K. Hellsten, “Rationalising Circumcision: From Tradition to Fashion, from Public Health to Individual Freedom—Critical Notes on Cultural Persistence of the Practice of Genital Mutilation,” *Journal of Medical Ethics* 30, no. 3 (2004): 248-53.

¹⁷³ R. Charli Carpenter, “Some Other Conceptual Problems,” *International Feminist Journal of Politics* 6, no. 2 (2004): 308-13, at 309.

¹⁷⁴ See e. g. Robert Darby and J. Steven Svoboda, “A Rose by Any Other Name? Rethinking the Similarities and Differences between Male and Female Genital Cutting,” *Medical Anthropology Quarterly* 21, no. 3 (2007): 301-23. Hellsten, “Rationalising Circumcision: From Tradition to Fashion, from Public Health to Individual Freedom—Critical Notes on Cultural Persistence of the Practice of Genital Mutilation.”

¹⁷⁵ Marie Fox and Michael Thomson, “Short Changed? The Law and Ethics of Male Circumcision,” in *Children's Health and Children's Rights*, ed. Michael Freeman (Leiden; Boston: Brill, 2006), 161-82, at 175.

is constructed and perceived. Harm, which underlies the notion of harmful practices, John Tobin notes, is neither objective nor quantifiable, but rather contested and subjective based on social values.¹⁷⁶ Notions of masculinity/femininity feed into the construction of harm, where female bodies are construed as vulnerable as opposed to male bodies that are imagined as “safe, bound and impermeable.”¹⁷⁷ The harm then inflicted by male circumcision on the body of boys is seen as either negligible or as even beneficial in terms of prophylaxis, aesthetics, or religious belonging. The overt focus on the harms afflicting girls and women, scholars suggest, also reflects a blind spot in the way that gender is theorised. Matthew Johnson argues that male circumcision challenges the “Oppressor/Oppressed dichotomy of gender” underpinning liberal thought in which FGC is readily identified with male domination.¹⁷⁸ The fact that male circumcision does not sit easily with this dichotomy, Johnson suggests, prevents liberals from acknowledging its harms.¹⁷⁹ Fox and Thomson make a similar argument stating that “within the law the role of the abuse victim is feminised” with the consequence that harms against girls are more readily acknowledged than harms against boys.¹⁸⁰ Taking gender equality seriously would thus mean to scrutinise male circumcision in similar ways to FGC.

IV. Conclusion: The Role of Cultural Bias

The critique of circumcision is not an entirely academic question. Anti-circumcision activists, lawmakers, and medical professionals have joined the debate by lobbying against what they perceive as lenient attitudes that national and international law have shown towards the practice – with some success. In 2018, both Denmark¹⁸¹ and Iceland¹⁸² discussed possible laws that would criminalise the actions of parents who have their sons circumcised. A year earlier, one of Norway’s governing parties

¹⁷⁶ John Tobin, “The International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does It Mean and Require of States?,” *Human Rights Law Review* 9, no. 3 (2009): 373-96, at 385.

¹⁷⁷ Fox and Thomson, “Short Changed? The Law and Ethics of Male Circumcision,” 176.

¹⁷⁸ Johnson, “Male Genital Mutilation: Beyond the Tolerable?,” 183. Anthropologists studying FGC have challenged this simplistic interpretation of FGC as the expression of male domination and describe how many women perceive the practice as empowering, beautifying, and of cultural value, see e.g. Lenore Manderson, “Local Rites and Body Politics. Tensions between Cultural Diversity and Human Rights,” *International Feminist Journal of Politics* 6, no. 2 (2004): 285-307.

¹⁷⁹ Johnson, “Male Genital Mutilation: Beyond the Tolerable?,” 183. Scholars also stress that one of male circumcision’s symbolic dimension is the perpetuation of patriarchy, an argument they often make with reference to Maimonides interpretation of circumcision as a way to curb sexual excitement. See Earp, “Female Genital Mutilation and Male Circumcision: Toward an Autonomy-Based Ethical Framework,” 97-98.

¹⁸⁰ Fox and Thomson, “Short Changed? The Law and Ethics of Male Circumcision,” 176.

¹⁸¹ Mattha Busby, “Danish Parliament to Consider Becoming First Country to Ban Circumcision of Boys,” *Independent*, 3 June 2018, <https://www.independent.co.uk/news/world/europe/denmark-boyhood-circumcision-petition-danish-parliament-debate-a8381366.html>.

¹⁸² Christina Caron, “Bill Banning Circumcision in Iceland Alarms Religious Groups,” *New York Times*, 28 February 2018, <https://www.nytimes.com/2018/02/28/world/europe/circumcision-ban-iceland.html>.

called for a ban of circumcision for boys under sixteen years old.¹⁸³ In 2013, the Parliamentary Assembly of the Council of Europe issued a resolution that stressed the right of children to physical integrity, listing the circumcision of young boys for religious reasons as a violation of that right.¹⁸⁴ In Australia, several state law commissions have suggested a stricter legal approach to circumcision, albeit to date unsuccessfully.¹⁸⁵ In the United States, an anti-circumcision movement, which formed during the 1980s, has begun to challenge the positive views held about the procedure. So-called ‘intactivists’ rally against the practice urging to “accept the intact male body as the normal body.”¹⁸⁶ In 2011, the group brought a ban to the ballot in San Francisco after collecting 12,000 signatures. But the measure had to be withdrawn from the ballot as it did not fall within the jurisdiction of the city to regulate medical procedures.¹⁸⁷ Although none of the initiatives to ban or severely restrict circumcision has so far led to a legal change, they indicate a changing climate for the acceptability of male circumcision.

The debate on circumcision as a human rights issue is emotionally charged and each side accuses the other of cultural bias. There is a disagreement over what drives this opposition to the practice apart from legitimate concerns about children’s rights. For critics of circumcision, not only a gender bias but also cultural double-standard is at work when it comes to the designation of ‘harmful practices’ in different cultures. Looking at the list of harmful practices, one can indeed not avoid the impression of cultural bias when it comes to the designation of these practices. Most of the practices on the list have their origins in non-Western societies or are still practiced in these societies.¹⁸⁸ As John Tobin argues, there is the “tendency to condemn non-Western cultural practices and condone or overlook the deeply embedded traditional practices within Western cultures that may also be harmful to the health of children.”¹⁸⁹ Darby and Svoboda explain the reason for this cultural bias in what they call

¹⁸³ Rachael Revesz, “Norwegian Ruling Party Votes to Ban Circumcision for Men Under 16 Years,” *Independent*, 8 May 2017, <https://www.independent.co.uk/news/world/europe/norwegian-ruling-progress-party-ban-circumcision-men-under-16-years-old-vote-annual-conference-a7723746.html>.

¹⁸⁴ Parliamentary Assembly of the Council of Europe, Res. 1952 (2013), available from <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20174&lang=en>.

¹⁸⁵ Roger Collier, “Tasmania Moving toward Circumcision Ban,” *CMAJ: Canadian Medical Association Journal* 184, no. 13 (2012): E690. Queensland Law Reform Commission, “Circumcision of Male Infants. Research Paper,” December 1993, available from https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0008/372068/mp06.pdf.

¹⁸⁶ See the statement of Intact America on its website <http://intactamerica.org>.

¹⁸⁷ Mikaela Conley, “Proposed Circumcision Ban Struck from San Francisco Ballot,” *ABC News*, 28 July 2011, <https://abcnews.go.com/Health/san-francisco-circumcision-ban-stricken/story?id=14179024>

¹⁸⁸ The list is, in fact, tentative and practices have been added over time. In 2014, a joint general recommendation of CEDAW and CRC highlighted female genital mutilation, child and/or forced marriage, polygamy, and crimes committed in the name of so-called honour as harmful practices. See Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18 (14 November 2014).

¹⁸⁹ Tobin, “The International Obligation to Abolish Traditional Practices Harmful to Children’s Health: What Does It Mean and Require of States?” 381.

“Western agencies” with the particular history of the tradition in the United States and other English-speaking countries. For them, the general acceptance of male circumcision stems from

our comfort with the familiar, the example of the Jewish people, and the relentless devaluation of the foreskin as a body part. Millenia of Semitic custom and a century of routine MGA [Male Genital Alteration, my words] in English-speaking countries have desensitized us into seeing the procedure as a mild adjustment and the result as acceptably normal.¹⁹⁰

Feminist scholar Wairimu Ngaruiya Njambi draws a similar conclusion arguing that the acceptance of male circumcision as opposed to FGC reflects “a common Judeo-Christian assumption that circumcised bodies are normal and acceptable”.¹⁹¹ But other commentators strongly disagree with this assessment, arguing that it disregards the long history of male circumcision as a sign of difference and its role as a boundary marker between Judaism and Christianity.¹⁹² The question arises whether cultural bias has not only prevented a critical examination of male circumcision but is now in fact contributing to the increased scrutiny by re-activating old tropes about circumcision as a sign of difference and Otherness. Back in 1998, Kate Green and Hilary Lim, writing in the context of female genital cutting, anticipated that

as the number of non-religious male circumcisions rapidly declines in the West, all the ingredients are present for male circumcision to shift from the realm of the ‘normal’ and the ‘culture-free’ to being constituted as a fixed and barbaric practice of the West’s local other. The danger lies in creating a new object of study: Religious Male Circumcision.¹⁹³

Given the long history of religious male circumcision as a sign of Otherness, this fear does not seem unfounded. In the wake of declining circumcision rates in the United States,¹⁹⁴ Geoffrey Miller expects that “as it becomes increasingly uncommon... circumcision is likely to move in the direction of being thought of as alien, unnatural, and disfiguring.”¹⁹⁵ But while in the context of the United States this shift may indeed signal the questioning of a practice shared by both Jews and Christians,

¹⁹⁰ Darby and Svoboda, “A Rose by Any Other Name? Rethinking the Similarities and Differences between Male and Female Genital Cutting,” 312.

¹⁹¹ Wairimu Ngaruiya Njambi, “Dualisms and Female Bodies in Representations of African Female Circumcision. A Feminist Critique,” *Feminist Theory* 5, no. 3 (2004): 281-303, at 294.

¹⁹² Iddo Porat, “The Problem with Iceland’s Proposed Ban on Circumcision,” *EUROPP Blog*, 27 April 2018, <http://blogs.lse.ac.uk/europpblog/2018/04/27/the-problem-with-icelands-proposed-ban-on-circumcision/>; Tanya Gold, “A Ban on Male Circumcision Would Be Antisemitic. How Could It Not Be?” *Guardian*, 12 October 2013, <https://www.theguardian.com/commentisfree/2013/oct/11/ban-male-circumcision-antisemitic>; Alan Dershowitz, “J’acuse [Sic]: Shame on Germany for Circumcision Ban,” *Huffington Post*, 9 June 2012, https://www.huffingtonpost.com/alan-dershowitz/jacuse-shame-on-germany-f_b_1861252.html.

¹⁹³ Green and Lim, “What Is This Thing About Female Circumcision?,” 382.

¹⁹⁴ Brian J. Morris, Stefan A. Bailis, and Thomas E. Wiswell, “Circumcision Rates in the United States: Rising or Falling? What Effect Might the New Affirmative Pediatric Policy Statement Have?,” *Mayo Clinic Proceedings* 89, no. 5 (2014): 677-86.

¹⁹⁵ Miller, “Circumcision: Cultural-Legal Analysis,” 583.

as Njambi and others suggest,¹⁹⁶ the situation is different outside of the United States where circumcision has never entered the societal mainstream. The diverging trajectories of circumcision during the nineteenth century in English-speaking countries as compared to continental European societies, like Germany, provide a different cultural context for debates about the tradition. It is noteworthy that the Western societies, such as Germany or the Scandinavian countries, where most of the legal controversies occurred so far, have never embraced the practice. Rather, the long and entrenched history of circumcision as a trope for difference suggests that the practice has remained associated with religious minorities. In these countries, circumcision has never been perceived as a Judeo-Christian practice and it seems doubtful that the mounting debates can be completely detached from the heavy cultural baggage that circumcision carries in the Western imagination. Moreover, the arguments of the small but vocal global movement against male circumcision may fall on particularly fertile ground in European societies where migration and globalisation have fuelled anxieties over religious difference. Much of this suspicion is directed towards Muslim immigrants who happen to share the rite of male circumcision with Jews. But this similarity inevitably draws attention to Jews and once again makes visible their difference from the non-circumcising Christian societies of Europe.

¹⁹⁶ It is important to note that the movement against circumcision in the United States is also not completely free from anti-Jewish sentiment. In 2011, the intactivist group *MGMBill* (Male Genital Mutilation Bill) that was behind the San Francisco initiative published a comic book called *Foreskin Man* in which the super hero 'Foreskin Man' comes to the rescue of an infant who is about to be circumcised by the dark haired and bearded 'Monster Mohel'. When accused of Antisemitism, the editor of the comic book and *MGMBill's* head stated that "A lot of people have said that, but we're not trying to be anti-Semitic. We're trying to be pro-human rights." For the statement and images from the comic book see Lisa Derrick, "Foreskin Man Comic Book Attacks Circumcision," *Huffington Post*, 6 June 2011, https://www.huffingtonpost.com/lisa-derrick/foreskin-man-comicbook-at_b_871262.html.

4 OTHER BODIES AND GERMAN LAW

Circumcision – Part Two

In 2012, a German district court in the city of Cologne decided that male circumcision for non-therapeutical reasons amounted to criminal assault that could not be justified by parental consent.¹ This decision constituted a turning point for Jews in Germany. Although the *Bundestag*, the German parliament, hastily drafted a new law to affirm the procedure's legality,² it could not undo the social damage. Over a period of several months, between the decision and the drafting of the new law, the German public and academy became embroiled in a remarkably heated and emotional debate about the future of the practice, during which a troubling amount of anti-Jewish resentment came to the surface. But this time the resentment did not just appear in the notorious online world but became woven into medical and legal arguments against circumcision. Even though critics of circumcision were eager to stress that their concerns were children's rights alone, the Cologne debate sent a signal to Jews in Germany that the law could easily turn them into strangers again.

The aim of this chapter is to explore the role of perceptions of Jews as different in the German controversy over male circumcision by examining the legal arguments and rhetoric used by participants in the debate. The goal is neither to refute criticism of the practice nor to contribute to

¹ District Court of Cologne (Landgericht Köln), 7 May 2012, Case 151 Ns 169/11. An unofficial translation of the decision is available on the website of Durham University: <https://www.dur.ac.uk/ilm/news/?itemno=14984>.

² Section 1631d Circumcision of the Male Child. Section Added Through the Law Concerning the Scope of Parental Care with Regard to the Circumcision of the Male Child, German Civil Code, 20 December 2012, Federal Law Gazette I, 28 December 2012. (§ 1631d Beschneidung des männlichen Kindes. Vorschrift eingefügt durch das Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes, Bürgerliches Gesetzbuch (BGB), 20 Dezember 2012, Bundesgesetzblatt (BGBl.) I, 28. Dezember 2012).

the doctrinal argument. Rather I am interested in the ways in which circumcision opponents used law in order to draw boundaries between ‘us’ and ‘them’. I attend to this question in three steps. After contextualising the case in the specific context of German law, politics, and history, I briefly summarise the main arguments of the Court decision. In the second part, I analyse how legal and medical professionals in particular, but also other public commentators, represented Jews and Judaism in their discussion of male circumcision.³ I first show how several critics relied on an Orientalist paradigm, which rendered those who circumcised as the religious Other. In a further step, I focus on two particular sites of the legal debate – notions of the secular body and notions of religion – to explore the tensions between Judaism and ideas about a ‘truly modern religiosity’ that emerged from the arguments of circumcision critics. I then reflect on the contested role of the German-Jewish past. In the third and final part of the chapter, I conclude with the argument that the German controversy over *brit milah* shows how law is prone to serve as a vessel to enforce majority values and norms, thereby constructing and aiming to contain Jewish difference.

I. Turning Points

a. The Context of Cologne

The German controversy over male circumcision occurred at the confluence of a number of cultural anxieties and societal shifts that shaped the debate in important ways. As I discussed in the previous chapter, unlike in the United States and other Anglo-descent countries, Germany has never endorsed routine male circumcision. It is estimated that only about 11 per cent of German men are circumcised today,⁴ many of whom belong to the country’s significant Muslim community. Consequently, Germany is a society in which the practice has remained almost exclusively within the domain of religious minorities, such as Jews and Muslims. A discussion of male circumcision can therefore not be disentangled from sentiments towards these minorities and the procedure’s cultural baggage as a sign of difference and Otherness in the European-Christian imagination. It is worth remembering that, as noted in the previous chapter, one of the first circumcision controversies of modern times took place in Germany during the 1840s, during which *brit milah* was interpreted by some as an obstacle to Jewish integration into German society.

³ A note on translations: Much of the academic and public discussion was in German. All translations to English are mine, unless there is an official version available or scholars have also published in English. These cases are, however, rare. I provide the original German text of the passages I analyse in footnotes for comparison.

⁴ Jeremy Laurance, “Circumcision: A Necessary Cut or Bodily Harm?” *Independent*, 6 May 2014, <https://www.independent.co.uk/life-style/health-and-families/features/circumcision-a-necessary-cut-or-bodily-harm-9328250.html>

Today, debates about integration and belonging in Germany circle mainly around Muslims. The arrival of a high number of refugees and immigrants from Muslim countries has triggered renewed discussions about the country's so-called *Leitkultur* (leading culture), which some fear is threatened by Islam. For some politicians, this *Leitkultur* is to be found in the "Judeo-Christian tradition of the Occident".⁵ So far, Jewish practices have appeared to be less of an issue for those concerned about protecting this *Leitkultur*. After the end of the Second World War there had been little debate about Judaism's compatibility with contemporary German law and culture. Rather, as I discussed in chapter two, the integration of the small Jewish minority has served as a measuring stick of Germany's democratic progress after the Second World War. British Chief Rabbi Jonathan Sacks thus wondered whether the growing opposition to male circumcision was in fact motivated by suspicion towards Muslims and concerns about their integration, a climate in which Jews become "collateral damage".⁶ Muslim immigration has indeed led to a heightened awareness of religious difference, as the numerous headscarf disputes across Europe illustrate. Given the similarities between Jewish and Muslim practices, including the tradition of male circumcision and the slaughter of animals without prior stunning, any discussion of these practices thereby inevitably draws attention to Jews as well.

However, explaining these attacks merely as collateral damage would miss the persistence of references to Jews, particularly in the German circumcision debate. Given that the initial court decision concerned the circumcision of a Muslim boy, it was indeed remarkable how quickly the discussion shifted to the Jewish question of circumcision. German critics focussed noticeably on Jews and Judaism to make their case against male circumcision, as my discussion of the case will show. One reason might be that Jewish commentators were much more vocal in the debate than Muslims. Moreover, the still delicate relations between Jews and Germans made the issue more contentious.⁷

Some scholarly commentators suggest that secularisation of German society played another important role in the debate. German society is becoming increasingly secularised in the sense of shrinking rates of participation in religious institutions and a decline in belief and practice, leading to "an atmosphere in which ignorance and disdain for many religious practices tended to become socially normative."⁸ Stephen Munzer thus wonders if "secularization of German society helped many Germans to see themselves as protectors of human rights without considering the religious significance of ritual circumcisions" for both Jews and Muslims.⁹ Yet, as he acknowledges, several

⁵ Andreas Scheuer quoted in: *Deutsche Leitkultur statt Multikulti*, 6 October 2015, <http://www.csu.de/aktuell/meldungen/oktober-2015/deutsche-leitkultur-statt-multikulti/>. See also the discussion of the term Judeo-Christianity in chapter one.

⁶ Jonathan Sacks, "The Europeans' Skewed View of Circumcision," *Jerusalem Post*, 5 July 2012, <https://www.jpost.com/Opinion/Columnists/The-Europeans-skewed-view-of-circumcision>.

⁷ I discussed Jewish-German relations in chapter two. See also Jeffrey Peck, *Being Jewish in the New Germany* (New Brunswick: Rutgers University Press, 2006); Bodenheimer, *Haut Ab! Die Juden in Der Beschneidungsdebatte*.

⁸ Stephen R. Munzer, "Secularization, Anti-Minority Sentiment, and Cultural Norms in the German Circumcision Controversy," *University of Pennsylvania Journal of International Law* 37 (2015): 503-81, at 507.

⁹ *Ibid.*, 508.

German commentators remained oblivious to the extent that their notion of German secularism was adapted to the dominant Christian sensibilities,¹⁰ hinting at the way that secular standards remain tied to majoritarian values and their historical roots, an aspect to which I will return later in this chapter.

Cultural baggage and societal trends alone cannot, however, explain the case. German legal culture and the country's constitutional tradition also shaped the ways in which the issue was discussed. Fundamental rights, as the German Constitution, the *Grundgesetz* (Basic Law) calls the human and citizens' rights that it protects, are "omnipresent in the legal order and in the political and social life,"¹¹ and shape public debates in a language of rights. Moreover, as Andrew Hammel notes, the country's notion of freedom and of the relation between citizen and state which couples rights with duties is crucial for understanding the Court's reasoning and the surrounding legal debate.¹² This conception of freedom and the relation between citizen and state in the German legal order, Hammel explains, enables the state to make claims on its citizens which would seem controversial in other places, such as the United States.

This particular conception also underpins the relation between state, parents, and children. Article 6(2) of the German Constitution provides that the "care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty." In practice, this means that the state may interfere with parental decisions if these are deemed harmful for the child or her social integration. This includes, for example, the ability of authorities to refuse a name chosen by parents for their child on a number of grounds, such as that the name might make the child subject to ridicule. Moreover, the country does not permit exclusive home schooling, instead enforcing compulsory school attendance from which there are only limited exceptions. Hammel concludes that

Germans face more subtle pressure to conform to the majority social norms, but in return enjoy benefits by that majority itself. This ideology of 'duties rooted deeply in the culture and community' may have influenced the German court's reasoning. Instead of simply endorsing parental autonomy

¹⁰ Ibid.

¹¹ Dieter Grimm, "The Role of Fundamental Rights after Sixty-Five Years of Constitutional Jurisprudence in Germany," *International Journal of Constitutional Law* 13, no. 1 (2015): 9-29, at 28. The German Constitution, the Basic Law (*Grundgesetz*), speaks of *Grundrechte*, which is usually translated as fundamental rights. Not all of these rights are human rights. Some provisions only apply to German citizens, such as the right to occupational freedom in article 12(1) (which is now read to include EU citizens). Article 12(1) states that "All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training..." Non-Germans can claim in these cases protection under the right to personal freedom in article 2(1), which affords a lower level of protection.

¹² Andrew Hammel, "Why the Circumcision Judgment Looks So Weird to American Eyes," *UK Constitutional Law Association Blog*, 4 October 2012.

tout court, the judges asked whether the parents' choice would bind their child closer to the majority 'culture and community' of Germany.¹³

Ultimately, the issue also touched upon the question of how to make sense of the past. The Holocaust loomed heavily above the debate. While Jews wondered whether the "convalescence period" (*Schonzeit*) from the Shoa was now over,¹⁴ critics of the practice insisted on their right to criticise Jewish traditions when they violate children's rights – even if that meant touching upon this 'taboo'. An open letter signed by hundreds of mostly medical professionals urged lawmakers to take the rights of the child seriously. After all, the signatories asked, did the Enlightenment not teach respect for the dignity of all human life, including that of children?

It is about the protection of Jewish and Muslim life within the boundaries of the German legal order. As children of the Enlightenment, we have to finally open our eyes: We must not hurt children!¹⁵

Circumcision connected past and present for both Jewish and non-Jewish Germans. For Jews in particular, the debate invoked the long history of circumcision as a persistent motif in historical discourses on Jewish Otherness, raising questions about the terms of their acceptance in German society.

b. Circumcision in Court

The Cologne decision marked a turning point for German legal doctrine on male circumcision. Before the decision, German public authorities had shown little interest in the practice. Only a small number of court decisions had dealt with the tradition, with the issue, as in other countries, either being the validity of parental consent or violations of medical standards during the procedure. As in the United States,¹⁶ in none of the German cases had courts questioned the general permissibility of a circumcision for non-medical reasons. In fact, an administrative court in the state of Lower Saxony affirmed twice that a Muslim family had the right to receive financial welfare support for the

¹³ Ibid. It is noteworthy that the majority of legal attempts to restrict or ban circumcision occurred in states with a strong tradition of the social welfare state, such as Denmark, Sweden, Iceland, and Norway (known as the Nordic model), which traditionally place a strong emphasis on social cohesion.

¹⁴ Vanessa Rau, "Vehementer Säkularismus Als Antisemitismus?," *Aus Politik und Zeitgeschichte* 28-30 (2014): 31-38, at 37.

¹⁵ In German: "Als Kinder der Aufklärung müssen wir endlich die Augen aufmachen: Man tut Kindern nicht weh!" The open letter of 21 July 2012 addressed the German government and parliament and was published on several news websites online, see e.g. <http://www.faz.net/aktuell/politik/inland/offener-brief-zur-beschneidung-religionsfreiheit-kann-kein-freibrief-fuer-gewalt-sein-11827590.html>.

¹⁶ For an overview of US case law on male circumcision see Miller, "Circumcision: Cultural-Legal Analysis."

circumcision of their child and the Court compared the practice's importance to a Christian baptism.¹⁷ Similarly, legal commentary, which in Germany's civil law tradition plays an important role in the development of doctrine, had little to say about the rite. Most scholars had no doubt that parents had the right to circumcise their sons. Despite this, a group of criminal law scholars had begun to vigorously write against male circumcision in legal and medical journals, and it was to this body of opinion that the court in Cologne referred in its fateful decision. The German case is thus also an example of a legal agenda significantly driven by a group of law school professors changing doctrine and practice.

The case itself began in the medical practice of a Muslim physician. In November 2010, he circumcised *lege artis* a four-year old Muslim boy on the request of his Tunisian-born mother. Shortly after, the boy suffered from bleeding and the mother took him to hospital. Hospital staff tried to find out what had happened but had trouble to communicate with the mother, who had only poor German skills and was also visually impaired.¹⁸ A couple of misunderstandings led them to inform the police. The doctor who had circumcised the boy was subsequently charged with causing bodily harm to another person by using a dangerous instrument. The Cologne Local Court (*Amtsgericht Köln*) acquitted the defendant in its judgment of 21 September 2011.¹⁹ The Prosecution, however, appealed this decision to the Cologne Regional Court (*Landgericht Köln*), which delivered its fateful decision on 7 May 2012.²⁰

In principle, German criminal law doctrine understands any medical operation as an offence of criminal assault.²¹ This assault can of course be justified by the consent of the patient or a legal guardian (proxy consent). The question of whether the consent was valid in the case of a religiously motivated circumcision became the pivotal point of the decision. In this case, the Court found that the circumcision was illegitimate because it was not justified by the consent of the boy's parents because the consent given was invalid. Normally, parents have the right to consent to medical operations, which stems from their parental rights as enshrined in the German constitution and in

¹⁷ Higher Administrative Court Lüneburg (Oberverwaltungsgericht Lüneburg), 23 July 2002, Case 4 ME 336/02; Higher Administrative Court Lüneburg (Oberverwaltungsgericht Lüneburg), 9 February 1993, Case 4 L 5670/92.

¹⁸ For a detailed account of the events leading to the case before the court see Georg Bönisch et al., "Circumcision Debate Has Berlin Searching for Answers," *Der Spiegel*, 25 July 2012, <http://www.spiegel.de/international/germany/circumcision-debate-has-german-government-scrumbling-for-a-law-a-846144.html>.

¹⁹ Local Court of Cologne (Amtsgericht Köln), 21 September 2011, Case 528 Ds 30/11.

²⁰ District Court of Cologne (Landgericht Köln), 7 May 2012, Case 151 Ns 169/11. An unofficial translation of the decision is available on the website of Durham University: <https://www.dur.ac.uk/ilm/news/?itemno=14984>. For a doctrinal analysis of the case see e.g. Hendrik Pekárek, "Circumcision Indecision in Germany," *Journal of Law, Religion and State* 4, no. 1 (2015): 1-48.

²¹ The doctor had initially been charged with causing bodily harms by dangerous means under section 223 (1) and 224 (1, no. 2) Penal Code (Strafgesetzbuch) as he had used a scalpel.

statutory law.²² In the case of male circumcision, however, the Court claimed that these parental rights were themselves limited by the constitutional rights of the child, specifically the right to bodily integrity and the right to self-determination,²³ familiar arguments shared by many circumcision opponents.²⁴ Balancing the rights of the child with the rights of the parents, the Court argued that

the circumcision changes the child's body permanently and irreparably. This change runs contrary to the interests of the child in deciding his religious affiliation independently later in life. On the other hand, the parental right of education is not unacceptably diminished by requiring them to wait until their son is able to make the decision himself whether to have a circumcision as a visible sign of his affiliation to Islam.²⁵

The Court declared the child's ability to choose his own religion later in life to be his paramount interest. While the Court acknowledged *en passant* the religious interests and rights of the parents, it weighed in favour of the individual rights of the child to bodily integrity and religious self-determination. In the Court's reasoning, the right to freedom *from* religion in particular formed the core of the child's interest, with the consequence that parental rights did not encompass the right to circumcise their child if there is no medical necessity. Given the significance of male circumcision in both Islam and Judaism, it is surprising that the decision lacks any substantial discussion of the tradition's religious meaning. It is simply assumed that postponing the circumcision is not only necessary from the standpoint of German law but also easily possible for both Jewish and Islamic religious doctrine. The decision also does not discuss how being circumcised prevents a change of religion later in life, as if the mark itself fixes the religious identity of a person indefinitely and ties him to a community without avenue of escape. Circumcision is constructed as a mark of unfreedom and lost possibilities that calls for the intervention of liberal law, an idea to which I will return.

Despite the illegality of the performed circumcision, the Court found that the doctor acted 'without guilt' because he could invoke the rare defence of non-awareness or mistake of law. Since the legality of circumcision had so far been unclear and not answered unambiguously, the doctor found himself in an unavoidable mistake of law and was therefore acquitted. This acquittal meant that the doctor

²² See Article 6(2) Grundgesetz (GG, Basic Law) and section 1631 Bürgerliches Gesetzbuch (BGB, German Civil Code).

²³ Article 2(2) Grundgesetz (GG, Basic Law) provides that "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law." The right to self-determination is based on article 2(1) GG in conjunction with article 1(1) GG. Article 1(1) GG stipulates the inviolability of human dignity, whereas article 2(1) GG states that "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

²⁴ See the discussion of the arguments against male circumcision in chapter three.

²⁵ District Court of Cologne (Landgericht Köln), 7 May 2012, Case 151 Ns 169/11, at 15. In German: "Zudem wird der Körper des Kindes durch die Beschneidung dauerhaft und irreparabel verändert. Diese Veränderung läuft dem Interesse des Kindes später selbst über seine Religionszugehörigkeit entscheiden zu können zuwider. Umgekehrt wird das Erziehungsrecht der Eltern nicht unzumutbar beeinträchtigt, wenn sie gehalten sind abzuwarten, ob sich der Knabe später, wenn er mündig ist, selbst für die Beschneidung als sichtbares Zeichen der Zugehörigkeit zum Islam entscheidet"

could not appeal the decision further, which would have allowed a higher court to address the problem in more depth.

c. Cologne's Repercussions

From this point, the decision took an unlikely trajectory into the public realm. Normally, decisions of lower courts do not set legal precedents and are thus non-binding to other courts. However, when the decision became public, it triggered an emotional and heated debate, partly because it was misrepresented as a 'ban' by international media.²⁶ What the decision indeed did do was create a situation of legal insecurity, as other courts could have followed the arguments of the case if they considered them convincing. Several hospitals, including the Jewish hospital in Berlin, temporarily halted the procedure since they could not be sure that public authorities would not prosecute them. Even beyond German borders, in Austria and Switzerland, the repercussions could be felt when several hospitals followed suit.²⁷ Since a ban on male circumcision would have touched upon a central tenet of Jewish identity, Jews were alarmed and the matter turned quickly into a Jewish issue, with some Jews fearing the end of Jewish life in Germany. "Do you still want us here in Germany", asked Charlotte Knobloch, the former president of the peak political body of Jews in Germany.²⁸ Pinchas Goldschmidt from the Conference of European Rabbis called the ruling the "worst attack on Jewish life since the Holocaust".²⁹

Calls for legal security grew louder, with many asking the parliament to clarify the issue through legislation. Chancellor Angela Merkel urged parliamentarians to consider the implications of a ban, which would turn the country into a "laughing stock."³⁰ National and international media fervently debated the future of the ritual, while angry letters reached the offices of politicians and newspapers calling for an end to the 'primitive ritual'. Muslims, although far outnumbering Jews in Germany, remained remarkably quiet. They perceived the debate to be yet another episode in an ongoing discussion about their ability to integrate into German society, which had been repeatedly

²⁶ See e.g. the report by the ABC: "German Court bans circumcision of young boys," *ABC News*, 27 June 2012, <http://www.abc.net.au/news/2012-06-28/german-court-bans-circumcision-of-young-boys/4096998>.

²⁷ Bodenheimer, *Haut Ab! Die Juden in der Beschneidungsdebatte*, 20.

²⁸ Charlotte Knobloch, "Wollt ihr uns Juden noch?," *Süddeutsche Zeitung*, 25 September 2012, <http://www.sueddeutsche.de/politik/beschneidungen-in-deutschland-wollt-ihr-uns-juden-noch-1.1459038>.

²⁹ Quoted in Ines Burckhardt, "Circumcision Ruling Riles Muslims and Jews," *Financial Times*, 13 August 2012, <https://www.ft.com/content/d4735d40-e2c7-11e1-a463-00144feab49a?mhq5j=e3>.

³⁰ Quoted in Gareth Jones, "Circumcision ban makes Germany 'laughing stock' – Merkel," *Reuters*, 17 July 2012, <https://uk.reuters.com/article/uk-germany-circumcision-idUKBRE86G0EU20120717>.

questioned,³¹ and intervened much less in the debate than Jews. Jews, on the other hand, were shocked by the amount of hostility stirred up.³² As Jewish Studies scholar Alfred Bodenheimer writes:

The Jews in Germany were used to being treated by the public either with a certain respect or, in their particular role as victims of the Holocaust, being viewed with a certain suspicion, or at most to have to deal with criticism of Israel, which either directly or indirectly affected them. Religion however was always the ‘soft’ element of Jewishness, which was more accepted among the majority population. The Jews were certainly not used to being included together with the ‘non-included’, that is to say with those who require integration – but in the minds of many are not capable of integrating – the Muslims.”³³

Ultimately, the *Bundestag*, the German parliament, drafted a new law that confirms that parents have the right to consent to the circumcision of their male child.³⁴ The law also permits the circumcision of boys under six months by non-medical professionals. This ‘mohel clause’ is obviously tailored to the needs of the Jewish community in Germany, where it is more common that mohalim, traditional circumcisers, circumcise newborn boys. Although the new law is now in force, it could not overcome a feeling of ‘restrangement’ for Jews, and this time the ‘system-relevant’ discourses of law and

³¹ Between 2009 and 2010, Thilo Sarrazin, back then a member of the Social Democratic Party, had stirred a public debate with his comments and subsequent book on Germany’s immigration and integration policy in which he attacked Muslims. In an interview with the cultural quarterly *Lettre International*, Sarrazin stated: “Integration requires effort from those that are to be integrated. I will not show respect for anyone who is not making that effort. I do not have to acknowledge anyone who lives by welfare, denies the legitimacy of the very state that provides that welfare, refuses to care for the education of his children and constantly produces new little headscarf-girls. This holds true for 70 percent of the Turkish and 90 percent of the Arab population in Berlin.” See Frank Berberich, “Thilo Sarrazin im Gespräch. Klasse statt Masse,” 86 *Lettre International*, 197-201.

³² Kerem Öktem, *Signale aus der Mehrheitsgesellschaft. Auswirkungen der Beschneidungsdebatte und staatlicher Überwachung islamischer Organisationen auf Identitätsbildung und Integration in Deutschland*, 2nd, revised ed. (Oxford: Network Turkey, European Studies Centre, University of Oxford, 2013).

³³ Bodenheimer, *Haut Ab! Die Juden in der Beschneidungsdebatte*, 26. My translation.

³⁴ Section 1631d Circumcision of the Male Child. Section Added Through the Law Concerning the Scope of Parental Care with Regard to the Circumcision of the Male Child, German Civil Code, 20 December 2012, Federal Law Gazette I, 28 December 2012. (§ 1631d Beschneidung des männlichen Kindes. Vorschrift eingefügt durch das Gesetz über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes, Bürgerliches Gesetzbuch (BGB), 20. Dezember 2012, Bundesgesetzblatt (BGBl.) I, 28. Dezember 2012).

Section 1631d reads: Circumcision of the male child (1) The care for the person of the child includes the right to give consent to the medically unnecessary circumcision of a male child who is not capable of reasoning and forming a judgment, if this is to be carried out in accordance with the rules of medical practice. This does not apply if the circumcision, even considering its purpose, jeopardises the best interests of the child. (2) In the first six months after the child is born, circumcision may also be performed pursuant to subsection (1) by persons designated by a religious group to perform this procedure if these persons are specially trained to do so and, without being a physician, are comparably qualified to perform circumcisions.

medicine had contributed their fair share to this feeling.³⁵ It seemed, as the magazine *Der Spiegel* concluded, that the debate “had only brought the truth of people’s real differences to light.”³⁶

II. (Re)Making the Religious Other

The German controversy is testament to how “modern law’s relation to the sacred remains deeply ambivalent”³⁷, especially if the sacred concerns the non-Christian. My reading of the German case in the following sections focusses on the way critics represented Jews and Judaism, especially in legal commentary. I have selected arguments for analysis that address Jewishness directly or point to particular tensions between Jewishness and interpretations of German law, but I will not engage with the discussions about the medical harms and benefits of the practice. It is important to stress that these opinions do not reflect the entire debate, neither in public nor in the academy – there were many that argued in support of circumcision – but rather a certain strand of thinking that reveals an ambivalent attitude towards Jews and Judaism. Sometimes these attitudes also concern Muslims and they point to broader concerns about difference, the closeness between the two religions, and how quickly alliances can shift. My aim is not to disqualify criticism of male circumcision *per se*, but to trace how criticism of male circumcision in the German debate contributed to an image of Jews as Others in need of reform.

a. The Power of Language

Language plays a powerful role in encounters with religious and cultural difference. It enables the cultural interpretation and moral judgement of people’s behaviour, values, and attitudes. To name something is hardly ever a neutral activity; rather it already assumes a certain position. Scholars have shown how Orientalist thinking pervades current debates about Islam and other non-Western religions in Europe.³⁸ But as scholars in Jewish Studies remind us, Jews, too, have played an important role in the Orientalist imagination³⁹ and the German debate illustrates how this thinking is replicated in a contemporary legal discussion. In the German debate, an orientalising gaze permeated the arguments of circumcision critics, placing non-Jewish and non-Muslim Germans at a superior level

³⁵ Bodenheimer, *Haut Ab! Die Juden in der Beschneidungsdebatte*, 94.

³⁶ Matthias Bartsch et al., “‘Great Anxiety’: Jews Question Their Future in Germany,” *Der Spiegel*, 10 September 2012.

³⁷ Austin Sarat, “Editorial,” *Law, Culture and the Humanities* 3, no. 2 (2007): 187-88, at 188.

³⁸ See e.g. Malik, “Feminism and Its Other,” Beverly Weber, “Cloth on Her Head, Constitution in Hand: Germany’s Headscarf Debates and the Cultural Politics of Difference,” *German Politics and Society* 22, no. 3 (2004): 33-64.

³⁹ See the discussion of Jews in the Orientalist imagination in chapter one and two.

vis-à-vis Jews and Muslims. This Orientalist dichotomy of ‘us’ versus ‘them’ becomes quite clear in a comment by criminal law professor Tonio Walter, a critic of circumcision, who argued for a legal compromise

which makes clear the concerns of the secular, enlightened and humane society with regard to the circumcision of boys, without turning into criminals those who subjectively carry out their religious duty; a duty which was not made up by some sect, but rather is rooted in two world religions.⁴⁰

In his account, German society is associated with rationality, Enlightenment, and humanity, while Jews and Muslims as circumcising groups are placed outside and in opposition to this community as the irrational, the traditional, the unaware, the inhumane. An association of Jews with violence, backwardness, and inferiority runs through the comments of those who opposed circumcision. In his leading commentary on criminal law, Thomas Fischer, a judge at Germany’s High Court (*Bundesgerichtshof*), labelled male circumcision as a form of “genital mutilation”⁴¹ thereby drawing on the same language that dominates much Western discourse on practices of female genital cutting (FGC) in which the term ‘female genital mutilation’ already emphasises a particular position: that the practice is absolutely unjustifiable.⁴² He thereby establishes both the semantic and legal link between male circumcision and FGC for which many international scholars advocate. For criminal scholar Günter Jerouschek, circumcision is a “stigmatisation that touches upon human dignity”⁴³ – a severe accusation given that the German constitution declares human dignity to be inviolable and a bitter irony given that the constitutional emphasis on human dignity was also an attempt to learn from the country’s atrocious past, with its absolute disregard for those it deemed Other.

Jerouschek also equates being circumcised with a “brand mark”.⁴⁴ Such comparisons evoke the horror of branding animals to mark their race or burning signs into objects to assign ownership. It implies that Jewish and Muslim parents do something to their child that one only does to non-humans which, in turn, suggests that those who circumcise dehumanise their children. Several public and legal commentators linked male circumcision to violence or even abuse. A German NGO for children

⁴⁰ Tonio Walter, “Der Gesetzentwurf zur Beschneidung – Kritik und strafrechtliche Alternative,” *JuristenZeitung* 67, no. 22 (2012): 1110-17, at 1116. In German: “Es kann daher in meinen Augen nur darum gehen, eine Kompromisslösung zu finden, welche die Bedenken der säkularen, aufgeklärten und humanen Gesellschaft gegenüber der Knabenbeschneidung deutlich macht, ohne diejenigen zu Straftätern zu stempeln, die subjektiv ihre religiöse Pflicht erfüllen; und zwar eine Pflicht, die sich nicht eine Sekte ausgedacht hat, sondern die in zwei Weltreligionen wurzelt.”

⁴¹ Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen*, 62 ed. (München: C.H. Beck, 2015), Section 223, at 43. In German: “Rechtfertigung von Beschneidungen (Genitalverstümmelungen)“.

⁴² Norma Claire Moruzzi, “Cutting through Culture: The Feminist Discourse on Female Circumcision,” *Critique: Critical Middle Eastern Studies* 14, no. 2 (2005): 203-20, at 204.

⁴³ Günter Jerouschek, “Beschneidung und das deutsche Recht. Historische, medizinische, psychologische und juristische Aspekte,” *Neue Zeitschrift für Strafrecht* 6 (2008): 313-19, at 319. In German: “Insoweit tangiert sie [die Beschneidung] als Stigmatisierung auch die Menschenwürde des Kindes aus Art. 1 I GG.”

⁴⁴ Ibid. In German: “Die so im Kindesalter erzwungene Beschneidung stellt, vergleichbar einer „Brandmarkung“, eine lebenslange sinnfällige Zuordnung zur jeweiligen Religionsgemeinschaft dar, auch wenn die Zugehörigkeit nicht zwingend daraus folgt.”

called *Kinderhilfe* (Aid for Children) argued that a law allowing circumcision would give a *carte blanche* to “religiously motivated child abuse”,⁴⁵ a claim Jews not only took as an attack on their religious traditions but as a personal, hurtful attack that placed them in the same category as paedophiles and child abusers.⁴⁶ In a similar vein, one legal commentator described parents as “perpetrators” and children as “victims”.⁴⁷ In his account, parents are depicted as aggressive offenders, who are unwilling or unable to fully comprehend what they are doing to their children, who become casualties. Circumcising parents are placed in a position of criminals, who need to be civilised and disciplined by German law. Yet, at the same time this argument carries echoes of the medieval accusations of Jews as ritual murderers of Christian children or even their own children who became too close with Christian children.⁴⁸

Framing male circumcision through a paradigm of violence and cruelty establishes hierarchies of power through a clash of values – the progressive German commitment to non-violence versus the Other’s alleged stubbornly backward insistence on cruel practices. The practice undergoes a process of semantic re-interpretation according to majoritarian cultural norms. But the choice of words is not simply a matter of linguistic style. Labelling an act as a ‘mutilation,’ as ‘cruel’ or ‘inhumane’ not only constructs this act within a particular paradigm but also provides the justification for intervention. As Juliet Rogers cautions: “The call of mutilation is the call of law.”⁴⁹ In the case of male circumcision, comparing the practice with violence allows critics to draw an analogy to the legal ban on all forms of violent education in Germany.⁵⁰ German law defines violence as physical punishment, psychological injuries, and other degrading measures. Although Jews and Muslims insisted that none of these terms could describe the intentions behind circumcision, which were quite the contrary, they were already pushed into a particular paradigm that limited their way of speaking about the practice. The way that German critics of circumcision framed the practice as cruel violence resembles the Western discourse on practices of female genital cutting. While not defensive of the practice per se, scholars criticise the language and tone of the debate. The discourse on FGC, these scholars note,

⁴⁵ In German: “Blankoscheck für religiös motivierte Kindesmisshandlungen”, quoted in: “Blankoscheck für Kindesmisshandlungen,” *Die Zeit*, 14 July 2012, <http://www.zeit.de/gesellschaft/zeitgeschehen/2012-07/beschneidungen-kinderschutzbund>.

⁴⁶ Matthias Bartsch et al., “‘Great Anxiety’: Jews Question Their Future in Germany,” *Der Spiegel*, 10 September 2012, <http://www.spiegel.de/international/germany/amid-circumcision-debate-jews-question-their-future-in-germany-a-854863.html>.

⁴⁷ Josef Isensee, “Grundrechtliche Konsequenz wider geheiligte Tradition,” *JuristenZeitung* 68, no. 7 (2013): 317-27, at 319. In German (in relation to the doctrinal conflict): “Die Grundrechte in ihrer Abwehrfunktion auf der einen Seite und die in der Schutzfunktion auf der anderen ergeben das Dreieck Staat – Eltern (Täter) – Kind (Opfer).”

⁴⁸ For variations of this story see Nirenberg, *Anti-Judaism: The Western Tradition*, 203-07.

⁴⁹ Juliet Rogers, *Law's Cut on the Body of Human Rights: Female Circumcision, Torture and Sacred Flesh* (Abingdon, Oxon; New York: Routledge, 2013).

⁵⁰ Section 1631(2) German Civil Code (Bürgerliches Gesetzbuch, BGB) reads: “Children have a right to non-violent upbringing. Physical punishments, psychological injuries and other degrading measures are inadmissible.”

often taps into binaries of modernity/barbarism, of us/them and thus “remains within an Orientalist paradigm that still frames the issue as a problem of barbarism and rescue.”⁵¹ In this discourse, the roles are clearly assigned – the West as the place of normality, law, and reason and ‘their’ place as one of dark culture and tradition.⁵² Moreover, critical scholars studying the Western discourse on FGC contrast the language of mutilation with the experiences of women who have undergone the procedure, yet whose voices are mostly silenced. They describe how women do not necessarily describe their bodies as mutilated, but experience their altered anatomy as normal, desirable, and beautiful.⁵³ Associating FGC merely with mutilation, loss, and oppression, these scholars argue, not only marginalises the voices of these women but also tends to impose Western understandings of the human being, including notions of childhood and the normal/natural body.⁵⁴

Engaging with cultural and religious difference always involves the question of who speaks, what can be said, and whose voice is silenced. In legal discourse, not all voices are heard equally and legal discourse can limit the form of possible expressions, as Katherine O'Donovan describes in her discussion of the gendered nature of family law:

In the ritual legal opera only certain kind of song can be performed; only certain persons can sing. Less powerful characters may not be allowed on stage. This point goes to the formulation of ideas, their presentation in language and their legitimacy in law.... Law is a powerful mechanism for recognizing or hiding the desires and perspectives of those whose lives it governs.⁵⁵

Jewish studies scholar Alfred Bodenheimer points out that the German stage was filled with songs sung by the uncircumcised majority and a tiny minority of circumcised men that expressed regrets about their circumcision.⁵⁶ Other critics, such as Andreas Gotzmann, argue that, since a significant number of German Jews who migrated from the former Soviet Union were uncircumcised but nevertheless integrated into Jewish communities, brit milah could not be understood as a central requirement for Jewish identity.⁵⁷ But Gotzmann does not explain the important context of this particular German situation. Decisions to accept uncircumcised Jewish males into German Jewish communities were not necessarily the result of a ‘more liberal’ Jewish identity, but rather reflects the

⁵¹ Moruzzi, “Cutting through Culture,” 205.

⁵² See the critical analysis of legal discourse on FGC by Green and Lim, “What Is This Thing About Female Circumcision?”

⁵³ See e.g. the interviews with women who have undergone FGC in Manderson, “Local Rites and Body Politics. Tensions between Cultural Diversity and Human Rights.”

⁵⁴ Green and Lim, “What Is This Thing About Female Circumcision?,” 368.

⁵⁵ Katherine O'Donovan, “Family Law and Legal Theory,” in *Legal Theory and Common Law*, ed. William Twining (Oxford; New York: Blackwell, 1986), 184-94, at 191.

⁵⁶ Bodenheimer, *Haut Ab! Die Juden in der Beschneidungsdebatte*, 106.

⁵⁷ Andreas Gotzmann, “Jenseits der Aufregung – Zur Konstruktion des Jüdischen in der Beschneidungsdebatte,” in *Die Beschneidung von Jungen. Ein trauriges Vermächtnis*, ed. Matthias Franz (Göttingen: Vandenhoeck & Ruprecht, 2014), 228-66, at 253-54.

Soviet Union’ active discouragement of religious observance in the name of state promoted atheism⁵⁸ and the dwindling numbers of German Jewry, in which every member counts.

An article from 2012 in the left-leaning Israeli newspaper *Ha’aretz* entitled “Even in Israel, More and More Parents Choose Not to Circumcise Their Sons”⁵⁹ became another popular source among critics to support their argument that even Jews had growing doubts about the procedure.⁶⁰ The reference to supposedly ‘more enlightened’ Jews who do not circumcise constructs an ambivalent paradigm of ‘good Jews’ who are capable of reform and ‘bad Jews’ who are bound to tradition. Critics however hardly ever mentioned that the article described how this very small phenomenon of *brit shalom*⁶¹ occurs within the context of a Jewish majority society and still only concerns a tiny portion of the country’s Jewish population. They thereby neglect to discuss how the power-relations of the Diaspora, where Jews live as a minority among non-circumcising societies, shape Jewish perceptions of the procedure in different ways. Philip Roth struck right to the heart of the matter in his 1986 novel *The Counterlife* when he lets his protagonist Nathan Zuckerman ponder about his own mark of Jewish identity:

Only a few hours ago, I went so far as to tell Shuki Elchanan that the custom of circumcision was probably irrelevant to my “I”. Well, it turns out to be easier to take that line on Dizengoff Street than sitting here beside the Thames... Here it turns out, by my emotional logic, to be the number one priority.⁶²

Critics of circumcision engaged with Jewish sources often selectively and emphasised negative traits without considering their wider context. References focussed extensively on Maimonides’ account of circumcision as a way to discourage masturbation or on rabbinical quotes that depict the uncircumcised as imperfect.⁶³ Indeed, as I discussed in the previous chapter, Maimonides contemplates in his *Guide of the Perplexed* that one of the rationales behind the cutting of the foreskin is sexual modesty.⁶⁴ Yet Maimonides also emphasises that a reason for *brit milah*, which he considers perhaps “even stronger” than any argument about sexual modesty, is about belief and community,⁶⁵

⁵⁸ Mordechai Altshuler, *Religion and Jewish Identity in the Soviet Union, 1941–1964*, trans. Saadya Sternberg (Waltham: Brandeis University Press, 2012), 200–04.

⁵⁹ Netta Ahituv, “Even in Israel, More and More Parents Choose Not to Circumcise Their Sons,” *Ha’aretz*, 14 June 2012, <https://www.haaretz.com/even-in-israel-more-and-more-parents-choose-not-to-circumcise-1.5178506>.

⁶⁰ See e.g. Walter, “Der Gesetzentwurf zur Beschneidung,” 1114.

⁶¹ I discussed *brit shalom* and its context in chapter three.

⁶² Philip Roth, *The Counterlife* (New York: Farrar Straus Giroux, 1986), 324.

⁶³ See e.g. Andreas Manok, Die Medizinisch nicht indizierte Beschneidung des männlichen Kindes: Rechtslage vor und nach Inkrafttreten des § 1631d BGB unter besonderer Berücksichtigung der Grundrechte (Berlin: Duncker & Humblot, 2015), 21–23.

⁶⁴ See the discussion in chapter three. See also Maimonides, *The Guide of the Perplexed*, III 49, at 609–10.

⁶⁵ *Ibid.*, III 49, at 610.

and there is no evidence that the majority of Jewish parents follow Maimonides ideas about sexual modesty when they decide to circumcise their sons.

The selective quoting of biblical and Talmudic passages by critics of circumcision appears to be a serious engagement with Jewish sources, but ultimately it excludes the multiplicity of Jewish voices on the topic. Such hermeneutical ignorance also fails to consider the power-relations of Diaspora in which the rabbinical interpretation of the foreskin as an imperfection, a blemish, emerged. Jonathan and Daniel Boyarin argue that this interpretation has to be understood as a defensive reaction to the charge that Jews mutilate their own children in a context where Jews were a minority and thus threatened with assimilation to non-Jewish norms.⁶⁶ Being circumcised has always been an important trope for the perception of Jews as different, especially in non-circumcising societies. As I discussed in the previous chapter, attitudes of the non-circumcising majority populations, often derogatory or hostile, thereby contributed psychologically to an even stronger commitment to brit milah as essential for Jewish identity. “One defense against feelings of insecurity and inadequacy that may accompany a condition of difference devalorised by society is to invest in that difference with strong positive valuation”, writes Elizabeth Wyner-Mark.⁶⁷ Wider experiences of anti-Jewish resentments and cultural pressure to assimilate to the dominant norms of the society thus inevitably shape “ideas of bodily perfection and imperfection, of what is counted mutilation and what is adornment”.⁶⁸

b. The Child's Best Interests

Unfortunately, on this point there is also no other way to proceed, other than to say that, from the standpoint of an enlightened and informed third party, there is – apart from a medical indication – absolutely no rational motive for the circumcision of boys.⁶⁹

As in the international discussion, the concept of the ‘child’s best interests’ became a central legal battleground for the German debate over the legality of male circumcision.⁷⁰ The education and upbringing of children has always been a *locus classicus* for the negotiation of cultural and religious difference. Sociologists of childhood have pointed out how constructions of ‘childhood’ are linked

⁶⁶ Boyarin and Boyarin, “Self-Exposure as Theory,” 26.

⁶⁷ Wyner Mark, “Crossing the Gender Divide,” xxiv.

⁶⁸ Boyarin and Boyarin, “Self-Exposure as Theory,” 26.

⁶⁹ Walter, “Der Gesetzentwurf zur Beschneidung,” 1114. In German: “Es führt leider auch an dieser Stelle kein Weg daran vorbei, dass es vom Standpunkt eines aufgeklärten und sachkundigen Dritten aus – und abgesehen von einer medizinischen Indikation – überhaupt kein vernünftiges Motiv für die Beschneidung der Jungen gibt.”

⁷⁰ On male circumcision and its relation to the child’s best interests and human rights see the discussion in chapter three. See also Schuz, “The Dangers of Children’s Rights’ Discourse in the Political Arena.”

to processes of nation-building and the formation of collective identities.⁷¹ The upbringing and education of children provides parents, communities, and societies with the unique opportunity to expose future generations to the values and norms that they consider most important. Sometimes, however, those visions conflict when parents and society do not share the same preferences, as illustrated by the 1972 decision of *Wisconsin v. Yoder*, in which the United States Supreme Court had to address the different education values of the Amish and the state.⁷² Cases such as *Yoder* or those dealing with male circumcision remind us that the upbringing of children is tied to broader projects of collective identity formation. Children thereby turn into subjects of regulation “hard-fought about.”⁷³ Consequently, defining what is in the best interests of the child is an endeavour fraught with difficulties, as it may serve “as a vessel, filled with moral judgements about how children should be reared and what values should be taught.”⁷⁴ Far from being a neutral and universal concept, the child’s best interests can turn into a tool to assimilate minorities to the norms of majorities.⁷⁵

In the German case, critics of circumcision, similarly to their counterparts elsewhere, took a position based on the discourse of children’s rights by arguing that the practice is not in the best interests of the child⁷⁶ because it violates a child’s right to bodily integrity by inflicting an irreversible mark on his penis. Since this mark is irreversible, the argument goes, it also violates the child’s right to an open future. In particular, it would hinder the child abandoning religion or changing his religion later in life. In response to these claims, the Central Council of Jews in Germany rightly pointed out that Jesus had not only been circumcised but also became the founder of a new religion.⁷⁷ Finally, for critics, supposed religious benefits, such as communal belonging, did not warrant the violation of these rights of the child: either because these critics rejected religion as a ‘metaphysical assertion,’ whose benefits could not be measured by rational science, or because they understood the child as a hyper-autonomous individual without religious identity. Although critics claimed to argue from the

⁷¹ Zsuzsa Millei, “The Cultural Politics of ‘Childhood’ and ‘Nation’: Space, Mobility and a Global World,” *Global Studies of Childhood* 4, no. 3 (2014): 137–43. Sharon Stephens, ed. *Children and the Politics of Culture* (Princeton: Princeton University Press, 1995). In Germany, Julie Lepperhoff and Lena Correll observe that in the country’s nation-building processes, “shifting constructions of childhood had and still have a central significance, firstly for the formation of an employment society (as future labour), and secondly for the formation of a collective identity (population preservation and society’s ideals).” See Julia Lepperhoff and Lena Correll, “Children in Family Policy Discourses in Germany: From Invisible Family Members to Society’s Great Hope,” *Global Studies of Childhood* 4, no. 3 (2014): 143–56, at 151–52.

⁷² *Wisconsin v. Yoder*, 406 U.S. 205 (1972). I briefly discussed the case in chapter three in relation to the open future argument.

⁷³ Amir-Moazami, “Investigating the Secular Body,” 155.

⁷⁴ Jennifer S. Hendricks, “Schrödinger’s Child: Non-Identity and Probabilities in Reproductive Decision-Making,” in *Studies in Law, Politics, and Society, Vol. 69. Special Issue: Feminist Legal Theory*, ed. Austin Sarat (Bingley: Emerald, 2016), 221–51, at 224.

⁷⁵ Schuz, “The Dangers of Children’s Rights’ Discourse in the Political Arena.”

⁷⁶ I discussed the legal arguments against male circumcision in chapter three.

⁷⁷ Zentralrat der Juden in Deutschland, “Why Do Jews Circumcise Their Children? Dossier of the Central Council of Jews in Germany on the Issue of Circumcision.” 10 July 2012, available from <http://www.hagalil.com/judentum/2012/beschneidung.pdf>.

neutral position of secular law, they expressed ideas about the body and about religion that are entangled with the German Christian majoritarian culture. They therefore struggled to make sense of Jewish difference within their understanding of the law.

aa. The Secular Body

The way in which ideas about the body become enmeshed with majority norms, which are rooted in Christianity, becomes clear when we approach the idea of the ‘unmarked secular body’ from a Jewish perspective. During the German debate, critics insisted that they did not wish to ban circumcision completely, but rather suggested implementing a law that would mean that only those who could legally consent would be able to undergo circumcision. Some proposed that the boy should decide for himself when he is eighteen or fourteen, the age of religious maturity (*Religionsmündigkeit*) when, according to German law, children can decide for themselves which religion, if any at all, they wish to adopt.⁷⁸ According to this line of thought, the unmarked body is understood as the secular and neutral state of being that enables all future choices. The uncircumcised body is set as the universal norm, the locus of rationality and humanity.⁷⁹ What many commentators failed to see is that postponing or the complete omission of circumcision is not a neutral act either. From the Jewish (and Muslim) perspective, being uncircumcised is not simply the characteristic of the secular and neutral body but rather it “coincides with the Christian understanding of the physical body”.⁸⁰ Leaving the body uncircumcised thus does not necessarily mean leaving the body open to all possible choices later in life, but it can also mean “orient[ing] a child towards the majority Christian culture”⁸¹, as a way of subtly converting a child and rearing him within the bodily norms and values of a non-Jewish culture. Being uncircumcised thus always has to be considered as much as a particularistic choice rooted in a particular culture and religion as being circumcised. Yet, as Richard Amesbury remarks, “by positioning ‘the body’ outside ‘culture – as *‘intact before the law’* – law occludes its own culture.”⁸²

⁷⁸ See section 5 Law Regarding the Religious Upbringing of Children (Gesetz über die religiöse Kindererziehung).

⁷⁹ Hannah Tzuberi and Sultan Doughan, “Säkularismus als Praxis und Herrschaft: Zur Kategorisierung von Juden und Muslimen im Kontext säkularer Wissensproduktion,” in *Der inspierte Muslim. Zur Politisierung der Islamforschung in Europa*, ed. Schirin Amir-Moazami (Bielefeld: Transcript, 2018), 269-308, at 296.

⁸⁰ Reut Yael Paz, “The Cologne Circumcision Judgment: A Blow against Liberal Legal Pluralism,” *Verfassungsblog*, 24 July 2012.

⁸¹ Herman, *An Unfortunate Coincidence*, 83.

⁸² Richard Amesbury, “Is the Body Secular? Circumcision, Religious Freedom, and Bodily Integrity,” *Journal of the British Association for the Study of Religions* 18 (2016): 1-10, at 8.

Alexandra Kemmerer, however, cautions that a simplistic conflation of the unaltered body with Christianity neglects the long history of bodily practices, such as Christian asceticism.⁸³ This is surely true, yet, it overlooks the fact that the mark of circumcision has never belonged to the dominant canon of Christianity in the West. On the contrary, as I noted in chapter three, in the early days of Christendom, the sign of the Jewish covenant played an important role in marking the division between the two religions. But the preoccupation with circumcision as a mark of the Jew's difference did not end with the writings of Paul. Sander Gilman suggests that the modern "cultural anxiety [about the circumcised penis] was but the continuation of an older response to the Western critique of circumcision as a sign of Jewish self-isolation and resulting feminization".⁸⁴ Circumcision "marked the Jewish body as inherently different".⁸⁵ Moreover, Robin Judd, whose work I also discussed in the previous chapter, shows how the engagement with Jewish practices such as brit milah helped to shape exclusive notions of German national identity during the nineteenth century, at a time when Jewish difference was increasingly constructed as a biological difference of race.⁸⁶ Reminding us of the importance of historical processes of othering for today's debates, Schirin Amir-Moazami argues that

There seems to be an intimate relationship between an emerging modern conception of the body as ruled and governed by modern medicine and the related racialization of *religiously* justified practices, whose genealogy still needs to be traced more carefully.⁸⁷

The way that such Christian-Western ambivalence towards Jews can be perpetuated through law becomes obvious in a doctrinal comment by constitutional scholar Josef Isensee, in which he draws a direct line between the early rift between Judaism and Christianity as embodied in the different attitudes to brit milah and the contemporary secular state. Tapping directly into the Paulinian polemics against brit milah, Isensee makes the point that male circumcision is alien to German secular law. In his legal comment on the constitutionality of male circumcision, he presents a story of human progress that replicates the Christian narrative of Judaism's supersession by Christianity. In Isensee's account (and that of many Christian and secularist thinkers before him), "circumcision replaced human sacrifice" just as on the "next evolutionary step" the early Christian community replaced the carnal ritual of circumcision with baptism, a "gender comprehensive" practice through which circumcision endured as the "circumcision of the heart". Regrettably, the "secular state" could not enforce the sublimation process in religions such as Judaism, Isensee concluded.⁸⁸

⁸³ Alexandra Kemmerer, "Naked Law, Lost Traditions. A Comment on Reut Paz and Legal Pluralism," *Verfassungsblog*, 18 August 2012.

⁸⁴ Sander L. Gilman, *Making the Body Beautiful: A Cultural History of Aesthetic Surgery* (Princeton: Princeton University Press, 1999), 137.

⁸⁵ Ibid.

⁸⁶ See Judd, *Contested Rituals*. See also the discussion of racial Antisemitism in chapter two.

⁸⁷ Amir-Moazami, "Investigating the Secular Body," 162. Emphasis in original.

⁸⁸ Isensee, "Grundrechtliche Konsequenz wider geheiligte Tradition," 322. In German: "Man mag die Beschneidung als Ablöse eines solchen furchtbaren Rituals [Menschenopfer] deuten, wie auf der nächsten

Two things are notable in Isensee's argument: the direct link between Christianity and the modern secular state, both committed to progressive liberal values such as gender equality, and the direct invocation of a Christian text within a constitutional law commentary. The Christian roots of the secular state, often muted through references to universalism and neutrality, are here made explicit. Christianity becomes, like the secular state, associated with gender equality through its gender-neutral ritual of baptism. Again, this idea is not new and echoes, perhaps unconsciously, what Paul had to say about circumcision in contrast to baptism. For Paul, as Shaye Cohen explains, "circumcision discriminates, baptism does not."⁸⁹ However, as Johanna Schiratzki notes, the gender-neutral rite of baptism has in fact done little to alleviate the historically weak position of women in Christianity.⁹⁰ Moreover, Isensee reproduces the equation of secularisation with human advancement in which Judaism holds the role of the backward. As Ari Joskowitz and Ethan Katz argue, in discourses about the secular, Jews play a similar role to those they had in Christian theology:⁹¹ as the Other in need of reform and conversion. The obvious reference to Paul makes this link to the historical divide between Judaism and Christianity explicit, where the New Testament opens a world of Christian spirituality, as opposed to the world of "Judaic carnality" in the Old Testament. Boyarin argues that the true cultural issue that divided Christians from Jews by the second century was the relevance of bodily belonging.⁹² At this time, Jews and Christians looked at circumcision quite differently. For Jews, this hidden marker manifested the divine election of the Jewish people, while Christians saw it as "a stigma, a sign of rejection, punishment, and humiliation, a 'mark of Cain'".⁹³

bb. Images of Religion: "A Metaphysical Assertion"

In the German debate, both medicine and health became dominant frames for the definition of the child's best interest. The debate is thus also testament to the role of doctors and medical professionals for the creation and hierarchisation of secular knowledge.⁹⁴ Medicine and public health concerns have assumed a prominent status in many areas of social life. This shift is described as medicalisation,

Entwicklungsstufe die christliche Urgemeinde die fleischliche Komponente der Beschneidung ablöste durch die Taufe, in der das jüdische Initiationsritual in spiritualisierter Form, nunmehr geschlechtsübergreifend als 'Beschneidung des Herzens dem Geiste, nicht dem Buchstaben nach' fortlebt. Der säkulare Staat aber kann dem Sublimierungsprozeß nicht nachhelfen und von sich aus vorschreiben, wie man Jude oder Muslim wird."

⁸⁹ Cohen, *Why Aren't Jewish Women Circumcised?*, 71. The well-known passage in Galatians 3:28 is: "There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus."

⁹⁰ Schiratzki, "Banning God's Law in the Name of the Holy Body," 48-49.

⁹¹ Joskowitz and Katz, "Rethinking Jews and Secularism," 2.

⁹² Boyarin, *A Radical Jew*, 36.

⁹³ Cohen, *Why Aren't Jewish Women Circumcised?*, 11. See also the discussion of circumcision as a trope for Jewish difference in chapter three.

⁹⁴ Amélie Barras and Dia Dabby, "Only Skin Deep," in *Globalized Religion and Sexual Identity: Contexts, Contestations, Voices*, ed. Heather Shipley (Leiden; Boston: Brill, 2014), 86-106.

which is “the process by which nonmedical problems become defined and treated as medical problems”.⁹⁵ Hannah Carpenter argues that a de-medicalisation is under way in the United States, which reverts back to seeing circumcision as a religious rather than a health practice.⁹⁶ But in Germany, the discourse starts on a different footing because circumcision, as I noted in chapter three, had never been successfully medicalised as a medically beneficial practice. Here the move to health shifts the practice from the realm of religion to the realm of science and medicine, which thereby become the sole determinants of the procedure’s acceptability in conjunction with law.⁹⁷ Circumcision is rearticulated from a religious ritual to a health risk, reflecting the general shift of Western societies since the Enlightenment from a culture of religious belief to a culture of medical and scientific knowledge.⁹⁸

What does the medical framing of male circumcision achieve in the context of the German debate? A discussion of the practice in mostly medical terms enables a move from considerations about religious identity and community to a cost-benefit analysis in terms of health. In turn, it requires Jewish organisations to follow a dominant framing and to focus extensively on the health and hygiene benefits of the practice, even though these considerations only play a minor role in the Jewish understanding of the practice as a marker of communal identity. Public statements of Jewish organisations explained in detail the health benefits⁹⁹ and the Central Council of Jews in Germany even announced the introduction of a medical and hygienic training course for mohalim – although it is estimated that there are only four to six such traditional circumcisers in Germany and no complications have ever been reported. Yet, as I noted in the previous chapter, this scientific knowledge is, to some extent, culturally contingent. The disagreement between various paediatric bodies on whether harms outweigh benefits or vice versa is tied to the socio-cultural context, as the diverging opinions of medical associations in the United States on the one hand and continental European countries, such as Germany, on the other show.¹⁰⁰ “One observer’s health risk is another’s

⁹⁵ Peter Conrad, “Medicalization and Social Control,” *Annual Review of Sociology* 18, no. 1 (1992): 209-32, at 209.

⁹⁶ Carpenter, “On Remedicalisation: Male Circumcision in the United States and Great Britain,” 614.

⁹⁷ Carpenter speaks here of re-medicalisation, although she acknowledges that this process would “have to start virtually from scratch.” *Ibid.*, 626.

⁹⁸ Sander L. Gilman, “How Health and Disease Define the Relationship among the Abrahmic Religions in the Age of Diaspora,” in *Judaism, Christianity, and Islam. Collaboration and Conflict in the Age of Diaspora*, ed. Sander L. Gilman (Hong Kong: Hong Kong University Press, 2014), 55-76, at 57.

⁹⁹ See Zentralrat der Juden in Deutschland, “Warum beschneiden Juden ihre Kinder? Dossier des Zentralrats der Juden in Deutschland zum Thema Beschneidung,” 10 July 2012, available from <http://www.hagalil.com/judentum/2012/beschneidung.pdf>. See also American Jewish Committee “Fakten und Mythen in der Beschneidungsdebatte,” 15 November 2012, available from https://ajcberlin.org/sites/default/files/update_ajc_berlin_briefing_fakten_und_mythen_in_der_beschneidungsdebatte_web.pdf.

¹⁰⁰ See the discussion of circumcision’s two trajectories in the previous chapter.

valid intervention; one observers' sense of the rights of any category may or may not be trumped by the health risk," writes Sander Gilman.¹⁰¹

The whole debate thereby hints at the wider relation between knowledge and power. Among critics, there was the tendency to privilege medical knowledge as legitimate and authoritative, while religious knowledge was discarded as irrelevant and illegitimate. In the German debate, religion and science became juxtaposed as being mutually exclusive, thereby enabling a struggle over how to legally define the benefits of the procedure: by taking into account the 'irrational' benefit of Jewish communal belonging or through a 'rational' utilitarian health assessment? A striking example of such an attitude is given by Markus Löning, the then federal commissioner for human rights, who wrote on his Facebook page with reference to the ongoing debate: "Too stupid to understand science? Try religion!"¹⁰². The pull towards health as a dominant frame enabled critics to marginalise the actual significance of brit milah as a marker of Jewish identity by labelling such concerns as 'irrational' – an argument of high importance for the legal question of whether the integration into a religious community has any benefits for the child that could warrant the violation of his physical integrity.¹⁰³ Among critics, there was the tendency to reject any such religious or social benefit with religion understood to be a mere 'metaphysical assertion',¹⁰⁴ which would need to be proved in order to be considered legitimate. Elgar Sarajlic, in an essay which won a prize by the journal *Res Publica*, for example argued:

The question about the existence of such an entity is a matter of personal persuasion, the mere presumption can hardly warrant authorizing invasive intervention into the body of another human being, even if in cases of parents and their children. Without a definite proof that such an intervention would bring metaphysical benefits (provided these are defined more precisely) to the child, circumcision cannot be justified.¹⁰⁵

One of the most outspoken opponents of circumcision in Germany, Holm Putzke, took a similar approach arguing that religious practices have to be rationally justifiable and their benefits empirically measurable.¹⁰⁶ On the surface, such an anti-religious approach may simply be the sign of an

¹⁰¹ Gilman, "How Health and Disease Define the Relationship among the Abrahmic Religions in the Age of Diaspora," 71.

¹⁰² Quoted in Mariam Lau, "Die Debatte über die Beschneidung kennt viele Verlierer," *Die Zeit*, 11 October 2012, <http://www.zeit.de/2012/42/Beschneidung-Gesetz/komplettansicht>.

¹⁰³ For a discussion of the legal question if religion can justify circumcision see e.g the analysis by Jacobs and Arora, "Ritual Male Infant Circumcision and Human Rights."

¹⁰⁴ Rolf-Dietrich Herzberg, "Der Abwägungsgedanke und der 'evidenzbasierte Blick' in der Beschneidungsdebatte," *Zeitschrift für Internationale Strafrechtsdogmatik* 9 (2014): 56-65, at 59. In German: "Ich bleibe dabei, dass in unserem Streit eine solche metaphysische Behauptung – als Argument pro Einwilligungsrecht wegen Kindeswohlförderung – null und nichtig ist [...]."

¹⁰⁵ Sarajlic, "Can Culture Justify Infant Circumcision?," 334.

¹⁰⁶ Holm Putzke, "Die strafrechtliche Relevanz der Beschneidung von Knaben. Zugleich ein Beitrag über die Grenzen der Einwilligung in Fällen der Personensorge," in *Strafrecht zwischen System und Telos: Festschrift für Rolf*

increasingly disenchanted society, where distance and incomprehension have replaced empathy for religion. However, the consequences of this approach are far-reaching. Subjecting religious practice to a rational calculus renders the entire concept of freedom of religion obsolete. Furthermore, the dictate of rationalisation particularly targets certain religious groups for whom religion is not just a matter of inner belief, but rather a practice which is necessarily to some extent public, and therefore more prone to the scrutiny of public reason.

The tension in this account then also arises from the notion of religion as first and foremost a matter of inner belief, voluntary and not compulsory – a notion with which Judaism has never easily fit. Historically, as discussed in chapter two, Judaism has been a religion of law and practice and thus in many ways necessarily public. The idea that Judaism is a religion in the sense of inner, private belief is in fact rather new, and emerged, as I discussed in chapter two, during the nineteenth century as a prerequisite for Jewish access to citizenship.¹⁰⁷ But the notional transformation of Judaism into a religion in this sense did not resolve the tensions around Judaism's public aspects, such as the practice of circumcision. This tension now plays out in the debate about male circumcision, in which Jews again face the demand to privatise their difference into a matter of belief in order to fully belong as modern and liberal citizens. These tensions are of course not unique to Judaism but affect all religions that do not fit such a privatised model of religion – a model that is, in fact, not even supported by the German constitution.¹⁰⁸ There is indeed hardly any other tradition in which such an anti-ritualistic notion of religion would make sense, as Robert Yelle points out.¹⁰⁹

Given the difficulty with legal definitions of religion, German lawmakers were probably wise to avoid any reference to religion as a requirement for the validity of parental consent when they drafted the new regulation on the legality of male circumcision. The new regulation immediately attracted a new criticism: that it would pave the way for “all kinds of shoddy or outright wicked motives on the parents' side”.¹¹⁰ Some scholars, such as Tatjana Hörnle, argued for a restriction on purely religiously motivated circumcisions and suggested that parents should be asked to provide reasons for why male circumcision forms an integral part of their “educational concept,” which would require a religious self-understanding that needs to be demonstrated.¹¹¹ But restricting the law to only allow for religious circumcision would face serious practical difficulties. How is religion to be defined? And how would

Dietrich Herzberg zum siebzigsten Geburtstag, eds. Holm Putzke, et al. (Tübingen: Mohr Siebeck, 2008), 669-709, at 19.

¹⁰⁷ See also Batnitzky, *How Judaism Became a Religion*.

¹⁰⁸ Hans Michael Heinig and Martin Morlok, “Von Schafen und Kopftüchern: Das Grundrecht auf Religionsfreiheit in Deutschland vor den Herausforderungen Religiöser Pluralisierung,” *JuristenZeitung* 15/16, no. 58 (2003): 777-85.

¹⁰⁹ Yelle, “Imagining the Hebrew Republic,” 25.

¹¹⁰ Merkel and Putzke, “After Cologne: Male Circumcision and the Law,” 448.

¹¹¹ Tatjana Hörnle, “Strafrecht: Kultur, Religion, Strafrecht – Neue Herausforderungen in einer pluralistischen Gesellschaft,” in *70. Deutscher Juristentag. Thesen der Gutachter und Referenten* (Hannover: 2014), 22-30, at 23.

parents prove their religiosity? Is it frequency of synagogue attendance? Or keeping kosher? What would Jewish mean in this context?

The idea of such a religious observance test is, again, informed by a Christian understanding of religion, in which someone is understood to be religious who participates in the observance of religious practice. But this understanding does not sit easily with the way that Judaism defines the Jewishness of a person. Despite the internal pluralism of Judaism, almost all Jewish denominations agree that a person is Jewish either by birth or by conversion, although they differ on the exact criteria. But this emphasis on descent, on shared communality and genealogy appears foreign in a world “dominated by liberalism and cultural Christianity,” Susanna Mancini points out.¹¹²

The way that Western secular courts have grappled with the definition of Jewishness is illustrated by the 2009 UK Supreme Court case *R v. Governing Body of JFS*.¹¹³ In this decision, the UK Supreme Court found that a state-funded Jewish school’s admission policy discriminated on grounds of ethnic origin. In brief, the school had refused admission to a boy because it did not consider him Jewish under the Orthodox Jewish criteria it applied. According to Orthodox Judaism, someone is Jewish if born to a Jewish mother or following a conversion to Judaism according to Orthodox criteria. Since the mother had converted within the less strict Jewish Masorti movement,¹¹⁴ the school did not acknowledge her conversion and hence she was not considered to be Jewish and thus neither was her son for Orthodox purposes. Not only did the Court reach the problematic conclusion that the school had racially discriminated because of this matrilineal test,¹¹⁵ the decision also required the school to adopt a new admission policy which effectively resulted in the “Christianisation”¹¹⁶ of the Jewish school. The new admission policy is based on a ‘Certificate of Religious Observance’¹¹⁷ thus replacing the genealogical story of Jewishness with Jewishness as belonging through belief and its expression.¹¹⁸ In practice, the religious observance requirement thereby creates a less diverse body of students by excluding those who are Jewish by birth but non-observant. By requiring the school to abandon the Jewish understanding of Jewishness and to define Jewishness as a matter of religious observance, the decision replicates the Christian narrative that it had overcome Judaism’s exclusionary view of

¹¹² Mancini, “To Be or Not to Be Jewish,” 490.

¹¹³ *R v. The Governing Body of JFS* (2009 UKSC 15). See the critical comments by *ibid.*; Joseph H. H. Weiler, “Discrimination and Identity in London: The Jewish Free School Case,” *Jewish Review of Books*, no. Spring (2010).

¹¹⁴ Masorti describes itself as traditional Judaism. It is less strict in observance than Orthodox Judaism, e.g. with regard to the equal participation of women. Many Masorti synagogues are egalitarian. See e.g. Masorti in the UK <https://masorti.org.uk/about-masorti/faqs.html>.

¹¹⁵ For a detailed discussion see Herman, *An Unfortunate Coincidence*, Chapter 7.

¹¹⁶ *Ibid.*, 168.

¹¹⁷ The requirements, including frequency of synagogue attendance, can be found here: <https://jfs.brent.sch.uk/wp-content/uploads/2018/09/11-CRP-2019.pdf>.

¹¹⁸ On the role of genealogy and kinship in Judaism see Jonathan Boyarin, “Circumscribing Constitutional Identities in Kiryas Joel,” *Yale Law Journal* 106 (1997): 1537-70, at 1547.

religious membership by defining membership as a matter of belief. Moreover, it further entrenches the idea of Jewishness as a religious identity, despite the multiple layers of Jewish identity. As Josef Weiler notes, the UK Supreme Court's decision is

shaped by the fundamental Christian idea of the New Covenant in which the 'old' covenantal boundaries of Israelite peoplehood were dissolved, and a universal salvific message was extended to all *individuals* regardless of the people to whom they belonged.¹¹⁹

The JFS case sends a warning message to those advocating for a 'proof of a religious education concept' as a prerequisite for a right to circumcise. If Christianity is the benchmark for what constitutes a legally protected religious identity, the resulting understanding of Judaism will be unable to contain the multi-layered nature of Jewish identity that cuts across modern notions of ethnicity, religion, culture, and nationality.¹²⁰ Unreflected legal attempts to define religion run the risk of discriminating,¹²¹ or even of Christianising non-Christian religions, as many scholars critically note.¹²² Thus, by not mentioning religion at all in its new regulation that affirmed the legality of male circumcision, the German parliament avoided the murky waters of such definitions, probably trusting that the large majority of parents have motives other than "shoddy or wicked" ones.¹²³

c. The Shadows of the Past

Although the Cologne decision had not introduced a ban on male circumcision, several critics advocated for such a restriction. Furthermore, a public opinion poll found in 2012 that 56 per cent of Germans supported such a ban on male circumcision.¹²⁴ But even for some of the most outspoken critics, the criminalisation of religious male circumcision, the effective consequence if a ban were to have come into place, caused some uneasiness. The main reason for this was the Holocaust and German historical guilt. German-Jewish history played an ambivalent role throughout the debate. Lawyers in particular were eager to stress that the Holocaust should not prevent a discussion or even

¹¹⁹ Weiler, "Discrimination and Identity in London: The Jewish Free School Case." Emphasis in original.

¹²⁰ See on the many approaches to Jewish identity Susan A. Glenn and Naomi B. Sokoloff, *Boundaries of Jewish Identity* (Seattle: University of Washington Press, 2011).

¹²¹ Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (New Haven: Princeton University Press, 2005).

¹²² Mancini, "To Be or Not to Be Jewish," 500-01.

¹²³ For the text of the new regulation in section 1631d German Civil Code see note 34.

¹²⁴ According to the opinion poll which was conducted by polling institute Emnid, 56 per cent of Germans found the Cologne decision to be right, 35 per cent disagreed, and 10 per cent had no opinion on the matter. See Alexandra Hudson, "Germany Resumes Ritual Circumcisions After Bitter Dispute," *Reuters*, 1 October 2012, <http://www.reuters.com/article/us-germany-circumcision-idUSBRE8900US20121001>.

regulation of male circumcision, however they affirmed the ‘special obligation’ of the German state towards Jewish life.¹²⁵

For some, historical guilt obligated the German state to create special laws for Jews and treat Jewish communities especially carefully, even if this would run counter to the constitutional order. For others, the Third Reich and its carelessness for human life required an absolute protection of human life and bodily integrity under the German constitution, even to the extent that the state had to put an end to religious practices of those who suffered most under Nazi rule. Marlene Rupprecht, spokesperson for children’s rights in the Social Democratic Party (SPD), argued that she did not wish Germany to become known for being the country that legalised the violation of bodies of vulnerable children because of “random biblical sources and ancient traditions”.¹²⁶ She claimed that “the respect for human life – this is our lesson from the Nazi era!”¹²⁷ The lesson to be drawn from the atrocities of the Holocaust was the absolute protection of human rights – even if this meant the protection of Jewish babies from their Jewish parents. Or, as legal scholar Jörg Scheinfeldt put it, “the high moral duty of the state to take into account Jewish matters does not exempt it from protecting the concerned children”.¹²⁸ For Scheinfeldt, the genital integrity of Jewish children was a legal concern of extraordinary weight.¹²⁹ In his account, a certain understanding of human rights and morals becomes universalised, while at the same time it reveals its particularistic historical roots in the German past. Ultimately, this reasoning exposes an ethnocentric and paternalistic view of the German state’s responsibility for its Jewish citizens, whereby the state has to eradicate their differences in order to protect them from themselves.

Some framed the question as one of “whether Jews should have special rights because of the Holocaust”¹³⁰. Reinhard Merkel, legal scholar and member of the German Ethics Council, declared

¹²⁵ See e.g. Sven Großmann, “§ 1631d Abs. 2 BGB. Gelungener Ausgleich zwischen Grundrechten und Staatsräson?,” *HRRS* 14 (2013): 515-25, at 518. In German: “Als unmittelbare Folge der unmenschlichen Verbrechen des Holocausts ergibt sich die historisch einzigartige politische und gesellschaftliche Pflicht der BRD, den Wiederaufbau des jüdischen Lebens in Deutschland in besonderem Maße zu schützen und zu fördern.”

¹²⁶ Quoted in in Mariam Lau, “Die Debatte über die Beschneidung kennt viele Verlierer,” *Die Zeit*, 11 October 2012, available from <http://www.zeit.de/2012/42/Beschneidung-Gesetz/komplettansicht>. In German: “Ich möchte nicht, dass Deutschland in die Geschichte eingeht als das Land, das Körperverletzung an wehrlosen Kindern legalisiert wegen irgendwelcher Bibelstellen und Tausende von Jahren alten Traditionen. Der Respekt vor dem Leben – das ist doch unsere Lektion aus der Nazizeit!”

¹²⁷ *Ibid.* For German text see note above.

¹²⁸ Jörg Scheinfeldt, “Erläuterungen zum neuen § 1631d BGB – Beschneidung des männlichen Kindes,” *HRRS* 14 (2013): 268-83, at 273.

¹²⁹ *Ibid.* In German: “Die aus der Historie abgeleitete moralische Pflicht der deutschen Staatsorgane, auf alle jüdischen Belange von Gewicht besonders Rücksicht zu nehmen, dispensiert den Gesetzgeber nicht von seiner Schutzpflicht gegenüber den betroffenen Kindern! Gerade auch gegenüber den jüdischen Kindern mutet die These paradox an. Ihre Unversehrtheit im Intimbereich ist ein Belang von außerordentlichem Gewicht (Art. 2 I GG mit Art. 1 I GG).”

¹³⁰ Walter, “Der Gesetzentwurf zur Beschneidung,” 1111. In German: “Wir streiten um die Befugnisse der Eltern gegenüber ihren Kindern, darum, ob Juden aufgrund des Holocaust Sonderrechte haben dürfen oder

the circumcision controversy a “legal and political state of emergency” that forced Germany to create a special law just for Jews and Muslims. The rule of law, he stated, had to “commit a sin”.¹³¹ On this account, the globally unique obligation of Germany because of its past required the German legislator to be extraordinarily sensitive to Jewish matters and therefore to tolerate the intolerable and to justify the unjustifiable by legalising male circumcision. From this perspective, the new regulation carries the flaw of the illegitimate, as a mere concession to the Jews because of historical guilt, forcing it to reluctantly integrate “foreign” or “alien bodies”,¹³² as the German-Jewish writer Esther Dischereit observed about Jewish integration after the Second World War. In German legal doctrine, with its emphasis on human dignity and human life, the law constituted for some a “hardly compatible alien element”.¹³³ The feelings of guilt after the Second World War led Germany to a sacralisation of fundamental rights, yet, the same feelings of guilt collapsed this construct in the face of male circumcision.¹³⁴ The lessons of the past did not lead to a respect for difference and the rights and values of others, but continued to mask the claim of German superiority behind the universalism of human rights.

In the opinion of several scholars,¹³⁵ the German state refrained from criminalising male circumcision only because of extra-constitutional reasons (German guilt) or because of some free-floating constitutional “taboo clause” and not because of respect for parental rights and the right to freedom of religion, the inherent parameter of the German constitutional *nomos*. This argument is also worrisome for other reasons. It emphasises once more the Otherness of Jews, by labelling the new regulation that affirms the legality of male circumcision as a *Sonderrecht*, a special law, which stands outside of, or even in opposition to, the German legal order and its commitment to the protection

müssen, darüber, wie weit die Bundesrepublik gehen soll, um Muslime zu integrieren, und schließlich darüber, wieviel Gleichberechtigung unsere Gesellschaft braucht.”

¹³¹ In German: “Und damit erweist sich das Dilemma als eine Art rechtspolitischer Notstand für die Politik. [...] Es ist im Kern der Sache nach ein jüdisch-muslimisches Sonderrecht. Das ist eigentlich ein Sündenfall des Rechtsstaates, aber dahinter steht dieses Problem und das ist ein extrem gewichtiges Problem, das ich eben versucht habe zu skizzieren.” See Reinhard Merkel in German Ethics Council, “Protocol of the Meeting on the Topic of Religious Circumcision,” 23 August 2012, available from <http://www.ethikrat.org/dateien/pdf/ plenarsitzung-23-08-2012-simultanmitschrift.pdf>.

¹³² In German: “integrierte Fremdkörper”. German language is multivalent here. Fremdkörper can in fact be translated as both foreign/alien body and foreign/alien element. Quoted in Sander L. Gilman and Karen Remmler, “Introduction,” in *Reemerging Jewish Culture in Germany: Life and Literature since 1989*, eds. Sander L. Gilman and Karen Remmler (New York: New York University Press, 1994), 1-12, at 3.

¹³³ Herzberg, “Der Abwägungsgedanke,” 60. In German: “Thm (*dem Gesetzgeber*) war gewiss klar, dass er, politischem Druck nachgebend, mit § 1631d Abs. 1 S. 1 BGB dem Organismus unserer Rechtsordnung einen kaum verträglichen Fremdkörper eingefügt hat.”

¹³⁴ Heiner Alwart, “Sacrificium Intellectus. Wie Sich die Deutsche Rechtsphilosophie in der Debatte über die Knabenbeschneidung Erneut Auf Einen Irrweg Begibt,” in *Säkulare Selbstbestimmung Versus Religiöse Fremdbestimmung. Zur Kritik an Der Öffentlichen Debatte Um Das Beschneidungsritual*, ed. Michael Wermke (Leipzig: Evangelische Verlagsanstalt, 2014), 115-40, at 140.

¹³⁵ See e.g. Isensee, “Grundrechtliche Konsequenz wider geheiligte Tradition;” Christian Fahl, “Wird das Beschneidungsverbot kommen? Zur ‚Sozialadäquanz‘ von Beschneidungen,” in *Ein menschengerechtes Strafrecht als Lebensaufgabe. Festschrift für Werner Beulke*, eds. Christian Fahl, et al. (Heidelberg: C.F. Müller, 2015), 81-94, at 94.

of fundamental rights. This argument continues to enforce dichotomies between ‘our law’ and ‘their traditions’ and the idea of a *nomos* to which ‘we’ belong but ‘they’ do not. Moreover, it singles out Jews as Others who need, as Zygmunt Bauman remarks, special treatment in the form of special laws.¹³⁶ The question of Jewish belonging is reformulated in terms of belonging to the German constitutional community – but in this line of thought the law that legalises circumcision places Jews outside this community, exposing them as strangers.

The status as a *Sonderrecht* puts the Sword of Damocles over the new regulation and makes it subject to strict scrutiny and revocation at the discretion of the majority. In this way, a more or less subtle pressure of assimilation is put onto religious communities, who are given time to rethink their practices. Criminal law scholar Tonio Walter, for example, contemplates a temporal restriction on the validity of the law in order to enable Jews and Muslims to reform their practices.¹³⁷ This line of argument reveals an impoverished vision of diversity, with successful integration still being understood as eliminating difference and integration as a matter of assimilation. German society remains “torn between the postulate of assimilation on the one hand and on unconditioned acceptance of otherness on the other hand”, Dieter Grimm remarks about the country’s struggle to formulate a coherent answer to the realities of an increasingly diverse society.¹³⁸ The demand to assimilate is, however, framed as the necessary and therefore legitimate modernisation and liberalisation of religious minorities in need of reform. The new regulation affirming the legality of male circumcision, on the other hand, is cast as a temporary act of virtue, as an act of tolerance, which expects, ultimately, compliance with the dominant norm. The discourse of tolerance which underpins this argument thus speaks to the concerns voiced by scholars such as Lori Beaman, who criticise that, in today’s discourse of diversity, notions of accommodation and tolerance “are vestiges of the empire that conceptually anchor a hierarchy of privilege that works to maintain a boundary of *otherness*.”¹³⁹ Tolerance, Wendy Brown writes in a similar vein, is a modern form of power that carries an antagonism to alterity within it, a condition of disapproval while simultaneously affording the tolerating an air of virtue and benevolence:

tolerance is necessitated by something one would prefer did not exist. It involves managing the presence of the undesirable, the tasteless, the faulty – even the revolting, repugnant, or vile. In this activity of management, tolerance does not offer resolution or transcendence, but

¹³⁶ Bauman, “Allosemitism: Premodern, Modern, Postmodern,” 143. See also the discussion of Bauman’s argument in the first chapter of this thesis.

¹³⁷ Walter, “Der Gesetzentwurf zur Beschneidung,” 1116. “Nach Ablauf der fünf Jahre wäre es natürlich möglich, die Geltung zu verlängern, und dies wäre wahrscheinlich auch nötig. Aber der Gesetzgeber hätte deutlich gemacht, dass er die Diskussion in den Glaubensgemeinschaften der Muslime und der Juden zur Kenntnis nimmt und offen dafür bleibt, einem Wandel ihrer religiösen Anschauungen Rechnung zu tragen.”

¹³⁸ Dieter Grimm, “Conflicts between General Laws and Religious Norms,” in *Constitutional Secularism in an Age of Religious Revival*, eds. Susanna Mancini and Michel Rosenfeld (Oxford: Oxford University Press, 2014), 3-13, at 4.

¹³⁹ Beaman, “Tolerance and Accommodation as Vestiges of the Empire,” 120-21. Emphasis in original.

only a strategy for coping. There is no *Aufhebung* in the operation of tolerance, no purity and no redemption. As compensation, tolerance anoints the bearer with virtue, with standing for a principled act of permitting one's tastes to be violated. It offers a robe of modest superiority in exchange for yielding.¹⁴⁰

III. Conclusion: Fragile Acceptance

The German debate on male circumcision reveals how legal language and arguments can be deployed as a tool of cultural hegemony in order to make and remake the religious Other according to norms of the majority. Reading this case through the lens of 'ambivalence' allows us to understand how criticism of male circumcision can be seen as yet another attempt to assimilate Jews, to force them through the language of supposedly neutral and secular law to 'be like us' after casting them as Others. In this case, the 'us', although imagined as the universal and neutral position, remains entangled with the culture of the German majority, with its roots in Christianity. Taking a closer look at the hidden assumptions behind the 'normal' body or the truly 'modern' religion shows how these ideals remain coupled with the "notion of a secularized and tamed Christianity"¹⁴¹ which constructs Jews (and Muslims) as deviant Others. The debate also illustrates the concern voiced by Lim and Green in 1998 that the legal framing of male circumcision as a human rights issue risks creating another object of study and thereby replicates many of the discourses around female genital cutting. As my reading of the German controversy on male circumcision illustrates, the discourse indeed evokes similar images and language, thereby repeating the barbarism/rescue paradigm that already underpins the FGC discourse. In the German debate, Jews become associated with cruelty and barbarism, with violence and backwardness, while their own understanding and valuation of the practice is marginalised.

The German debate about male circumcision provided a forum for ambivalence towards Jewishness to surface, clouded in the alleged neutrality and objectivity of medical and legal knowledge. Moreover, it made visible the fragility of Jewish belonging in the imagined community of the country. The debate also echoed, albeit in much more muted tone, the unfinished project of the nineteenth century, in which critics saw the bodily marker of Jewish particularity as an obstacle to Jewish belonging to the modern secular state.¹⁴² The language of strangeness and difference that underpinned significant parts of the debate revealed the fragile acceptance of Jewish particularity, which is still expected to dissolve into sameness with Christian Germans in the name of constitutional rights.

¹⁴⁰ Brown, *Regulating Aversion*, 25.

¹⁴¹ Amir-Moazami, "Investigating the Secular Body," 162.

¹⁴² See the discussion of *brit milah* as a sign of national segregation in chapter three.

5 DIVIDING LINES: THE ERUV

The Eruv – Part One

The eruv is an ingenious rabbinical concept that allows observant Jews to transfer objects in public on Shabbat, an activity otherwise forbidden during the Jewish day of rest. By virtually extending the domestic sphere into the public space of the city, the eruv creates the fiction of a shared home for one day of the week, allowing observant Jews to move freely through the public space enclosed by the eruv. The walls of this imagined home are demarcated by existing boundary structures such as walls, fences, railway tracks, cliff faces, and steep slopes. Remaining gaps are closed by poles and wires, often relying on existing utility poles. Although eruvim may seem an innocent Talmudic fiction, the establishment of these imagined religious spaces is often fraught with immense difficulties. The eruv is the only Jewish practice that requires Jews to interact with non-Jews and this is often where the trouble begins. From Outremont to Johannesburg, from Palo Alto to Sydney, neighbours have wrestled with each other over what looks like an ordinary piece of string. The minimalist architecture of the eruv contrasts with the fierce opposition that neighbours voice against proposals to set up such a device, often investing significant resources and time to prevent the eruv from being established. As a form of public religiosity, the eruv serves as a microcosm of broader concerns about religious and cultural diversity in Western societies, including the contested place of religion in public space, the challenges of planning in multicultural cities, and the spatial dimension of the formation of collective identities – a dimension which may explain some of the bitterness of many of these controversies. At the same time, the eruv makes visible the difference of the Jewish neighbour – a difference which some residents do not wish to confront.

This is the first of a pair of chapters in which I explore the legal encounter with Jewishness in the public space through the case of the eruv. The purpose of this chapter is to introduce the practice of

the eruv, which is unique to Orthodox Judaism and to discuss how neighbours have reacted to this spatial practice by mobilising law. This chapter has three parts. In the first part, I describe the Talmudic foundations of the eruv, the different steps of its establishment, and the symbolism of the eruv as a form of ‘diaspora cartography’ – a symbolism that resonates deeply in neighbourly disputes about these structures. The second part of the chapter explores a number of such disputes over eruvin from both a historical and contemporary perspective. In contrast to the case of circumcision, there is little scholarly commentary and case law on the eruv, but this has not made the eruv less contentious in the eyes of those who oppose its construction as an illegitimate intrusion of religion into secular public space. Despite fierce neighbourly opposition, state courts have been overwhelmingly sympathetic to the eruv. The third part of the chapter looks beyond the language of secularism that underpins most of these legal conflicts by situating the eruv within the wider politics of space and difference.

I. Shabbat Spaces

Eruvin can be found in many places of the world, yet it is unknown how many of these structures exist. A website called *Eruv Directory* lists 260 eruvin worldwide out of which 215 operate in the United States,¹ many of them scattered across urban areas along the East Coast of the United States. This geographical distribution is not surprising given that eruvin, as a distinct Orthodox Jewish practice, follow Orthodox Jewish demographic patterns.² But the actual number of existing eruvin may be in fact significantly higher than 260. Almost every Israeli town (out of which the website only names three) is surrounded by an eruv that is maintained by the municipality,³ whereas eruvin outside Israel are entirely run by the Jewish communities themselves. In Europe, eruvin serve observant Jews in cities such as London, Metz, Manchester, Vienna, Venice, and Strasbourg. Despite its significant Orthodox Jewish population, the city of Paris lacks an eruv. The eruv in Antwerp, a city where a large part of Belgium’s 31,700 Jews resides, is probably one of the oldest operating eruvin in Europe. Established in 1902, it is still functional today.⁴ Historically, many German towns and cities such as Hamburg, Würzburg, and Frankfurt had areas encircled by eruvin, but they perished during the Holocaust and have not been re-erected. Moreover, eruvin can be found in South Africa in Cape

¹ Eruv Directory, available from <http://www.eruv.org/eruv-directory/>.

² Reform Judaism takes a different approach to the laws of Shabbat. The institution of the eruv is not relevant for Reform Jews, see Jacobs, *The Jewish Religion: A Companion*, 149.

³ Peter Vincent and Barney Warf, “Eruvim: Talmudic Places in a Postmodern World,” *Transactions of the Institute of British Geographers* 27, no. 1 (2002): 30–51, at 41.

⁴ Veerle Vanden Daelen, “Markers of a Minority Group: Jews in Antwerp in the Twentieth Century,” in *Borders and Boundaries in and around Dutch Jewish History*, eds. David J. Wertheim, Judith Frishman, and Ido de Haan (Amsterdam: Amsterdam University Press, 2011), 45–64, at 54.

Town, Johannesburg, and Pretoria, and in Australia, where three are located in Sydney and one each in Melbourne and Perth respectively.

a. The Ritual System of the Eruv

The purpose of an eruv is to facilitate the observance of the Shabbat, the Jewish day of rest, by easing some of the restrictions associated with this day. The Shabbat is of central importance to Judaism. Within the Ten Commandments, the command to ‘Remember the Sabbath day to keep it holy’ ranks fourth and the Torah repeats twelve times the imperative to observe the Shabbat. The rhythm of the calendar and the associated practices and behaviours have played a crucial role in the religious and cultural preservation of Judaism.⁵ Joshua Heschel described Judaism as a religion of time in which the Shabbat appears as the great cathedral in the Jewish temporal architecture.⁶ In Judaism, God endowed the seventh day with a special sanctity and holiness. Jewish liturgy refers to the Shabbat as the metaphorical queen or bride that brings majesty to the Jewish home. The experience of the Shabbat is made possible through the absence of labour (*melakha*). The Talmud⁷ spells out in more detail the words of the Torah by listing 39 forbidden activities that are considered to be labour.⁸ Labour does not simply mean work in the modern sense as one’s daily occupation. Rather, the prohibited activities relate to the building of the Temple, from which the 39 categories of forbidden activities derive. One of the prohibitions concerns the transfer of objects both from the private domain to the public and within the public space. This means that Shabbat-observant Jews are not allowed to carry, push, or pull objects in or into the public space during the day of rest.

In everyday life, this restriction can lead to very mundane problems. Keys, prayer books, and food may not be carried. It also affects families with small children who cannot yet walk yet and need to be carried or pushed in a pram, as the halakha, the Jewish law, makes no distinction between carrying a child and other items. Elderly people or people with disabilities who need a wheelchair cannot move as freely as they wish. While a walking stick can be used since it is considered to be an extension of

⁵ Paula Daccarett, “Shabbat, Noël, and Jewish Temporal Modernity: A Comparative View from Salonica,” *Jewish Social Studies* 19, no. 2 (2013): 109-50, at 109.

⁶ Abraham Joshua Heschel, *The Sabbath: Its Meaning for Modern Man* (New York: Farrar, Straus & Giroux, 1951).

⁷ The Talmud is the summary of oral law that evolved from the scholarly works by the sages that lived in Babylonia and Palestine. It comprises two parts, the Mishnah and the Gemarah: The Mishnah contains the halakha (law) and is followed by the commentary on the Mishnah, the Gemarah.

⁸ These activities are according to the Babylonian Talmud, Sabbath, 73a: “sowing, ploughing, reaping, binding into sheaves, threshing, winnowing, selecting, grinding, sifting, kneading, baking, wool-shearing, bleaching, hackling, dyeing, spinning, stretching the threads, the making of two meshes, weaving two threads, dividing two threads, tying [knotting] and untying, sewing two stitches, tearing in order to sew two stitches, capturing a deer, slaughtering, or slaying, or salting it, curing its hide, scarping it [of its hair], cutting it up, writing two letters, erasing it in order to write two letters [over the erasure], building, pulling down, extinguishing, kindling, striking with a hammer, [and] carrying out from one domain to another.”

the arm, a wheelchair may not be pushed. The prohibition thus has a significant impact on the enjoyment of Shabbat for already vulnerable community members who find themselves tied to their homes and are unable to attend synagogue service or dinner with friends and family. The ability of all community members to attend service is especially relevant in very small communities with ageing members. In order to conduct a prayer service, a minimum quorum of ten adult males, called *minyan*, has to be reached. If some community members cannot attend because of the lack of an eruv, this may impact on the ability of the entire community to hold a service.

Jewish life is full of creative inventions to ease the burdens of Shabbat observance. A famous example is the Shabbat elevator that stops on every level without the need to push a button because the operation of electrical equipment falls under the prohibition to light a fire. Turning keys into a piece of jewellery allows them to be carried. Some families hire non-Jews as ‘pushers’ to move wheelchairs and prams. The downside is that it makes families more dependent on the willingness and availability of others. Often Jewish communities therefore opt for the establishment of an eruv. What looks like a modern invention, dates, in fact, back to antiquity. The Mishna is the earliest text that mentions the laws of the eruv and the Talmud devotes an entire tractate to erubin. The Babylonian Talmud attributes the invention of this practice to King Solomon, the historical truth of this claim is however doubtful.⁹

b. The Making of an Eruv: Imagined Walls and Shared Bread

The point of departure for the establishment of an eruv is the intricate spatial logic of the Shabbat laws which is distinct from the order of ordinary weekdays. Crucial to the spatiolegal order of the Shabbat is the distinction between public and private space. Using the terms ‘public’ and ‘private’ is, however, misleading as the secular understanding of these terms only partially captures the meaning of these terms in the Talmud. Rabbinic notions of private and public are less concerned with ownership or legal title, but rather with the presence or absence of domestic space.¹⁰ For the purpose of the eruv, the spatial vocabulary of the Talmud distinguishes four different types of space: the *reshut hayabid* (the domestic space), the *reshut harabim* (the public space), *karmelis* (a sort of semi-public space) and *makom patur* (exempt area).¹¹ Through the eruv, non-domestic space in the halakhic sense is virtually transformed into halakhic domestic space. In the secular world, this means that a public area encircled by an eruv is turned into ‘private’ Jewish space in the halakhic sense. But even from the

⁹ Charlotte Elisheva Fonrobert, “The Political Symbolism of the Eruv,” *Jewish Social Studies* 11, no. 3 (2005): 9-35, at 9-10.

¹⁰ Jennifer Cousineau, “Rabbinic Urbanism in London: Rituals and the Material Culture of the Sabbath,” *Jewish Social Studies* 11, no. 3 (2005): 36-57, at 43. Cousineau uses the term ‘rabbinic urbanism’ to describe “the processes by which rabbinic actors and thinkers theorize and construct urban space”, see *ibid.*, 36.

¹¹ Yosef Gavriel Bechhofer, *The Contemporary Eruv: Eruvin in Modern Metropolitan Areas* (Jerusalem; New York: Feldheim Publishers, 2002), 41.

viewpoint of the halakha, the eruv cannot turn all Talmudic public spaces into private ones. This seemingly technical detail has provided the source of many disputes, not only within Jewish communities but also with outside neighbours who suggest the extension of the eruv to encircle whole countries in order to not be bothered by an eruv.¹²

Once an agreement over the suitability of a particular area has been reached, it has to be encircled by boundaries to mimic an enclosed space. This is not an easy task given that the Mishna's understanding of space relies on antique Mediterranean city architecture in which small courtyards are inhabited by a residential community and joined together by little alleyways (*mavoi*) that connect further courtyard communities.¹³ Modern cities only vaguely resemble these antique urban settings. Back then, creating an enclosed space through existing structures and small additions required little material intervention. Moreover, antique courtyards as well as later medieval towns were often already walled, and the built environment needed hardly any manipulation to close the boundary of an eruv. Such was the case in Kazimierz, a municipality just outside Cracow where the city's Jews lived. Defensive walls had surrounded Kazimierz since 1340 and the creation of the eruv relied on the walls and closed gates of the city.¹⁴ But today antique and medieval towns have outgrown their walls and planners of contemporary eruvim have to make creative use of existing structures to demarcate the borders of their Shabbat spaces. Cliff faces, water fronts, creeks, walls, fences, railway tracks, and utility poles can all turn into walls of an eruv. The Sydney eruv, located in the suburb of Bondi, for example, claims to be the only eruv in the world whose boundaries are mostly formed by using existing solid infrastructure, something that is often not possible to achieve.¹⁵

In most cases, remaining gaps need to be closed by additional infrastructure, for which a method called *tzuras hafesach* is used, which literally means "the form of a doorway".¹⁶ Since the building of a real wall is not a viable option, wires attached to poles act as boundary markers. The rabbinical reasoning from wall to wire reveals the remarkably creative chain of symbolic abstraction through which poles and wires are turned into walls. The logic is simple, yet convincing. Every house has both walls and doors. A wall with one or even several doors is still a wall. A wall can thus entirely

¹² Opponents in St Ives made this argument too, see chapter six.

¹³ Charlotte Elisheva Fonrobert, "Diaspora Cartography: On the Rabbinic Background of Contemporary Ritual Eruv Practice," *Images* 5, no. 1 (2011): 14-25, at 16. Eruv is in fact only the short form of eruv *batzerot*. The word eruv itself stems from the Hebrew root for 'to mingle', 'to blend.' In the Talmud, there are in fact three different ritual systems referred to as eruvim to which the action of blending is central. An *eruv tavshilin* (the eruv of cooking) allows the preparation of a meal for Shabbat when Friday falls on a *yom tov* (a holiday) and an *eruv thumim* (the eruv of distance) makes it permissible to walk farther than the distance permitted on Shabbat. Finally, there is the ritual system of the *eruv batzerot* (the eruv of courtyards) which symbolically blends a number of courtyards – it is this type of eruv with which this chapter is concerned. See also Bechhofer, *The Contemporary Eruv: Eruvin in Modern Metropolitan Areas*, 1.

¹⁴ Adam Mintz, "Halakha in America: The History of City Eruvin, 1894-1962" (PhD Thesis, New York University, 2011), 156.

¹⁵ These solid eruv walls are called *mechitzot*, see <http://www.sydneyeruv.org.au/index.htm>

¹⁶ Bechhofer, *The Contemporary Eruv: Eruvin in Modern Metropolitan Areas*, 3

consist of a line of gates. A door or a gate consists of doorposts (*lechi*) and a lintel (*koreh helyon*). Doorposts can be symbolised by poles and lintels by wires or fishing line. Since the lintel rests on top of the posts, also the wire has to stretch out from the top of the post. If already existing utility poles fulfil this requirement they can be used for the eruv. But often the wire is attached to the side of the pole which makes a small intervention necessary. Either a new pole is erected or the lechi is attached to a utility pole usually by using plastic conduit that mimics the doorpost. Through this technique, the eruv wire then integrates almost invisibly into the telephone and electricity cables, silently demarcating a religious space full of meaning through the most mundane architecture.

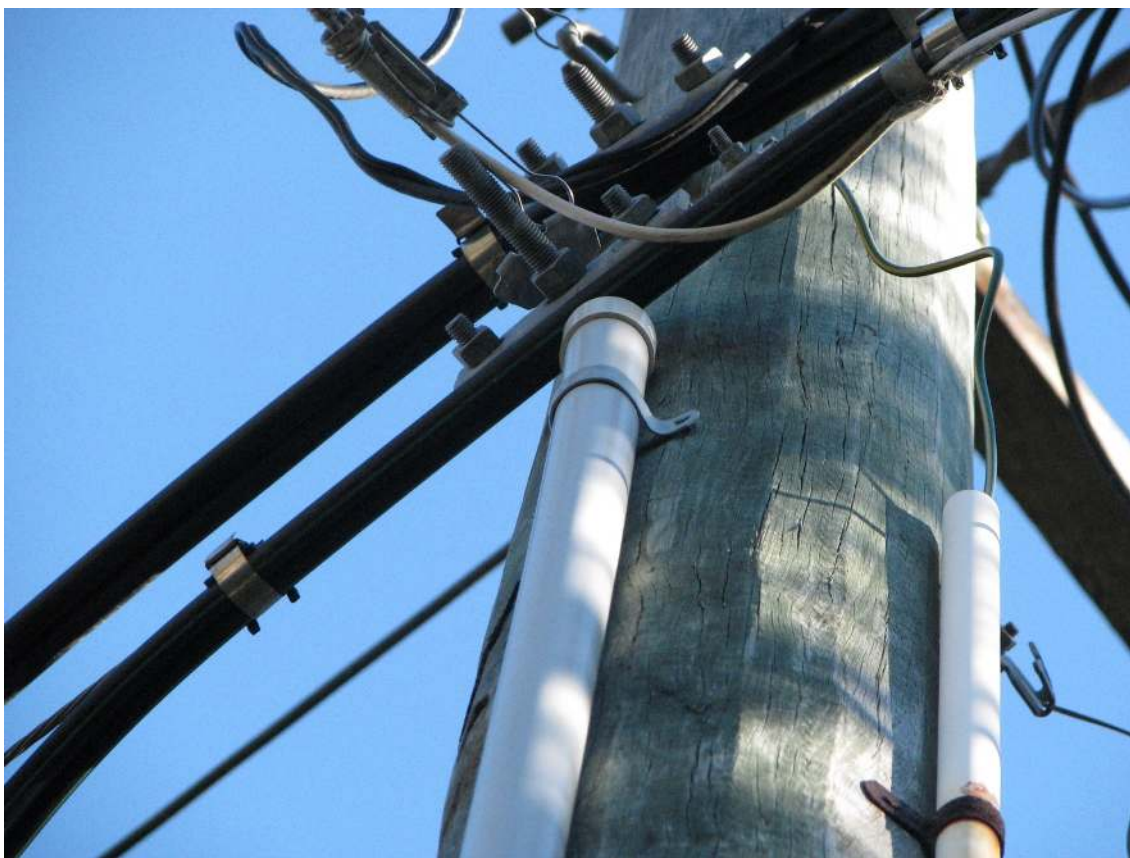


Figure 1: Lechi in St Ives. The plastic conduit on the left side is part of the eruv. Source: Photo by author.

While the boundary creation is an important step for the making of an eruv – and often the most controversial one because of its publicity – two further steps are necessary to make the fiction of the eruv complete. One is the unification of the eruv community and the other the notional lease of the encircled space from public authorities – of which Franz Kafka wrote in his diary during a visit to Warsaw in 1911:

As a result of bribery the telephone and telegraph wires around Warsaw were put up in a complete circle, which in the sense of the Talmud makes the city a bounded area a courtyard, as it were, so

that on Saturday it is possible even for the most pious person to move about, carry trifles (like handkerchiefs) on his person, within this circle.¹⁷

What Kafka refers to as bribery is the lease agreement (*sechirat hareshut*) that the Jewish community has to negotiate with local authorities in order to symbolically rent the eruv territory as a domestic Jewish space. Usually, the rent does not amount to more than a dollar or a little more for the lease period.¹⁸ The purpose of the lease is to obtain permission from all the residents who live within the confines of the eruv. In practice, obtaining consent from all residents is difficult but rabbinical reasoning holds that permission from local authorities such as the police or the mayor is sufficient.¹⁹ But the lease agreement also has a symbolic dimension as it requires the Jewish community to interact with their non-Jewish neighbours. Charlotte Elisheva Fonrobert argues that despite the eruv's innocuous nature, which would allow it to go almost unnoticed, the rabbis always considered it a crucial step to properly involve other Jewish and non-Jewish residents.²⁰

A third step to make the fiction the eruv complete involves the mingling of the eruv community itself to create the fiction of a shared household. Bread plays a crucial role for this ritual requirement. Initially, the Talmud envisioned a collection of bread or flour for bread each week but over time it has become practice to simply use a box of matzah, an unleavened bread for the holiday of *Pessah* (Passover) which has the advantage of staying fresh longer. In medieval times the matzah was sometimes attached to the synagogue wall as a signifier of the eruv.²¹ Today, the matzah box often sits in some inconspicuous corner of the rabbi's office and is replaced every year with a fresh box just before Passover. The shared food, the matzah, symbolises the community that is unified through the eruv. The principle of the eruv is as simple as it is fascinating, writes Margaret Olin, when "for twenty-four hours a week the deposit of bread conceptually turns one of the homes into a pantry, and a courtyard of homes into a single courtyard home."²²

¹⁷ Franz Kafka, *The Basic Kafka* (New York: Pocket Books, 1979), 236.

¹⁸ See e.g. the Boston eruv's lease agreement which can be found online: http://www.bostoneruv.org/kinyan_kesef.htm.

¹⁹ This is the case with Melbourne's eruv. Its administrator explains the underlying rationale: "Police have the right of hot pursuit onto any property and halachically that is sufficient to give them the authority to be able to agree on every property owners' behalf to give our community the permission required to build the Eruv. So we have in our files an agreement with a member of Victoria Police, who by virtue of his right to enter all properties in the metropolitan area has leased us permission to have an Eruv for ten years for the princely sum of one dollar." See Peter M. Kloot, "History of Melbourne Eruv," 21 April 2010, <http://www.cosv.org.au/index.php?article=485>.

²⁰ Fonrobert, "The Political Symbolism of the Eruv," 28-29.

²¹ Margaret Olin, "Introduction. The Poetics of the Eruv," *Images* 5, no. 1 (2011): 3-13, at 3.

²² Ibid.



Figure 2 Matzah box in the upper shelf in the Rabbi's office in St Ives. Source: Photo by author.

c. The Symbolism of the Eruv

While some have described the eruv as a “magic schlepping circle,”²³ its significance goes in fact beyond the facilitation of Shabbat observance. Jewish studies scholars describe the eruv as a practice of place-making, as a form of “diaspora cartography”²⁴ or of “imaginary cartography.”²⁵ The eruv, as Charlotte Elisheva Fonrobert points out, is a “project of constructing, maintaining, and re-enacting a collective identity” through means of space and law.²⁶ Whereas circumcision marks the body with a collective identity, the eruv leaves a mark on the public space. The eruv thereby alludes to the intricate link between law, collective identity, and space, reminding us that space, much like the body,

²³ Calvin Trillin, “Drawing the Line,” *New Yorker*, 12 December 1994.

²⁴ Fonrobert, “Diaspora Cartography: On the Rabbinic Background of Contemporary Ritual Eruv Practice.”

²⁵ Micha J. Perry, “Imaginary Space Meets Actual Space in Thirteenth-Century Cologne: Eliezer Ben Joel and the Eruv,” *Images* 5, no. 1 (2011): 26-36.

²⁶ Charlotte Elisheva Fonrobert, “From Separatism to Urbanism: The Dead Sea Scrolls and the Origins of the Rabbinic Eruv,” *Dead Sea Discoveries* 11, no. 1 (2004): 43-71, at 71.

has been a central site for the making of collective identities and the drawing of communal boundaries.²⁷

The nation has provided an important paradigm for the creation of imagined communities. Jewish civilisation, on the other hand, has been shaped by the lack of such a national home for almost two millennia, which posed significant challenges for the collective cultural survival of Jews.²⁸ After the destruction of the second temple in 70 CE, Jews lived dispersed under foreign rule with no sovereignty and legal authority to shape and claim public space. Instead of mastering their own territory, Jewish residency depended on the tolerance of local rulers, which could be revoked at any time, forcing Jews to migrate elsewhere. Spatiolegal strategies formed an important technology through which Christian societies managed the presence of the Jewish Other, including segregation, such as in the infamous ghetto in Venice which was instituted in 1516, and expulsion, such as from Spain in 1492. The image of the ‘wandering Jew,’ that became a central Antisemitic trope, alludes to this experience which is often described as one of displacement and non-spatiality.²⁹ Before the establishment of the state of Israel, Jewish space was therefore often thought to exist only imagined in the Torah, as what the poet Heinrich Heine called, the ‘portable homeland,’ lending the Jews another famous name – the people of the book. This is what philosopher Isaiah Berlin meant when he wrote that Jews “have enjoyed rather too much history and too little geography.”³⁰

Despite the lack of a national home for centuries, Jews did nonetheless create their own geography, significantly shaped by the experience of diaspora, for which the eruv is a prime example. The imaginary cartography of the eruv has equipped Jewish communities with the tools to create, with minimal intervention, a Jewish space without laying claim to sovereignty or authority over this space. Scholars describe the creation of an eruv as the drawing of a rabbinic map which is “superimposed on space without completely controlling that space nor reshaping it in one’s own image.”³¹ Through the shared ritual experience of space, the eruv enables Jewish communities to create a sense of spatial belonging by transforming the urban space notionally into “a city within a city: a Jewish one within

²⁷ See e.g. Gupta and Ferguson, “Beyond ‘Culture’: Space, Identity, and the Politics of Difference;” Massey, *Space, Place and Gender*.

²⁸ See e.g. Barbara E. Mann, *Space and Place in Jewish Studies* (New Brunswick; London: Rutgers University Press, 2012), chapter 8; Fonrobert, “Diaspora Cartography: On the Rabbinic Background of Contemporary Ritual Eruv Practice;” Perry, “Imaginary Space Meets Actual Space;” Michele Rapoport, “Creating Place, Creating Community: The Intangible Boundaries of the Jewish ‘Eruv’,” *Environment and Planning D* 29, no. 5 (2011): 891-904; Charlotte Elisheva Fonrobert, “The New Spatial Turn in Jewish Studies,” *AJS Review* 33, no. 1 (2009): 155-64; Julia Brauch, Anna Lipphardt, and Alexandra Nocke, “Exploring Jewish Space. An Approach,” in *Jewish Topographies: Visions of Space, Traditions of Place*, eds. Julia Brauch, Anna Lipphardt, and Alexandra Nocke (Aldershot: Ashgate, 2008), 1-26.

²⁹ Brauch, Lipphardt, and Nocke, “Exploring Jewish Space. An Approach,” 1.

³⁰ Isaiah Berlin, *The Power of Ideas*, ed. Henry Hardy (Princeton: Princeton University Press, 2013), 173.

³¹ Fonrobert, “Diaspora Cartography: On the Rabbinic Background of Contemporary Ritual Eruv Practice,” 16.

the Christian one.”³² The eruv is, in its best sense, a powerful “imagined community”³³ which highlights the relation between spatiolegal practices and processes of identity formation under the conditions of diaspora. By transforming the public space without claiming authority over it, the eruv is a “project that emerges after Jews have lost their ‘public’,” Fonrobert argues.³⁴

As with any communal ritual and similarly to brit milah, the eruv draws notional boundary between insiders and outsiders, between those belonging to the eruv community by virtue of their adherence to Jewish law, and those who do not. Beyond facilitating the observance of Shabbat, the eruv thus functions as a means to structure the relationship between insiders and outsiders in subtly spatial and legal ways.³⁵ The eruv adds another layer of meaning to the city³⁶ that makes it legible in terms of the spatiotemporal logic of Jewish law. But it does not do so to the exclusion of other readings, which makes it an almost post-modern pluralist intervention leaving behind homogeneous and exclusionary visions of public space and (national) identity. This subtle symbolism of the eruv is frequently lost in present-day eruv controversies in which the eruv, as Davina Cooper and others illustrate, is seen as a colonial strategy that “stains”³⁷ space to the detriment of other residents. Instead of understanding space as being able to hold plural meanings, shaping space is understood as a “zero-sum game”.³⁸ Notions of social exclusion and spatial appropriation resonate deeply in contemporary controversies in which neighbours evoke a language of ‘fences,’ ‘walls,’ and ‘ghettos’ as a response to the symbolism of the eruv, which they perceive as an attempt to take over and control space.

II. The Eruv as a Legal Issue: Past to Present

Most eruvin operate quietly and unnoticed by residents – Jewish and non-Jewish alike – who are often not even aware that they live in a space of such significance. But at times, the building of these structures marks the beginning of fierce neighbourly battles which often drag along for years in council chambers and the letter to the editor sections of local newspapers. Some of these disputes have escalated and had to be decided by courts. Planning law, constitutional law, human rights, and Jewish law itself have provided the most important arenas for these encounters. The earliest recorded

³² Perry, “Imaginary Space Meets Actual Space,” 27.

³³ Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*.

³⁴ Charlotte Elisheva Fonrobert, “As the Gates of Jerusalem, So the Gates of Mahuza: Defining Place in Diaspora,” in *Talmudic Transgressions: Engaging the Work of Daniel Boyarin*, eds. Charlotte Elisheva Fonrobert, et al. (Leiden; Boston: Brill), 507-22, at 521.

³⁵ Fonrobert, “The Political Symbolism of the Eruv,” 10.

³⁶ I take this thought from Charlotte Fonrobert who argues that the eruv indeed lays a claim to the public but in defiance of “all forms of isomorphism” that “require an equation between collective identity and physical environment”, *ibid.*, 77.

³⁷ Davina Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse,” *Journal of Law and Society* 23, no. 4 (1996): 529-48, at 533.

³⁸ *Ibid.*

eruv controversies date back to the nineteenth century, the period when emancipation granted Jews access to citizenship in the secular nation state, raising questions about spatial segregation and public religious difference. Contemporary courts wrestle with similar questions when neighbours contest eruvim, opposing these structures using arguments about state neutrality and the secularity of public urban space. A different kind of eruv controversy involves opposition by strictly Orthodox Jews who view the eruv as an erosion of Jewish law principles, allowing the secular world to encroach.

a. An Historical Dispute: The String Walls of Bromberg

As early as in 1882, an eruv troubled the legal boundaries of the Prussian town of Bromberg (now Bydgoszcz in Poland). The case of Bromberg provides insights into one of the earliest recorded disputes over an eruv, but it also alludes to some of the questions raised by the emancipation of Europe's once paradigmatic non-Christian minority during the nineteenth century. Does the secular state require religion to remain private? How can one be a citizen while maintaining a particular identity? What should Judaism's response to modernity be?

On 7 December 1822, the Municipality of Bromberg, in the north east of Prussia, wrote to the Prussian Minister of the Interior regarding the “string walls” of the Jews in the town.³⁹ The Municipality wanted to know whether it could let its police forces dismantle these “symbolic walls”. The strings and poles of the eruv, the Municipality claimed, would add another piece of furniture to the streets, which would disfigure the already unsightly cityscape. Moreover, the structure of the eruv would serve a religious purpose. According to the laws of Prussia, tolerated religious communities such as the Jews were only allowed to practise their traditions within the confines of designated buildings or in the private apartments of members of that community. Even if the practice of the eruv had a long tradition, the Municipality continued, Prussian law did not allow the Jews to use the public roads for these purposes. Given these considerations, the Municipality deemed it reasonable to forbid the practice and thereby to also eliminate an object which would only foster the segregation of the “mosaic fellow believer”.⁴⁰

The Municipality had to wait patiently for a response from the Prussian officials. After two years the Municipality received a letter from the authorities in Berlin stating the view that it would be left to the Municipality to intervene according to police laws if the strings constituted a significant grievance. This response initiated a lively exchange of letters between Prussian authorities, rabbinical scholars, and the Municipality of Bromberg. In a letter to the Prussian ministry, Bromberg's Rabbi Abraham

³⁹ My account of the events in Bromberg relies on the discussion in Joachim Schlör, *Das Ich der Stadt: Debatten über Judentum und Urbanität 1822 – 1938* (Göttingen Vandenhoeck & Ruprecht, 2005). Translations from German to English are mine.

⁴⁰ GStA PK, Rep. 77 Juden-Sachen, Generalia. 71: Acta betr. die Bindfäden oder Strick-Mauern der Juden in den Städten, 1822-1836, quoted in: *ibid.*, 11-12.

Weschnau asked to tolerate the “Shabbat strings” which had been, he argued, a common feature in Prussian towns for ages. The Ministry, however, replied that it would not be able to override the ordinance of the Bromberg Municipality if it considered the eruv to be a significant disturbance according to police laws. In other correspondence, Prussian authorities claimed that the “these traditions are not appropriate to our contemporary culture,” to which the regional Chief Rabbi countered that the Ministry had an exaggerated idea of the visual appearance of the strings which he considered to be a quiet religious practice in which neither prayers nor any assembly or religious festival would take place.⁴¹ In 1835, the Ministry finally issued an ordinance by His Majesty the King, which granted permission to establish an eruv if no additional poles were erected and the strings were unobtrusive and high enough to not disturb traffic and pedestrians.⁴²

The Prussian opponents of the Jewish ‘Shabbat borders’ interpreted the eruv within the framework of emancipation and thereby also instigated a turn in the spatial governance of Jewish communities. The practice of the eruv clashed with the reformist project of the times that aimed to turn the subjects of the monarch into citizens of a nation. The spatial dimension of this transformative project required the opening of the city and hence the liberation of the Jews from their separate quarters to which they were – sometimes voluntarily, sometimes involuntarily – confined.⁴³ The insistence on these ritual boundaries marked Jewish communities as not willing or capable of reform and modernisation, a prerequisite for emancipation and integration as full citizens into the German nation.⁴⁴ But the liberation of the Jews from their traditional modes of living proved complex on the ground precisely because of the ways that entrenched boundaries, both physical and societal, continued to contain the presence of Jews in the Christian towns of Prussia. Official Prussian policies sometimes clashed with municipal practices that still aimed to preserve the spatial segregation of Jews. The ritual enclosure, which helped Jews to keep their distinct identity and to follow their religious laws, posed a challenge to state-driven Jewish emancipation.

In nineteenth century Bromberg, the string walls became entangled in the project of turning Jews into universal citizens freed from the boundaries of their cultural and religious particularities to be released into the national space. The spatiolegal order of the nation state required difference to remain private. As Sophie Watson writes: “For the public realm to be the space of the universal disembodied

⁴¹ Ibid., 13.

⁴² Ibid.

⁴³ Ibid., 13-14.

⁴⁴ Ibid., 23. See also Peter Freimark, “Eruw / ‘Judentore’. Zur Geschichte einer Rituellen Institution im Hamburger Raum (und Anderswo).” in *Judentore, Kugel, Steuerkonten. Untersuchungen zur Geschichte der Deutschen Juden, Vornehmlich im Hamburger Raum*, eds. Peter Freimark, Ina Lorenz, and Günter Marwedel (Hamburg: Hans Christians Verlag, 1983), 10-55. In his discussion of eruv in and around Hamburg during the nineteenth century, Freimark shows how these eruv in were often interpreted in a framework of emancipation in which the eruv was seen as a premodern practice that hampered Jewish integration into modern German society.

citizen difference must remain privatized.”⁴⁵ The Bromberg incident provides an early example of how the eruv troubled the public-private boundary which underpins modern liberal thought and which gained new momentum through the Enlightenment encounter with the Jews. “Be a citizen in the street and a Jew at home,” a popular saying goes, alluding to the demand placed on Jews in exchange for emancipation. The string walls of Bromberg were a direct affront to this demand for privatisation as they took Jewishness into the streets, thereby transgressing the emerging paradigm of universal citizenship that demanded the privatisation of Jewishness and other differences.

b. Contemporary Disputes: Tenaflly, Outremont, and Westhampton Beach

Compared to circumcision, there is little contemporary case law on the eruv and even less doctrinal commentary on this topic.⁴⁶ The small body of existing case law approaches the eruv as a problem of religiosity in secular public space.⁴⁷ Each of the cases that I discuss in the following sections raises two interlinked questions: Firstly, is the erection of an eruv protected by the right to religious freedom? And secondly, do state neutrality and other residents’ right to freedom *from* religion warrant its ban from the public space? These are questions with which courts have frequently grappled – not only in relation to the eruv. The ritual boundary joins the category of religious symbols – veils and turbans, minarets and temples, kirpans and crucifixes – whose appearance in public space has become a source of vigorous political and legal controversy.⁴⁸

⁴⁵ Sophie Watson, “Symbolic Spaces of Difference: Contesting the Eruv in Barnet, London and Tenaflly, New Jersey,” *Environment and Planning D: Society and Space* 23, no. 4 (2005): 597-613, at 609.

⁴⁶ See e.g. Jeffrey Gautsche, “Neutral Discrimination - Selective Enforcement of Religiously Neutral Laws and the First Amendment: Tenaflly Eruv Ass’n v. Borough of Tenaflly,” *Touro Law Review* 30, no. 4 (2014): 975-83; Susman, “Strings Attached;” Eli Greenbaum, “First Amendment Inversions: Tenaflly Eruv Ass’n v. Borough of Tenaflly, 155 F. Supp. 2d 142 (D. N. J. 2001),” *Yale Law Journal* 111, no. 7 (2002): 1861-67; Metzger, “The Eruv.”

⁴⁷ Planning law has provided another important framework for eruv conflicts and many of the cases discussed here have in fact started as planning conflicts. Some, like the case of the eruv in the borough of Barnet in London, have been entirely negotiated within the realm of planning law (for an insightful analysis of the Barnet eruv dispute see Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse.”). The St Ives eruv too remained a planning conflict, see the discussion in chapter six.

⁴⁸ For an overview see Ferrari and Pastorelli, *Religion in Public Spaces: A European Perspective*. For the right to carry the *kirpan*, a ceremonial dagger worn by Sikhs, as a matter of religious freedom see e.g. the cases in Canada and the United States *Multani v. Commission Scolaire Marguerite-Bourgeoys*, (2006) 1 SCR 256, 2006 SCC 6 (CanLII); *Rajinder Singh Cheema et al. v. Harold H. Thompson, et al.*, 36 F.3d 1102 (9th Cir 1994). For a legal analysis of various headscarf debates see McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*; Joppke, *Veil: Mirror of Identity*. On the minaret ban in Switzerland see e.g. Miller, “Majorities and Minarets: Religious Freedom and Public Space.”

aa. Tenaflly Eruv Association v. Borough of Tenaflly

One of the best-known court decisions on the fate of an eruv is the *Tenaflly* case, named after the town of Tenaflly in New Jersey. The trouble began in 1999, when the Tenaflly Eruv Association approached the Mayor of Tenaflly to obtain the permission from the Borough to erect an eruv in the town. While the Mayor was initially supportive of the project, other Council members were less inclined to support it.⁴⁹ The Council was sceptical of the proposal to attach lechis to poles and eventually invoked an ordinance which states that

No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough.⁵⁰

Although the Borough based its refusal of the eruv on the application of the ordinance, it had in fact granted many exemptions to it. Residents had used the utility poles to attach house numbers or lost pet signs, local churches had pinned their directional signs with crosses to the poles, and for a while, supporters of a local high school had installed orange ribbons to express their view on school regionalisation – actions the Council so far had condoned. But things were different with the eruv. When the Council voted against the eruv, the lechis had already been attached to the power poles which belonged to the local cable company. The Borough thus ordered the cable company to take the eruv down, an order against which the eruv association filed a complaint in the District Court. The District Court ruled in favour of the town⁵¹ but the eruv association immediately appealed this decision to the US Court of Appeals of the Third Circuit.⁵² The plaintiffs based their appeal on both a free speech claim, which the Court dismissed, as it did not consider the eruv to be speech, and on a free exercise claim based on the First Amendment of the US Constitution, which the Court addressed in detail.

The Free Exercise Clause of the Constitution of the United States provides that “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof...” – a clause to which the Borough is bound through the Fourteenth Amendment.⁵³ A law that is neutral and generally applicable, and therefore burdens religious conduct only incidentally, does not violate the Free Exercise Clause. If the law is, however, not neutral (because it discriminates for example against

⁴⁹ For a detailed account of the events in Tenaflly see Susan H. Lees, “Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenaflly, New Jersey,” *Contemporary Jewry* 27, no. 1 (2007): 42-79, at 53-62.

⁵⁰ Quoted in *Tenaflly Eruv Association, Inc. v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002), at 151.

⁵¹ *Tenaflly Eruv Association, Inc. v. Borough of Tenaflly*, 155 F. Supp. 2d (D.N.J. 2001).

⁵² *Tenaflly Eruv Association, Inc. v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002). For a discussion of the legal history of the Tenaflly case see Zachary Heiden, “Fences and Neighbors,” *Law and Literature* 17, no. 2 (2005): 225-48.

⁵³ *Tenaflly Eruv Association, Inc. v. Borough of Tenaflly* (2002), at 151.

religiously motivated conduct), or it is not generally applicable (because it forbids for example certain conduct only when religiously motivated), the Free Exercise clause is violated unless the public authority has the law narrowly tailored in order to advance a compelling government interest.⁵⁴

The Borough had insisted that enforcing its ordinance was such a compelling interest. But the Court immediately dismissed this argument as the Borough had tolerated all sorts of permanent signs on the utility poles in violation of the ordinance. The Mayor had tried to downplay this signage by calling the church signs “directional” and the lights and garlands during Christmas “temporary holiday displays”.⁵⁵ The Borough was convinced that the eruv was different and sent a religious message, which made its ban a compelling interest in order to prevent “an Establishment controversy”. Because of the lechis’ religious nature, allowing them onto public poles would amount to an unconstitutional endorsement of Orthodox Judaism, the Borough contended.⁵⁶

At this point, the case became a matter of defining the symbolic message of the eruv, revealing how the law ultimately evaded dealing with the deeper and ambiguous symbolism of the eruv. The Court relied on the ‘Endorsement test’⁵⁷ in order to ascertain if the action constituted a forbidden establishment of religion.⁵⁸ The Endorsement test asks whether a government action is sending “a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”⁵⁹ Residents who opposed the eruv had indeed feared that the wires and poles would turn them into outsiders in their town. For those residents, as Susan Lees argues, the Tenaflly eruv expressed “an inherent exclusion of others – not so much in the creation of boundaries, but in the expression of communality through the shared (but exclusive) observance of communal ‘walls’ that are essential to an eruv.”⁶⁰ Indeed, one resident, who identified himself as Jewish, had argued that the

⁵⁴ *Tenaflly Eruv Association, Inc. v. Borough of Tenaflly* (2002), at 165.

⁵⁵ Quoted in Matthew Purdy, “A Wire-Thin Line Sharply Divides a Suburb’s Jews,” *New York Times*, 25 March 2011, <https://www.nytimes.com/2001/03/25/nyregion/our-towns-a-wire-thin-line-sharply-divides-a-suburb-s-jews.html>.

⁵⁶ While Courts have focussed on the visibility of the lechis as sending a message of endorsement, legal scholars have argued that the endorsement problem may actually lie in the lease agreement whereby the public authority rents out a portion of the public space to the eruv community. See e. g. the discussion in Susman, “Strings Attached,” 114-18.

⁵⁷ For a discussion of the Endorsement test see Jesse H. Choper, “The Endorsement Test: Its Status and Desirability,” *Journal of Law & Politics* 18, no. 2 (2002): 499-536.

⁵⁸ In fact, three other courts have held that allowing an eruv is constitutional, see my discussion of the Westhampton Beach below as well as *East End Eruv Association v. Town of Southampton*, No. 14-21124 (Sup. Ct. Suffolk Co. June 30, 2015); *ACLU of N.J. v. City of Long Branch*, 670 F. Supp. 1293, 1295-97 (D.N.J.1987); *Smith v. Community Board No. 14*, 128 Misc. 2d 944 (Sup. Ct. Queens Co. Special Term 1985), affirmed, 133 A.D.2d 79 (2d Dept. 1987).

⁵⁹ *Lynch v. Donnelly*, 465 U.S. 668 (1984), at 688.

⁶⁰ Lees, “Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenaflly, New Jersey,” 68.

eruv was the “antithesis of inclusion” which would create “a separation in Tenafly, us from them, the tribe from the rest of the community.”⁶¹

The Court, however, did not concern itself with the symbolic message that residents wanted to have acknowledged by law. Instead, the Court considered what “a reasonable observer” would think about the permission itself to attach the lechis.⁶² The Court concluded that such a reasonable observer, who knew of the Borough’s obligation to treat the eruv’s lechis like other postings, would not believe that the Borough would promote Orthodox Judaism or attribute the decision of attaching lechis to the State. Moreover, the Court dismissed the idea of the eruv’s symbolic communication and stated that it did not see any evidence that “the unobtrusive lechis are intended to send a religious message to anyone.”⁶³ Even if an observer would mistake the eruv as an establishment, the Court reasoned, there was a greater risk that an observer could perceive the removal of the eruv as a hostility towards Orthodox Jews.⁶⁴ Thus, while the Court dismissed the opponents’ fear of the eruv’s ambiguous symbolism, it was well aware of another symbolism that a ban on the eruv would send – the unequal treatment of the Orthodox Jewish lechis as compared to other signage. The town appealed the decision to the US Supreme Court, which declined to hear the case. In 2006, the Borough agreed with the Eruv Association to reimburse the group for the court costs, which had amounted to \$325,000.⁶⁵

bb. Rosenberg v. Outremont (City)

A similar constellation underpinned a 2001 dispute in the Canadian city of Outremont in which Orthodox Jews claimed protection for the eruv as a matter of religious freedom and also challenged the neutrality of the city authority in matters of religion. Outremont is now an arrondissement of Montréal and home to unlikely neighbours. It is a preferred location for richer francophone Quebecois and at the same time home to a large Jewish population.⁶⁶ Almost a quarter of Outremont’s population is Hasidic, making it one of the largest Hasidic communities outside Israel.⁶⁷

⁶¹ Quoted in George James, “Drawing a Line in Tenafly,” *New York Times*, 31 December 2000, <https://www.nytimes.com/2000/12/31/nyregion/church-and-state-drawing-a-line-in-tenafly.html>.

⁶² *Tenafly Eruv Association, Inc. v. Borough of Tenafly* (2002), at 176-177.

⁶³ *Tenafly Eruv Association, Inc. v. Borough of Tenafly* (2002), at 177.

⁶⁴ *Ibid.*

⁶⁵ Tina Kelley, “Town Votes for Marker Used by Jews,” *New York Times*, 25 January 2006, <https://www.nytimes.com/2006/01/25/nyregion/town-votes-for-marker-used-by-jews.html>.

⁶⁶ It is important to note that the eruv conflict in Outremont did not break down along these lines. Many French-Canadians voiced their support for the eruv, while some Hasidim opposed the eruv. See for a detailed analysis of the dynamics in Outremont: Valerie Stoker, “Drawing the Line: Hasidic Jews, Eruvim, and the Public Space of Outremont, Quebec,” *History of Religions* 43, no. 1 (2003): 18-49.

⁶⁷ Hasidic Judaism is a form of strictly Orthodox Judaism, originating in the eighteenth century in Eastern Europe as a movement of religious revival. Hasidism is in fact a collective term for a variety of groups, who live in tight-knit communities, centred around a dynastic leader who is known as the Rebbe. The names of

Chic street cafés and traditional Orthodox Jewish garb both form part of the arrondissement's street scenery. Tensions arose between Outremont's residents when an application to erect an eruv reached the City Council. The City Council rejected the proposal on the grounds that it would disturb the city's efforts to remain secular⁶⁸ and further argued that the eruv contravened the idea that public property belongs to everybody.⁶⁹ The Jewish community obtained a temporary court injunction against the Council's decision, which made it possible to set up an eruv just before the holiday of Passover in 2000. But following complaints by local residents, the municipality began to cut down the wires of the eruv soon after. Jewish residents appealed against this action to the Québec Superior Court. They argued that the dismantling of the eruv constituted a violation of the exercise of their right to religion and sought an accommodation under Section 3 of the Québec Charter of Human Rights and Freedoms which provides that "every person is the possessor of fundamental freedoms, including ... freedom of religion..."⁷⁰ and Section 2(b) of the Canadian Charter of Rights and Freedoms which enshrines the freedom of belief as a fundamental freedom.⁷¹ Moreover, the claimants questioned the neutrality of the Council's action as Christmas decorations had been allowed to be attached onto public property for years.⁷² As in Tenaflly, the Jewish community held that their right to religious freedom included the erection of an eruv and that the principle of religious equality warranted their right to access and use public space as did other religious groups.

The City of Outremont replied that it did not have "jurisdiction to permit anything to be done on religious grounds because of [its] secular vocation."⁷³ The dismantling of the eruv, the City argued, would not violate the right to religious freedom of Shabbat-observant Jews as the place in which freedom of religion is practiced was not a component part of the right, allowing the City to legally control the use of the air space over its streets.⁷⁴ Moreover, the City stated, even if the dismantling of the eruv violated the religious freedom of the applicants, this violation was justified by competing rights which in this case was the City's "duty to maintain the public domain accessible to all residents

these groups often derive from the names of the East European towns from where the dynastic leaders originated, such as the Lubavitch from Lubovicze in the Polish-Lithuanian Commonwealth (today in Russia) or the Bobov from Bobova in Polish Galicia. Today, large Hasidic groups can be found, for example, in Israel, in New York, and in Melbourne.

⁶⁸ Bram Eisenthal, "Canadian Court Rules for Jews in Shabbat Case," *Jewish Telegraphic Agency*, 25 June 2011, <https://www.jta.org/2001/06/25/life-religion/features/canadian-court-rules-for-jews-in-shabbat-case>.

⁶⁹ Ingrid Peritz, "Chi-Chi Quebec Enclave Clashes with Hasidim," *The Globe and Mail*, 18 October 2000, <https://www.theglobeandmail.com/news/national/chi-chi-quebec-enclave-clashes-with-hasidim/article25473739/>.

⁷⁰ Québec Charter of Human Rights and Freedoms, CQLR c C-12.

⁷¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁷² *Rosenberg v. Outremont (City)*, [2001] R.J.Q. 1556 (S.C.), at 12.

⁷³ *Ibid.*, at 12.

⁷⁴ *Ibid.*, at 14.

on the same basis and without distinction.”⁷⁵ This is a similar argument to the Borough of Tenafly’s concern about the establishing effects of allowing the eruv in public. The City had also argued before that allowing Christmas decoration did not contradict its secular stance, as these were “primarily a commercial prop put up at the request of shopkeepers.”⁷⁶ Whereas the eruv was clearly a religious structure, Christian symbols had acquired a commercialised meaning detaching them, in the opinion of the City, from their religious roots.

The City received vocal support from a local secularist group, the ‘Mouvement Laïque Québécois,’ which claimed that the eruv violated its freedom *from* religion. The group argued that the eruv would transform the area into “an officially recognized religious territory” which, other than a synagogue or a church, they would not be able to avoid.⁷⁷ The group opposed the eruv because it saw the eruv as type of zoning for religious neighbourhoods to the effect that religious principles would prevail over the civil laws of Québec.⁷⁸ The eruv, it argued, would violate the right to freedom from religion as it imposed itself onto all residents.⁷⁹ Instead of seeking accommodation from the City, the group contended that Orthodox Jews should seek relief from their own Orthodox Jewish authorities which constituted the actual source of the problem by upholding restrictive Shabbat laws.⁸⁰

In its decision, the Québec Superior Court addressed all of these concerns voiced by opponents but found none of them convincing. The Court noted that the Canadian Constitution does not itself contain an Establishment clause as in the United States, but it acknowledged that there may be a conflict between the state’s duty to accommodate religion and the obligation of neutrality.⁸¹ First, the Court determined whether the eruv was protected by the right to freedom of religion and if so, whether the claimants were entitled to accommodation including the “use of air space over City streets”.⁸² On the first question, the Court had no doubt that the eruv did fall under the right to religious freedom interpreting the eruv as “essential for the attendance of Orthodox Jews at Sabbath services, and their participation in related activities upon completion.”⁸³ The Court then refuted the idea that Orthodox Jews should seek an accommodation from their own authorities, as the eruv

⁷⁵ Ibid., at 14.

⁷⁶ Ingrid Peritz, “Chi-Chi Quebec Enclave Clashes with Hasidim,” *The Globe and Mail*, 18 October 2000, <https://www.theglobeandmail.com/news/national/chi-chi-quebec-enclave-clashes-with-hasidim/article25473739/>.

⁷⁷ *Rosenberg v. Outremont*, at 18.

⁷⁸ Annick Germain and Julie Elizabeth Gagnon, “Minority Places of Worship and Zoning Dilemmas in Montréal,” *Planning Theory & Practice* 4, no. 3 (2003): 295-318, at 312.

⁷⁹ *Rosenberg v. Outremont*, at 19

⁸⁰ Ibid., at 20.

⁸¹ Ibid., at 29

⁸² Ibid., at 30.

⁸³ Ibid., at 36.

already constituted such an accommodation to facilitate the observance of Shabbat laws.⁸⁴ It also rejected the City's argument of religious neutrality, noting that Canadian and Québec law were themselves not absolutely neutral, given, for example, the official account of Christian religious holidays in the Québécois calendar.⁸⁵

The accommodation of the eruv, the Court continued, would not constitute any inconvenience or hardship to other residents in light of the absence of any demonstrated harm. Indeed, complaining residents had refused to provide evidence for the hardship they had claimed the eruv would impose on them. Thus, the Court held, the actual impact of the eruv had to be proven by showing how the eruv would alter the quality of life of those living within its boundary. Mere symbolic impact or impact that is comparable to the ringing of church bells was not sufficient to warrant the restriction of the Orthodox Jews' religious freedom, the Court explained.⁸⁶ Moreover, the Court rejected the idea that the eruv would create a religious zone, pointing out that the eruv only affected the practitioners of Orthodox Judaism.⁸⁷ As Valerie Stoker observes, the decision thereby endorsed a multivalent view of public space by refusing to accept that the eruv would cast a "religious shadow" onto all residents.⁸⁸ Ultimately, the Court concluded, the City had a constitutional duty to accommodate the eruv as a religious practice which did not impose undue hardship on other residents of Outremont.⁸⁹

cc. JPOE v. Village of Westhampton Beach

In Westhampton Beach, residents made similar arguments about the secularity of public space when they opposed an eruv to be set up in the affluent coastal town. But what made the case different from Tenaflly and Outremont was the fact that the group of people who objected to the eruv most vehemently were themselves Jewish. The group called 'Jewish People for the Betterment of Westhampton Beach' consisted of a number of liberal and secular leaning Jews (also known as JPOE – Jewish People Opposed to the Eruv) who had organised themselves in order to protest the project which had been put forward by the Modern Orthodox Synagogue of Westhampton Beach in 2008. Fearing that the eruv would "create another ghetto", one of JPOEs leaders complained that "As a

⁸⁴ Ibid., at 38.

⁸⁵ Ibid., at 42.

⁸⁶ Ibid., at 25.

⁸⁷ Ibid., at 44.

⁸⁸ Stoker, "Drawing the Line: Hasidic Jews, Eruvim, and the Public Space of Outremont, Quebec," 43.

⁸⁹ *Rosenberg v. Outremont*, at 46.

reform Jew, I find it extremely offensive to create a distinction that this is a Jewish area.”⁹⁰ The events in the affluent Hamptons even made it into national television. A short segment in *The Daily Show* introduced the Jewish eruv to the wider public and mocked both proponents and opponents alike by suggesting a ‘portable eruv hat’ as an easy solution to what seemed to some a bizarre quarrel.⁹¹

In 2011, JPOE took the Village of Westhampton Beach and the local power provider to court, arguing that the attachment of the eruv’s lechis on public utility poles constituted an unconstitutional establishment of religion – arguments similar to those of the residents in Tenaflly. The members of JPOE rejected the claim that the eruv would be inconspicuous and complained that

The eruv, of course, will *not* go unnoticed; rather it will be a constant and ever-present symbol, message and reminder to the community at large, that the secular public spaces of the Village have been transformed for religious use and identity; to the non-Jewish residents, that the Village and LIPA [the local power provider] have given preferred status to the Jewish religion as the only faith permitted to permanently affix religious symbols to utility poles within the Village or to physically demarcate certain public spaces with particular religious significance; and to large portions of the Jewish community within the Village, that one particular form of Judaism has been preferred and endorsed by the Village over another.⁹²

In order to refute any allegations of Antisemitism, the plaintiffs were eager to stress that they too were “proud and observant Jews” – albeit belonging to denominations that would take a critical stance towards the eruv as a valid interpretation of Jewish law. Citing the official position of the Central Conference of American Rabbis (an umbrella organisation of Reform Judaism) in their complaint to the Court, JPOE attacked the eruv for elevating “such legalistic constructs over the true spiritual values of Judaism.”⁹³

The United States Court of Appeals for the Second Circuit ultimately rejected JPOE’s complaint in 2015 after applying the Lemon test.⁹⁴ In US constitutional jurisprudence, the Lemon test has been used next to the Endorsement test to assess whether an action violates the Establishment clause of the US Constitution.⁹⁵ According to the Lemon test, a government action or a law complies with the requirements of the Establishment Clause if the law has a legitimate secular purpose, if it does not

⁹⁰ Quoted in Matt A. V. Chaban, “Hamptons Town Nears a Deal on a Jewish Ritual Boundary,” *New York Times*, 29 May 2016, <https://www.nytimes.com/2016/05/30/nyregion/hamptons-town-nears-a-deal-on-a-jewish-ritual-boundary.html>.

⁹¹ The video is available online, e.g. from <http://www.jewishhumorcentral.com/2011/03/daily-show-pokes-fun-at-eruv-battle-in.html>.

⁹² *Complaint: Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, No. CV-123760, 30 July 2012, at 1. Available from <http://westhamptonbeach.org/wp-content/uploads/2012/10/complaint-JPOE-against-village.pdf>. Emphasis in original.

⁹³ *Ibid.*, at 2.

⁹⁴ *Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, 778 F.3d 390 (2d Cir. 2015).

⁹⁵ For a background to and a critical analysis of both the Lemon and the Endorsement test that the Court applied in the case of Tenaflly see Choper, “The Endorsement Test: Its Status and Desirability.”

have a primary effect of either advancing or inhibiting religion, and if it does not result in an excessive entanglement of government and religion.⁹⁶ Although the plaintiffs had argued that the establishment of an eruv served no secular purpose, the Court found that the mere action of allowing lechis to be attached to public power poles did indeed have a secular purpose. “Neutral accommodation of religious practice”, the Court reasoned, “qualifies as a secular purpose under Lemon.”⁹⁷ Hence simply accommodating religion did not give an action itself a religious purpose. In a second step, the Court asked, as in the case of *Tenaflly*, whether a reasonable observer would perceive the lechis as a message of government endorsement or sponsorship of a religion and quickly dismissed this possibility by stating that no reasonable observer would draw the conclusion that a state actor was endorsing religion by allowing simple plastic strips to be attached to poles.⁹⁸ Finally, the fact that the maintenance and financing lay solely in the hands of the Modern Orthodox community, there was also no risk of excessive government entanglement with religion.⁹⁹ The Court thus decided in favour of the eruv and in line with other courts in the US which have so far been overwhelmingly sympathetic to the eruv.¹⁰⁰

That secular and liberal Jews belong to the most vocal opponents of an eruv is in indeed not rare.¹⁰¹ In *Tenaflly*, several Jewish residents joined their non-Jewish neighbours creating “oddly ecumenical effects”¹⁰² in their union against the eruv. Historically, cases of Jew versus Jew were argued only within the realm of Jewish law and concerned the if’s and how’s of an eruv. Today, opposing Jews do not shy away from appealing to secular courts in order to intervene in what could pass as an internal Jewish matter if read as a claim about the authenticity of Jewish practice, to which JPOE’s complaint alluded. Some have argued that the public display of Orthodox Jewish identity constitutes for more liberal Jews “a source of discomfort of being publicly exposed as Jewish,”¹⁰³ threatening their precarious sense of belonging and acculturation to the Christian majority.

However, such an interpretation misses the importance that some of the Jewish opponents placed on the need for space for internal Jewish pluralism. Reform Jewish identity is not only articulated in relation to the non-Jewish, largely Christian majority, but independently affirmed against Orthodoxy and as one of the many valid ways to be Jewish – which was seen as threatened by the public

⁹⁶ *Lemon v. Kurtzman*, 403 U.S. 602 (1971), at 612-613.

⁹⁷ *Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach*, at 395.

⁹⁸ *Ibid.*, at 396.

⁹⁹ *Ibid.*

¹⁰⁰ In addition to the cases discussed here see also *American Civil Liberties Union v. City of Long Branch*, 670 F. Supp. 1293 (D.N.J. 1987).

¹⁰¹ In *Barnet*, London secular and liberal Jews also objected to an eruv, see Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse,” 538.

¹⁰² Myer Siemiatycki, “Contesting Sacred Urban Space: The Case of the Eruv,” *Journal of International Migration and Integration / Revue de l'integration et de la migration internationale* 6, no. 2 (2005): 255-70, at 262.

¹⁰³ Watson, “Symbolic Spaces of Difference: Contesting the Eruv in *Barnet*, London and *Tenaflly*, New Jersey,” 610. See also Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse,” 530.

accommodation of only one of them. As one opponent stressed: “All Jews are not lumped together. They come in many forms.”¹⁰⁴ The eruv is a practice that divides Reform and Orthodoxy. The opposition to the eruv in the Hamptons, articulated in terms of non-establishment, may thereby also reflect a struggle within American Jewry over Judaism’s proper response to modernity. This struggle over the content and continuity of American Jewish identity is fought between Orthodox and non-Orthodox Jews, as Samuel Freedman describes in his book *Jew vs. Jew*:

One is unity and the other is pluralism, and both are innocuous euphemisms for more controversial agendas. As invoked by America’s Orthodox Jews, ‘unity’ means unity if all Jews act and think as we do, accepting the inerrancy of Torah and the yoke of all 613 commandments, the mitzvot. As invoked by America’s non-Orthodox Jews, ‘pluralism’ means that any variation of Judaism must be accepted by everyone, no obligation required and no questions asked.¹⁰⁵

An eruv can be seen as a prism for intra-Jewish tolerance post-emancipation, which had opened up different pathways for the articulation of Judaism’s relationship with modernity. For Westhampton Beach’s Reform and secular Jews, the eruv constituted a spatial symbol that undermined the co-existence of competing visions of Jewish identity as its wires anchored Orthodoxy in the public sphere. By invoking the constitutional provision against non-establishment, JPOE tried to push back against the symbolic overreach of their Orthodox neighbours and to safeguard their vision of public space, where no Jewish denomination was to predominate.

c. Inner-Jewish Disputes: Crown Heights

The dispute over the Westhampton Beach eruv is an important reminder that eruvim are not merely matters of contention between Jews and non-Jews, but frequently involve other, less observant Jews. At times, however, opposition to an eruv comes from strictly observant Jews, who see their values and understandings of law and space threatened by the appearance of an eruv. This type of eruv controversy is distinct, not only because it usually remains within the realms of Jewish religious law, but also because it sheds a different light on the internal pluralism of answers that Jews have found to the challenges of secular modernity.

In 2016 in Crown Heights in Brooklyn, an eruv became the subject of a dispute between a local modern Orthodox and a strictly Orthodox community who shared the same neighbourhood space,

¹⁰⁴ Quoted in Kelly Carroll, “Westhampton’s Anti-Eruv Group Claims 85 Percent of Village Opposed to Religious Designation,” *Hamptons.com*, 11 September 2008, <https://www.hamptons.com/Community/Main-Articles/4814/Westhamptons-Anti-Eruv-Group-Claims-85-Percent.html>.

¹⁰⁵ Samuel G. Freedman, *Jew vs. Jew: The Struggle for the Soul of American Jewry* (New York: Simon & Schuster, 2000), 26.

but not the same vision of Jewish law and life.¹⁰⁶ Crown Heights is known as the location of the headquarters of Chabad Lubavitch, a Hasidic movement originating from Lithuania. Several thousand Lubavitch Jews call this part of Brooklyn their home. Like other strictly Orthodox Jewish groups, the Lubavitch Jews pursue a lifestyle of strict Torah observance and strive to limit their contact with the non-Hasidic world.¹⁰⁷ In recent years, the neighbourhood saw a growing number of non-Hasidic Modern Orthodox Jews moving to the area seeking affordable housing. Modern Orthodoxy is the most liberal stream within Orthodox Judaism that, amongst other things, allows for greater participation of women. The Modern Orthodox congregation *Kol Israel* began planning an eruv which encompassed significant parts of the traditional settlement area of the Lubavitch Jews. As soon as the Greater Crown Heights eruv, which complements two other eruvim in the area, was set up, the Hasidic rabbinical court (*Beit Din*) immediately opposed the structure. The Beit Din reminded the community that Rabbi Menachem Schneerson himself, the late Lubavitcher leader, had forbidden the building of an eruv in Crown Heights. Since Schneerson had not appointed a successor, his edicts remain guiding for many of his followers. In June 2014, the Beit Din issued an edict deeming the new eruv not kosher because of its inclusion of unsuitable areas.¹⁰⁸ Rabbi Shlomo Yehuda Segal, a member of the Hasidic Beit Din, feared that the religious boundary would lead to “the devastation of the Shabbat in our honourable neighbourhood.”¹⁰⁹ Another rabbi called the eruv the same as Reform Judaism¹¹⁰ – a serious allegation which questioned the sincerity of their Modern Orthodox neighbours by likening them to liberal Reform Judaism.

Although opposition to the Crown Heights eruv was articulated in technical-halakhic terms, the argument was not just about the exact interpretation of halakha but concerned an entire way of life that appeared to be threatened by the influx of Modern Orthodox Jews and their appropriation of neighbourhood space through the eruv. The fear was that some Lubavitchers could start using the Modern Orthodox eruv. From the perspective of the Hasidic Jews, the eruv had the potential to erode their distinct culture by watering down Shabbat observance and ultimately the general standards

¹⁰⁶ Sam Kestenbaum, “Controversial Brooklyn Eruv for Modern Orthodox Vandalized Amid Dispute with Chabad,” *Forward*, July 12, 2016, <https://forward.com/news/344767/controversial-brooklyn-eruv-for-modern-orthodox-vandalized-amid-dispute-wit/>.

¹⁰⁷ Chabad Lubavitch Jews differ from other strictly Orthodox (Haredi) Jewish groups in their attitude towards non-Haredi Jews, with whom they seek contact in order to encourage them to adopt a more stringent religious observance, a practice termed *kiruv*, which means “bringing close”. See https://www.chabad.org/library/article_cdo/aid/676588/jewish/What-is-Kiruv.htm.

¹⁰⁸ “Lubavitch rabbis issue edict against modern Orthodox eruv in Crown Heights,” *Jewish Telegraphic Agency*, 24 June 2016, <https://www.jta.org/2016/06/24/united-states/crown-heights-lubavitch-rabbis-issue-edict-against-new-eruv>.

¹⁰⁹ Sam Kestenbaum, “Controversial Brooklyn Eruv for Modern Orthodox Vandalized Amid Dispute with Chabad,” *Forward*, July 12, 2016, <https://forward.com/news/344767/controversial-brooklyn-eruv-for-modern-orthodox-vandalized-amid-dispute-wit/>.

¹¹⁰ “Rabbi Heller: Crown Heights Eruv Is Reform Judaism,” *Crown Heights Info*, 24 June 2016, <http://crownheights.info/communal-matters/537984/rabbi-heller-eruv-is-reform-judaism/>.

of observance in the neighbourhood.¹¹¹ The wires of the new eruv thus posed a threat to the existing spatiolegal order of the Lubavitch society, rooted in the shared belief that no eruv was permissible in the area and that no Jew should carry in the public space of Crown Heights during the Shabbat. “For many orthodox leaders,” Oliver Valins explains, “the institutionalisation of space provides a mechanism to maintain the social order (and a visible symbol of orthodox space), and thus any weakness to this must be countered.”¹¹² Quite different from other controversies, in which opponents interpreted the eruv as a pre-modern and archaic practice, for the Lubavitch Jews the Crown Heights eruv was precisely the opposite: the spatial manifestation of modernity’s threat to their insular way of life. The eruv appeared as part and parcel of the growing gentrification and change of their neighbourhood driven by Modern Orthodox Jews. By introducing alternative readings of Jewish law and its spatiotemporal order into the streets of Brooklyn, the eruv thus brought the perceived dangers of the more secularised world closer to Hasidic doorsteps.

For Lubavitch Jews, resisting the eruv was a way to defend their way of life. The women of the community also weighed in. One of them refuted the gender equality argument of the Modern Orthodox community who presented the eruv in the classic way as a means to liberate young mothers from being trapped in the house during Shabbat: “Do they think that they’re trying to save me from myself, as a young mother? Do they think I’m sitting crying, trapped in my house on Shabbos and, now, they made me an eruv and I’m a liberated woman? That’s offensive.”¹¹³ In modern times, gender equality and the inclusion of elderly and disabled community members have become a core argument to sell eruv in to a liberal-minded public that will be less convinced by religious rationales alone. Susan Lees, for example, attributes the proliferation of eruv in during the twentieth century to the changing role of women in Jewish Orthodoxy.¹¹⁴ As women are often still the primary care givers, the prohibition on carrying affects them disproportionately.¹¹⁵ Blu Greenberg, an Orthodox feminist scholar and activist, suggests that “although no eruv has come out of a women’s protest group, I think the increase in eruv in has something to do with the new perception women have of themselves, their needs and their place in community life.”¹¹⁶ But as this Hasidic woman’s statement makes clear,

¹¹¹ Amy Sara Clark, “Fight over New Eruv Erupts in Crown Heights,” *Jewish Week*, 22 June 2016, <https://jewishweek.timesofisrael.com/fight-over-new-eruv-erupts-in-crown-heights/>.

¹¹² Oliver Valins, “Institutionalised Religion: Sacred Texts and Jewish Spatial Practice,” *Geoforum* 31, no. 4 (2000): 575-86, at 583-84.

¹¹³ Quoted in Rachel Holliday Smith, “Newly Built Eruv Repeatedly Vandalized Amid Uproar in Crown Heights,” *DNA Info*, 25 July 2016, <https://www.dnainfo.com/new-york/20160725/crown-heights/newly-built-eruv-repeatedly-vandalized-amid-uproar-crown-heights/>.

¹¹⁴ Lees, “Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenafly, New Jersey,” 44.

¹¹⁵ For an ethnographic account of how the eruv impacts on Orthodox Jewish women’s life see Jennifer Cousineau, “Urban Boundaries, Religious Experience, and the North West London Eruv,” in *Making Place: Space and Embodiment in the City*, eds. Arijit Sen and Lisa Silverman (Bloomington; Indianapolis: Indiana University Press, 2014), 126-47.

¹¹⁶ Blu Greenberg, *How to Run a Traditional Jewish Household* (New York; London; Toronto; Sydney: Simon & Schuster, 1983), 49.

the gender argument is perceived by some as disrespectful and patronising, thereby echoing within Judaism debates about the difficulties of contemporary feminist theory to make sense of the intersection between cultural and gender differences without presenting mainstream feminist ideas as the norm to which to aspire.¹¹⁷

Differently to the secular-liberal Jews in Westhampton Beach, the Hasidic Jews of Crown Heights made no establishment claim in secular courts in order to prevent the eruv. Following their insular lifestyle, they took matters in their own hands and disestablished the eruv themselves. Only days after the Hasidic authorities published their verdict, the wire was cut.¹¹⁸ Eventually the conflict spilled over to the neighbouring Park Slope eruv, which was damaged too.¹¹⁹ Two Hasidic men were arrested and charged with hate crime – a charge the police eventually dropped.¹²⁰ The Lubavitch leaders distanced themselves from the actions. Some community members took a more peaceful strategy to question the eruv and published a Dr Seuss style poem on Facebook calling for peaceful co-existence while warning of the subversive dangers of the wires brought in by their Modern Orthodox neighbours:

I would not carry in the street/But not because YOU'RE not elite/It's cause the Rebbe made concrete/A Crown Heights Eruv no matter how neat/Will only confuse - and breed deceit.¹²¹

In Crown Heights, the religious eruv morphed into a signifier of the encroaching outside secular world anchoring a more liberal interpretation of Jewish law in the Hasidic space. For the Lubavitch Jews, the eruv was not only a violation of their interpretation of Jewish law. Instead, the eruv also turned from a religious symbol into a covert agent of modernity, illustrating the elusive and contextual symbolism of this ritual system and reminding us of the ambiguity of religious symbols in general.

III. Conclusion: The Eruv and the Politics of Space

Whereas opposition to eruv is often emotional and fierce, state courts have shown a lenient attitude towards this Jewish practice. As discussed, not a single court has banned an eruv so far from public space, with the exception of rabbinical courts, such as in the case of Crown Heights – although in this case, the verdict could not prevent the eruv. From the standpoint of state law at least, the eruv

¹¹⁷ See on this debate Malik, “Feminism and Its Other.”

¹¹⁸ Rachel Holliday Smith, “Newly Built Eruv Repeatedly Vandalized Amid Uproar in Crown Heights,” *DNA Info*, 25 July 2016, <https://www.dnainfo.com/new-york/20160725/crown-heights/newly-built-eruv-repeatedly-vandalized-amid-uproar-crown-heights/>.

¹¹⁹ Brooklyn in New York City has a high density of eruvim, with some of them even overlapping. A map is available from: https://www.google.com/maps/d/viewer?mid=1VLdHiyP0wgl5KO5i_HEiKe2IDvA&hl=en_US&ll=40.74441203539545%2C-74.09301256625974&z=11.

¹²⁰ “Two Arrested in Connection with Eruv Vandalism,” *Crown Heights Info*, 27 October 2016, <http://crownheights.info/crime/552088/two-arrested-in-connection-with-eruv-vandalism/>.

¹²¹ “Crown Heights Eruv Feud Gets Its Dr. Seuss Moment,” *Crown Heights Info*, 23 July 2016, <http://crownheights.info/crown-heights-news/541777/crown-heights-eruv-feud-gets-its-dr-seuss-moment/>

appears to be a non-issue. So why so much ado about a piece of string? What explains these strong neighbourly reactions?

The eruv is an important reminder of the politics of space. Although notions of public, neutral, and secular space conjure images of a blank canvas accessible to all, space remains a contested resource in which the boundaries of community, collective identity, and belonging are constantly policed and redrawn. Davina Cooper argues that “in reality, most spaces are constituted through exclusionary practices, and almost all areas defined as public are regulated, even if the identity or class of user is not prescribed a priori.”¹²² Space, much like the body, is an important resource for the formation of collective identities:

Representations of space and place are always ideological, always implicated in some form of nation-building or identity-formation, and considering ‘imagined,’ fictive, representational, or mythic geographies allows us to see the ways in which representations of space and place are intimately bound up in the nexus of power–knowledge.¹²³

Critical scholarly analyses of eruv conflicts emphasise the need to study what lies behind the language of law in eruv controversies. Instead of seeing eruv controversies merely as examples of the tensions between secular law and religion, Charlotte Fonrobert notes, these disputes need to be considered as making visible the “social dynamics between Jews in all their variety, and between Jews and non-Jews.”¹²⁴ In her discussion of the Tenaflly conflict, Susann Lees, for example, describes law as a “smoke screen for deeper community conflict.”¹²⁵ This community conflict is about who has the right to control and shape space, about who belongs and who does not, and about the conditions of this belonging. In eruv controversies, Lees suggests, the law masks essential dimensions of these neighbourly struggles.¹²⁶

Many critical analyses of eruv controversies highlight these dimensions that are couched into the language of secularism, rights, and planning rules. Analysing the Tenaflly and the English Barnet eruv disputes, Sophie Watson notes the role of “resistance to ‘other’ cultural practices”¹²⁷ for eruv opposition. For Watson, the eruv hints at how the success of multiculturalism in both the United Kingdom and the United States, in particular in the predominantly white Anglo-Saxon and Protestant

¹²² Davina Cooper, “Regard between Strangers: Diversity, Equality and the Reconstruction of Public Space,” *Critical Social Policy* 18, no. 57 (1998): 465-92, at 472.

¹²³ Jane Stadler, Peta Mitchell, and Stephen Carleton, *Imagined Landscapes: Geovisualizing Australian Spatial Narratives* (Bloomington: Indiana University Press, 2015), 2.

¹²⁴ Charlotte Elisheva Fonrobert, “Installations of Jewish Law in Public Urban Space: An American Eruv Controversy,” *Chicago-Kent Law Review* 90 (2015): 63-77, at 66.

¹²⁵ Stoker, “Drawing the Line: Hasidic Jews, Eruvim, and the Public Space of Outremont, Quebec,” 23.

¹²⁶ Lees, “Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenaflly, New Jersey,” 66.

¹²⁷ Watson, “Symbolic Spaces of Difference: Contesting the Eruv in Barnet, London and Tenaflly, New Jersey,” 608.

parts of the US, relies on the implicit assumption that minority groups will adopt Anglo-Christian norms, practices, and values.¹²⁸ Valerie Stoker observed a similar dynamic in Outremont. She argues that in this conflict secularism was understood as linked to promoting a common public culture of Enlightenment rationality, which the Hasidic way of life was seen as disrupting. Despite references to multiculturalism and therefore a culturally plural public space, opposition frequently “amounted to privileging a specific cultural orientation as rightfully dominant,” Stoker notes.¹²⁹ Similarly, Davina Cooper summarises the ‘danger’ of the eruv as allowing the Otherness of the Orthodox Jew “to find public expression.”¹³⁰ This Otherness, Cooper argues, troubles the modernist paradigm of citizenship, showing how these paradigms “tend either to advocate the reproduction of existing majoritarian and historically dominant identities, or, in their erasure of particularism, leave a residual dominant identity in place.”¹³¹ Seen from this critical perspective, the construction of an eruv offers residents a spatial and legal arena for the politics of belonging, for the “dirty work of boundary maintenance.”¹³²

By emphasising the role of perceptions of Otherness in eruv controversies, this literature provides an important starting point to understand how law may be mobilised for the construction of Jewish difference. Compared to male circumcision, the eruv carries less cultural baggage as a symbol of Jewish difference. Nonetheless, as a public expression of Judaism, the ‘imaginary cartography’ of the eruv takes Jewishness into the public space, thereby confronting non-Jewish neighbours with a confident display of a Jewish collective identity that otherwise remains hidden.

¹²⁸ Ibid., 610.

¹²⁹ Stoker, “Drawing the Line: Hasidic Jews, Eruvim, and the Public Space of Outremont, Quebec,” 20.

¹³⁰ Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse,” 537.

¹³¹ Ibid., 539.

¹³² John Crowley, “The Politics of Belonging: Some Theoretical Considerations,” in *The Politics of Belonging: Migrants and Minorities in Contemporary Europe*, eds. Andrew Geddes and Adrian Favell (Aldershot; Brookfield: Ashgate, 1999), 15–41, at 30.

6 (IN)VISIBLE BOUNDARIES IN ST IVES

The Eruv – Part Two

In the upper North Shore of Sydney on the edge of the Ku-ring-gai national park lies St Ives, a verdant and quiet suburb approximately eighteen kilometres from the city's central business district. The atmosphere is sleepy around the mostly one-storey detached houses, neat gardens, and tree-lined streets. Strolling through St Ives, one will eventually notice the highly secured grounds of Masada College, the only Jewish high school in this part of the city. The school shares grounds with the synagogue Kehillat Masada, the largest congregation in St Ives, which describes itself as Orthodox, yet “embracing all levels of observance.”¹ The synagogue also houses another smaller Torah observant community called *Ohr Ha Tzafon*. In addition, the Sephardic Modern Orthodox *Ohel Avraham* community has been holding services in St Ives since 2013. Chabad Lubavitch has a presence in St Ives too. In 1989, the Hasidic movement opened the Chabad house in the upper North Shore, which also includes a preschool, a day-care for children, and a *mikveh*, a ritual bath. Today St Ives is home to Sydney's second largest Jewish population. Whereas the majority of Sydney's Jews have settled in the eastern suburbs such as Dover Heights, Bondi, Rose Bay, and Vaucluse, the upper North Shore (Ku-ring-gai Local Government Area (LGA)), in particular St Ives, has become another preferred location for New South Wales' Jews. In the 2016 census, 13 percent of St Ives' residents identified as Jewish.²

¹ See the website of the Masada congregation in St Ives: website: <http://www.masada.org.au>.

² For the data on religious affiliation from the 2016 Australian census see the Australian Bureau of Statistic's community profile for St Ives under <http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/2016%20Census%20Community%20Profiles>.

In 2002, the Jewish communities in the eastern suburbs established their first eruv, which stretches along the Bondi and Tamarama beaches and it has been operating since its erection without interruption except for one week.³ Another eruv in Sydney's east, the Coogee and Maroubra eruv, which joins the southern border of the Bondi eruv, became functional in late 2017.⁴ In Sydney's north, however, the growing Jewish community of St Ives lacked an eruv and in the early 2000s a group of Shabbat-observant Jews set out to change this. What looked like an innocent project which did not involve much more than erecting a couple of poles in inconspicuous colours with wire attached to them, most of them on private lands with the consent of the owners, became a several year-long dispute in which the imagined boundary turned into a real one for many residents.

In this chapter, I take the neighbourhood quarrel over the St Ives eruv as a vantage point to explore through a close reading of opponents' arguments how residents drew on the language of law to turn their Jewish neighbours into strangers.⁵ My analysis is focussed on public statements, media reports, and letters sent to newspapers between 2010 and 2016.⁶ In addition, I also draw on the reasons that residents provided in a survey conducted by Ku-ring-gai Council in 2016 and other submissions to the Council over the course of the dispute.⁷ A small number of interviews complement this material.⁸ While it is important to highlight that many residents did indeed support the eruv – out of 618 survey submissions, 257 explicitly supported the eruv – my focus in this chapter is on the way opponents presented the eruv and its Jewish adherents in order to examine how they perceived the eruv and the

³ Sydney eruv, <http://www.sydneyeruv.org.au/index.htm>. The website does not specify what led to the interruption of the eruv.

⁴ For the Maroubra eruv map see <https://www.maroubrasynagogue.org.au/eruv/>. See also "South-east Sydney Eruv Up and Running," *Australian Jewish News*, 17 September 2017, <https://www.jewishnews.net.au/south-east-sydney-eruv-running/68553>.

⁵ I am not the first to analyse the St Ives eruv dispute. For a geographical perspective with a focus on 'space' and 'place' in St Ives (covering the events until 2011) see John Connell and Kurt Iveson, "An Eruv for St Ives? Religion, Identity, Place and Conflict on the Sydney North Shore," *Australian Geographer* 45, no. 4 (2014): 429-46.

⁶ I discussed how I approached this material in chapter one (see also footnote 146 in chapter one). Throughout this chapter, quotes from opponents and supporters without reference are always from the Council survey. In all other cases, I provide the exact source of the quote, such as the letters to the editor section of the local newspaper.

⁷ The survey data including the letter and the accompanying material sent out to residents is available on the Council website, see Ku-ring-Gai Council, "Agenda for Ordinary Meeting," 8 November 2016, Appendix No. 2 (Survey Information Sent to Residents) and Appendix No. 3 (Eruv Responses Submissions via Returned Survey Form). In the Council survey data, names and streets are omitted. Comments are summarised by the Council and may thus not reflect the exact wording used by residents.

PDF documents of this and other Council documents cited throughout this chapter are available for download through the dynamic online database of Ku-ring-gai Council by selecting the year and date of the meeting as indicated:

http://www.kmc.nsw.gov.au/Your_Council/Meetings/Minutes_and_agendas_business_papers_-_2011_to_present

⁸ In order to understand the halakhic side of the eruv, I talked with the two rabbis who are involved in managing the eruv, a member of the group that runs the eruv, and a former member of the early eruv initiative. I also interviewed several representatives of Jewish organisations in Australia and members of the Ku-ring-gai Local Council. Unfortunately, those who opposed the eruv were not willing to talk to me, a general attitude reflected in media reports in which eruv opponents mostly declined to comment.

people who use it. Moreover, by centring on the way that ‘ordinary’ residents understood the eruv and its users, I shift attention to a different site for the production of legal meaning: the realm of planning law in action. Although the statements of residents do not carry the same authoritative weight as those of legal scholars in the German circumcision case, they nonetheless shaped this legal encounter in significant ways. The participatory nature of the planning process, which is so heavily entangled with local politics, lend the ‘community’ an important normative voice which fed into the Council’s considerations, preventing the eruv’s construction for many years.

My aim in this chapter is to explore how participants mobilised the language and tools of planning law and other normative frameworks in order to construct an image of Shabbat-observant Jews and the eruv as a threat to the neighbourhood. My analysis proceeds in three parts. The first part summarises the turbulent history of the eruv – from its early inception to the lengthy and protracted planning process and its final contested construction. Differently to the cases discussed in the previous chapter, in St Ives, planning law provided the main legal frame for this conflict and I briefly outline how this framework structured the dispute and provide some context regarding the suburb of St Ives. In the second part of the chapter, I analyse in detail the various discourses of refusal, tracing how residents constructed the eruv as a space out of place. In the final part, I reflect on how the St Ives eruv case revealed the fragile status of Orthodox Jews in St Ives, reminding them that their belonging was not to be taken for granted.

I. An Eruv for St Ives

a. The Long Struggle for the St Ives Eruv

In October 2007, a group formed as *Northern Eruv Incorporated* – with the motto “Linking the Community” – submitted several development applications to the Local Council of Ku-ring-gai in order to install poles and wires on public and private land in St Ives. The Council rejected the application for failing to provide sufficient information on the project and for not having obtained the consent of owners of the affected land.⁹ In 2008, when another application was lodged, it became clear that not everyone welcomed an eruv in St Ives.¹⁰ At this stage, the Council had received fifteen objections from local residents raising concerns about the “impact of poles on views and visual intrusion of poles” and the preferential treatment of one religious group over others.¹¹ The eruv

⁹ Ku-ring-gai Planning Panel, “Agenda,” 6 April 2011, at GB.1/8.

¹⁰ Jano Gibson, “Jews Seek Religious Freedom with a Ring around St Ives,” *Sydney Morning Herald*, 1 October 2008, <https://www.smh.com.au/national/jews-seek-religious-freedom-with-a-ring-around-st-ives-20081001-gdsx2x.html>.

¹¹ Ibid.

group published a promotional video in 2008 in which it tried to explain that the eruv did not involve the construction of any fencing or walls.¹² Instead, the group assured the community that the eruv would be designed in the most unobtrusive way using poles that resembled existing poles in inconspicuous colours. They emphasised that the eruv would have no impact on other neighbours and highlighted the benefits for observant families and the Jewish community.

Despite these efforts, many residents did not condone the curious proposal. The St Ives Progress Association (SIPA), a local community group founded in 1913 whose aim has been to “promote, enhance and protect the natural and built amenity of St Ives,”¹³ was among the most vocal and active opponents and devoted significant energy and time to fight the proposal, thus confirming Ku-ring-gai’s reputation as an area notorious for its opposition to development.¹⁴ In a flyer distributed to residents in 2010, SIPA described the eruv as a “part-symbolic and part-physical wall” which would “encapsulate most of St Ives” and warned that the proposed eruv would be “inconsistent with the visual character” of the suburb.¹⁵ Doubting the eruv’s religious purpose, the group’s president stated that the eruv’s purpose was “not about following their [Orthodox Jews] beliefs” but “about imposing structures on the community.”¹⁶

The media had already fuelled the impression of the eruv as a highly intrusive installation. The local newspaper, the *North Shore Times*, called the development application in 2008 “a bizarre proposal ... to build a ‘virtual wall’ enclosing part of St Ives for Orthodox Jews.”¹⁷ The TV programme *A Current Affair* reported in 2010 that Jews were trying to turn the suburb into a “religious enclave.”¹⁸ The video was later posted on the programme’s website and received several hundreds of comments, some of them openly Antisemitic and racist. The comments were taken down after a request by the New South Wales Jewish Board of Deputies, the political representation of Jews in New South Wales.¹⁹ Even on the ABC, Australia’s public broadcaster, a reporter misrepresented the project in 2010 as “a

¹² The video titled “North Shore Eruv” was published on 25 November 2008 on *Youtube*, see <https://www.youtube.com/watch?v=U6Nkr24xDQ>.

¹³ SIPA’s self-description is available on their website: <http://sipa.org.au/index.html>.

¹⁴ Kristian Ruming and Donna Houston, “Enacting Planning Borders: Consolidation and Resistance in Ku-Ring-Gai, Sydney,” *Australian Planner* 50, no. 2 (2013): 123–29.

¹⁵ Quoted in Josephine Tovey, “Residents Draw Line over Jewish Boundary,” *Sydney Morning Herald*, 3 July 2010, <https://www.smh.com.au/national/nsw/residents-draw-line-over-jewish-boundary-20100702-zu5p.html>.

¹⁶ Quoted in *ibid.*

¹⁷ Katrina Adamski, “Wall of Opposition” *North Shore Times*, 7 October 2008.

¹⁸ See Gareth Narunsky, “St Ives to Finally Get Its Eruv,” *Australian Jewish News*, 10 April 2015, <https://www.jewishnews.net.au/st-ives-to-finally-get-its-eruv/41373>.

¹⁹ Joshua Levi, “Nine’s Racism Claim,” *Australian Jewish News*, 9 July 2010, <https://www.jewishnews.net.au/nines-racism-claim/14285>. Comments included such Antisemitic slurs as “The bosh (Germans) didn’t finish their job.” Another said: “Quick, hide your babies. The Jews are going to drain their blood to bake bread.”

religious zone for ultra-Orthodox Jews.”²⁰ The choice of language reinforced the idea that the eruv was much more than a simple wire: it was a boundary solid enough to cut right through the neighbourhood to the detriment and exclusion of other residents.

Between 2010 and 2011, the eruv group again submitted development applications for the erection of poles and also sought consent under section 138 of the New South Wales Roads Act 1993 in order to connect the poles with non-live wiring within public road reserves.²¹ This time the proposed eruv structure relied on existing structures to form the 20-kilometre eruv boundary, but it also required the erection of 27 additional poles on public and private land to close gaps. Soon the Local Council received five petitions from local residents, two in support of the eruv (with a total of 678 signatures)²² and three opposing the eruv (with a total of 1,423 signatures).²³ The objecting petitions were particularly concerned with the purportedly negative visual impact of the eruv. The religious structure was portrayed as “ugly and intrusive,”²⁴ and as “an eyesore”²⁵ which would turn St Ives into a “religious enclave.”²⁶ Another petition, emphasising that the undersigned represented both Jews and non-Jews, argued that the eruv’s poles will “bring negative social consequences for the local community” and “detrimentally affect the amenity and character of the locality as they predominate and mark the St Ives locality as being an enclave for the orthodox religious beliefs of a few in the locality.”²⁷

²⁰ Deborah Cornwall, “The Eruv,” *ABC News*, 12 July 2010. Video available online from <https://www.youtube.com/watch?v=6iDHIYZYd9g>.

²¹ See the summary of the applications in Ku-ring-gai Planning Panel, “Agenda,” 6 April 2011, at GB. 1/1. The Planning Panel and the Council assessed all applications together as they raised similar issues, see the explanation in *ibid.*, GB.1/16.

²² Petition Support for Erection of ERUV Poles and Wiring for Northern ERUV – (Sixty-Three [63] Signatures), Files DA0331/10, 88/05728/01 (22 August 2011); Petition Support for Erection of ERUV Poles and Wiring for Northern ERUV – (Six Hundred Fifteen [615] Signatures), Files DA0331/10, 88/05728/01 (22 August 2011).

Both petitions are available in Ku-ring-gai Council, “Late Agenda,” Ordinary Council Meeting, 23 August 2011, at PT.4 and PT.5

²³ *Petition (1)* Against a Eruv in St Ives – (One Thousand, Two Hundred and Twenty-Nine [1,229] Signatures), File DA0331/10 (15 August 2011). Available in Ku-ring-gai Council, “Agenda,” 23 August 2011.

Petition (2) Against Eruv Poles and Wiring at 26 Malborough Place, St Ives – (Seventy-Eight [78] Signatures), Files DA0331/10, 88/05728/01 (22 August 2011);

Petition (3) Against Eruv Poles and Wiring – Catherine Street, Carmen Street and Paul Avenue, St Ives – (Sixty-Eight [68] Signatures with Addresses and Forty-One [41] without Addresses), Files DA0331/10, 88/05728/01.

Petition (2) and (3) are available in Ku-ring-gai Council, “Late Agenda,” Ordinary Council Meeting, 23 August 2011, at PT.2 and PT.3.

²⁴ Petition (3).

²⁵ Petition (2).

²⁶ Petition (1).

²⁷ Petition (3).

The petitions opposing the eruv achieved their goal. In August 2011, the Council rejected the applications after receiving advice from the Council's director of operations. While the report recommended the approval of poles on private land, it advised rejecting the poles on public land because, as the Director noted, "there is no significant community benefit to the council or the community arising from this proposal."²⁸ The Deputy Mayor was, however, eager to emphasise that the reasons for the refusal were not religious intolerance and that the Council had based its decision entirely on legal considerations, and the public interest in preserving St Ives' amenity in particular:

The majority of residents objected to the proposed eruv, with many residents concerned with the negative impact the visual clutter from the additional poles and wires would have on the streetscape. This was the major concern and not religious or racial views.²⁹

Nevertheless, many eruv supporters felt quite differently about the motivations of their objectors. One St Ives resident wrote to the local newspaper to express his disappointment about the Council meeting which saw the eruv refused:

As a rational and thoughtful individual, I am willing to accept that one cannot always get what one asks for and am left not bitter or angry but disappointed over the meeting's outcome (...). I am saddened by the intolerance of some of the opposition arguments, which lead me to question if the issue was about the poles or rather about the people it would serve. Having felt blessed to spend my years in St Ives, finishing school this year, I am disappointed that my first taste of the cruel and brutal 'real world' had to be in the place I call home. I am not bitter, nor angry, as mentioned before, but suddenly wary if my neighbourhood is the accepting and warm environment I had always thought it to be.³⁰

One of St Ives' rabbis recalled a similar feeling of alienation among the Jewish community after the eruv proposal had encountered such fierce opposition. It called into question relations with their neighbours and put a strain on their sense of belonging, which they had taken for granted.

When the meeting happened at the Council, the Jewish community walked away shuddering, they walked around St Ives thinking that this is a wonderful place to live, and we all get along so well with our non-Jewish neighbours, and all of a sudden, this was all bubbling to the top. So, people were thinking, hold on a second, we have to re-look at our neighbours, who are really deep inside seething with hatred towards us and they've just masked it for so long. The Jewish community took

²⁸ Quoted in Fiona Brady, "Pole Position Key to Success of Eruv," *North Shore Times*, 19 August 2011, at 4.

²⁹ Quoted in Joshua Levi, "St Ives Eruv Turned Down by Council," *Australian Jewish News*, 25 August 2011, <https://www.jewishnews.net.au/st-ives-eruv-turned-down-by-council/22612>.

³⁰ Supporter 1, "Letter to the Editor," *North Shore Times*, 31 August 2011, at 21.

a lot of emotional strain, even though 90 per cent of the community has no interest in the eruv one way or the other. They just saw the ugly side of the broader St Ives community.³¹

Despite the initial disappointment, the eruv group did not give up so easily. In spring of 2012, they took the Council to the New South Wales Court of Environment and Planning to appeal the decision under section 97 of the Environmental Planning and Assessment Act 1979 of New South Wales (EPA Act). A Commissioner of the Court found that it was appropriate to grant conditional development consent to the elements of the eruv that had required consent under the EPA Act.³² The Commissioner's decision also addressed the question of the eruv's visual impact and reached a conclusion quite different from that of the Council. Four experts were heard and all of them confirmed that the impact of the poles and wires would be minor, both with regard to trees and the visual amenity of the area. One expert witness pondered the impact of the plastic conduit, which would be "mysterious" causing people to wonder what its purpose is. However, he admitted that despite their 'foreignness,' the lechis would not have a significant impact as they would blend in with existing poles and conduit.³³ Despite this favourable assessment of the eruv's effect on the amenity of St. Ives, the appeal was ultimately unsuccessful. The Commissioner found that the Court did not have jurisdiction to grant consent to those applications that required consent under the Roads Act, which would have been necessary to establish the whole eruv boundary.³⁴ The eruv group immediately appealed the Commissioner's decision to the Court of Environment and Planning, yet again without success. The Court dismissed the appeal in November 2012 and followed the view that it lacked jurisdiction with regard to granting consent under the Roads Act in this particular case, which meant that the eruv could not go ahead.³⁵

This legal technicality could have been the end for the St Ives eruv, but the insistence of several Jewish community members finally helped to turn the eruv into reality in April 2015. An unlikely actor helped the eruv to come into being. The local power provider, Ausgrid, granted permission to use its power poles to attach lechis and complete the eruv boundary – a common practice for many Jewish communities who want to avoid quarrels with local councils.³⁶ In St Ives, the perimeter had thus been redesigned in a way that did not require the erection of additional poles for which Council consent would have been necessary. The result was that the eruv now enclosed a much larger part of St Ives than initially planned, although some Jewish family homes still remained outside eruv. The *Australian Jewish News* eventually made the eruv public, quoting one of St Ives' rabbis who praised the

³¹ Interview with St Ives Rabbi I, Sydney, July 2016.

³² *The Northern Eruv v. Ku-ring-gai Council* [2012] NSWLEC 1058 (16 March 2012), at 75.

³³ *Ibid.*, at 44.

³⁴ *Ibid.*, at 76.

³⁵ *The Northern Eruv Incorporated v. Ku-ring-gai Council* [2012] NSWLEC 249 (30 November 2012).

³⁶ Interview with member of the St Ives eruv group, Sydney, August 2016.

eruv's completion: "It's a fantastic piece of North Shore infrastructure that I think will bring [sic] an enormous amount of harmony and unity to the community."³⁷

The sudden appearance of the eruv was noticed by local residents who disagreed with the rabbi's vision of the eruv's as a vehicle for harmony and unity. After it had become functional, the eruv was vandalised several times.³⁸ One resident attached post-it notes to each lechi to inform the public of the unlawfulness of the structure.³⁹ Despite these disruptions, the eruv kept operating and enabled Shabbat-observant Jews to move more freely through the streets of St Ives. Eventually, however, the issue came back before the Council, which had been approached by residents "concerned with the amenity of their local area."⁴⁰ After receiving legal advice on the matter, the Council ordered the eruv's dismantling on 4 July 2016, just fourteen months after its installation.⁴¹ The costs for removing the structure from the 571 Ausgrid poles were estimated to amount to \$50,000, a sum the Council would have to bear if no one would claim responsibility for erecting the eruv. Liberal State MP for Ku-ring-gai Alister Henskens weighed in, criticising the Council for "wasting ratepayers' money on this non-issue."⁴² Eventually, the individual members of the eruv group revealed themselves to the Council but remained reluctant to make their identity public after receiving numerous threats and intimidations.⁴³

Before things escalated, the eruv group successfully sought an injunction in the NSW Supreme Court, which prevented the Council from removing the lechis on 18 July 2016.⁴⁴ The group made a number of arguments in order to prevent the Council from dismantling the eruv, which circled around the question of ownership of the poles:

Section 65 of the Electricity Supply Act 1995 (NSW) provides that a person must not interfere with a network operator's electricity works unless authorised to do so by the network operator.

Further, section 65A prohibits any person from entering, climbing or being on the electricity works

³⁷ Quoted in Gareth Narunsky, "St Ives Gets Its Eruv," *Australian Jewish News*, 28 May 2015, <https://www.jewishnews.net.au/st-ives-gets-its-eruv/42070>.

³⁸ See Executive Council of Australian Jewry, "Report on Antisemitism in Australia 2016," 27 November 2016, at 78. Available from <http://www.ecaj.org.au/wp-content/uploads/2012/08/ECAJ-Antisemitism-Report-2016d-WEB.pdf>.

³⁹ Interview with Rabbi 1, Sydney, July 2016.

⁴⁰ Jessica Rapana, "Ku-Ring-Gai Council Takes on Prominent Jewish Community over St Ives Eruv," *North Shore Times*, 30 June 2016, <https://www.dailytelegraph.com.au/newslocal/north-shore/kuringgai-council-takes-on-prominent-jewish-community-over-st-ives-eruv/news-story/c7e0176213109548d295e61cdb01f4e3>.

⁴¹ David D. Knoll, "Protecting Religious Freedom and Places of Worship - the Example of the Eruv." Paper presented at the conference *Varieties of Diversity*, Notre Dame School of Law, Sydney, 2016, at 16.

⁴² MP Alister Henskens quoted in Jessica Rapana, "Ku-Ring-Gai Council Takes on Prominent Jewish Community over St Ives Eruv," *North Shore Times*, 30 June 2016 (for URL see note 40).

⁴³ Jessica Rapana, "Threats Follow Boundary Action," *North Shore Times*, 15 July 2016, at 3.

⁴⁴ Quoted in Knoll, "Protecting Religious Freedom and Places of Worship - the Example of the Eruv," 16.

without Ausgrid's consent. There is no evidence of any such consent having been obtained from Ausgrid and unless such consent is given, the Council's actions will constitute an offence.⁴⁵

The group also offered to lodge a retrospective application under the Roads Act. In August 2016, the group – now called 'Helping Families Unite' – submitted this application for retrospective approval of the placement of plastic conduit. On 2 September 2016, the Council sent out a survey to 2400 residents whose properties were affected by the eruv boundaries asking them for their opinion on the eruv.⁴⁶ 600 responses reached the Council, of which 50 percent disagreed with the proposal, while 41 percent agreed.⁴⁷ The rest felt neutral about the eruv. In addition, the Council received a folder containing 462 signatures in support of the eruv and another 31 responses which were not submitted via the survey form (with 17 of them agreeing, 13 disagreeing, and one neutral). Those submissions were however not included in the official survey which only considered directly affected residents who had responded through the survey form. The Council confirmed that the eruv lechis did neither constituted a safety risk to the general public nor did they impede public access.⁴⁸ Technically, the Council admitted, there were no reasons for refusing the eruv. However, the Council emphasised that "due to the number and extent of the plastic conduits" it was important to seek community views and opinions, which "any approval for the application should consider."⁴⁹

Meanwhile, the dispute took a nasty turn when SIPA distributed an openly Antisemitic leaflet in the neighbourhood which claimed that the eruv was an attempt to fundamentally change St Ives' demographics by encouraging "those of their faith to settle in the area."⁵⁰ Another letter, sent anonymously to residents, claimed that the eruv's purpose was to "establish a modern version of the ghetto under Rabbinical control."⁵¹ Politicians, Councillors, and residents condemned the leaflets' message,⁵² but the tone had become increasingly harsh. One day a lechi was found with a swastika etched into it, which was quickly condemned as "racial hatred at its worst"⁵³ by St Ives community leaders. Finally, in November 2016, more than 200 residents came to the scheduled Council meeting in which the final fate of the eruv was to be decided. The list of speakers had been limited to ten for

⁴⁵ Quoted in *ibid.*

⁴⁶ See the survey in Ku-ring-Gai Council, "Agenda for Ordinary Meeting," 8 November 2016, Appendix No. 2 (Survey Information Send to Residents).

⁴⁷ *Ibid.*, Appendix No. 3 (Eruv Responses Submissions via Returned Survey Form).

⁴⁸ Ku-ring-Gai Council, "Agenda for Ordinary Meeting," 8 November 2016, at GB. 6/295.

⁴⁹ *Ibid.*

⁵⁰ SIPA, "Letter to St Ives Residents," 7 September 2016 (see note 52).

⁵¹ "Aspects of the Eruv You Should Know About," Anonymous Letter Sent to St Ives Residents, 7 September 2016 (see note 52).

⁵² Jessica Rapana, "Anti-Eruv Flyer 'One of the Worst Examples of Anti-Semitism' in Sydney," *North Shore Times*, 15 September 2016, <https://www.dailytelegraph.com.au/newslocal/north-shore/antieruv-flyer-one-of-worst-examples-of-antisemitism-in-sydney/news-story/da7eeac9e11718449ca9f886c58d6716>. The report also contains photos of the two letters sent to residents.

⁵³ Jessica Rapana, "Nazi Sign 'Hatred at Its Worst'," *North Shore Times*, 30 September 2016, at 7.

and ten against the eruv. St Ives Jewish community was well prepared to argue their cause. In the lead up to the debate, Jewish mothers appeared frequently as respondents in the local newspaper, stressing the positive impact the eruv had in particular on families and mothers. One Jewish woman posted on the website North Shore Mums: “The only notable impact of the Eruv in the past eighteen months has been the sight of happy families walking to and from synagogue and friends on Saturdays.”⁵⁴ Even a Jewish Paralympic tennis champion, who relies on a wheelchair, joined the debate to support the eruv and underlined the benefits of an eruv for disabled people: “For any disabled person who uses any kind of wheelchair or walking device, it’s incredibly important that they stay involved in community activity,” he said.⁵⁵ For him, the eruv presented an opportunity “to enhance peace and equality in this area.”⁵⁶ Other residents also argued in support of the eruv, such as one Christian neighbour, who emphasised: “Let us be real – these people are our neighbours, our friends – let us not discriminate based on faith.”⁵⁷ This time the meeting ended in applause: Councillors approved the eruv by eight votes out of ten. The Mayor expressed her satisfaction with what she saw as an impartial process and stressed that it was the duty of the Council “to assess the application on its merits and ensure proper process was followed.”⁵⁸

b. The Language of Planning Law

In many ways, the St Ives eruv dispute is similar to the cases in Tenaflly and Outremont with regard to the arguments proponents and opponents exchanged. Neighbours in St Ives complained about the visibility of the structure, made claims about the permissibility of a religious installation on public land, and about the boundaries of religious freedom. However, there is an important difference between the cases in Tenaflly and Outremont on the one hand and in St Ives on the other. In St Ives, the dispute was never a substantive legal conflict over the scope of religious freedom or the accommodation of minority religious practice. Instead, the case remained entirely within the realm

⁵⁴ Megan Rosettenstein, “The St Ives Eruv: One Community Member’s View,” *North Shore Mums*, 20 September 2016, <https://www.northshoremums.com.au/the-st-ives-eruv-one-community-members-view/>.

⁵⁵ Quoted in Jessica Rapana, “Ku-ring-gai Council Has Approved the Jewish Eruv in St Ives as a Landmark Decision,” *North Shore Times*, 7 December 2016, <http://www.dailytelegraph.com.au/newslocal/north-shore/kuringgai-council-has-approved-the-jewish-eruv-in-st-ives-in-a-landmark-decision/news-story/a8da5184dac58242eb5c449634046cf3>.

⁵⁶ Supporter 2, quoted in Shane Desiatnek, “Eruv Decision a Win for the Community,” *Australian Jewish News*, 10 November 2016, <https://www.jewishnews.net.au/eruv-decision-win-community/56601>.

⁵⁷ Supporter 3, quoted in *ibid*.

⁵⁸ Ku-ring-gai Mayor, quoted in Jessica Rapana, “Ku-ring-gai Council Has Approved the Jewish Eruv in St Ives as a Landmark Decision,” *North Shore Times*, 7 December 2016, <http://www.dailytelegraph.com.au/newslocal/north-shore/kuringgai-council-has-approved-the-jewish-eruv-in-st-ives-in-a-landmark-decision/news-story/a8da5184dac58242eb5c449634046cf3>. A map of the St Ives eruv is included in Ku-ring-gai Council, Agenda of Ordinary Meeting, 8 November 2016, at GB.6, Appendix No. 1 – Notification Map, available from: https://eservices.kmc.nsw.gov.au/Infocouncil.Web/Open/2016/11/OMC_08112016_AGN_AT_WEB.htm

of planning law, which took a rather technical approach to the eruv as an issue of the built environment instead of as a matter of religious freedom and the secularity of public space. Many of the cases in North America also started out as planning disputes, but actors could draw on a different legal vocabulary as provided by constitutional rights when they took the eruv to court. In St Ives, both proponents and opponents lacked such a legal vocabulary.

The absence of any substantial legal discussion of religious freedom or the separation of state and church is the result of the specific Australian legal context. Australia is still the only Western liberal democracy without a full bill of rights. The country's Constitution only mentions a handful of rights which traditionally have been interpreted in rather narrow fashion by the Australian High Court.⁵⁹ Among these few provisions is section 116, a section concerning religion, which is modelled on the First Amendment of the Constitution of the United States:⁶⁰

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

As the wording shows, the section only applies to the Commonwealth government but not to the states nor to local councils. On the state and territory level, Victoria and the Australian Capital Territory have introduced their own human rights legislation. The Tasmanian Constitution Act 1934 protects the “freedom of conscience and the free profession and practice of religion.”⁶¹ New South Wales, however, lacks such a legislative protection. Australia's reluctance towards rights is the result of a number of different reasons, among them the ‘utilitarian confidence’ in governmental structures.⁶² Protecting a human right such as religious freedom has been largely left to political and democratic processes.⁶³ The shortcomings of this approach became obvious in St Ives, where the protection of the rights of Jewish residents to practise their religion was left for several years to the whims of an unsympathetic majority and the pitfalls of local politics. The planning law of a state such

⁵⁹ George Williams, *Human Rights under the Australian Constitution* (Oxford: Oxford University Press, 2002).

⁶⁰ On section 116 see Carolyn Evans, “Religion as Politics Not Law: The Religion Clauses in the Australian Constitution,” *Religion, State & Society* 36, no. 3 (2008): 283-302.

⁶¹ On the state and territorial protection of religious freedom see Carolyn Evans, “Religion and the Secular State in Australia,” in *Religion and the Secular State/La religion et l'état laïque. Interim National Reports Issued for the Occasion of the XVIIIITH. International Congress of Comparative Law*, eds. Javier Martínez-Torrón and W. Cole Durham Jr (Provo: International Center for Law and Religion Studies, 2010), 87-101, at 90.

⁶² There were formal attempts to introduce a more comprehensive protection of rights into the Constitution, in 1944 and in 1988, both unsuccessful. Hilary Charlesworth explains this hesitant position towards rights: “The Australian suspicion of constitutionally entrenched rights has been enduring. It has been supported by arguments that constitutional rights could both politicize the judiciary and legalize public policy, thus undermining our legal culture. The suspicion also rests on regional instincts of preserving states' rights. At a more fundamental level, reservations about rights are linked to a utilitarian confidence in our existing governmental structure.” See Hilary Charlesworth, “The Australian Reluctance About Rights,” *Osgoode Hall Law Journal* 31 (1993): 195-232, at 201.

⁶³ Evans, “Religion as Politics Not Law: The Religion Clauses in the Australian Constitution,” 284.

as New South Wales makes little room for the accommodation of minority religions and cultures.⁶⁴ When one of the Ku-ring-gai Councillors called the looming removal of the eruv the “removal of the human rights of many members of the community,”⁶⁵ his claim had little legal edge. In turn, it made it easy for opponents to dismiss appeals to human rights as a diversion and to refer the dispute back to the realms of planning law with its concerns for amenity and the environment. One opponent made clear:

Let’s not get side-tracked with statements about democracy or religion. The eruv is about permanent physical infrastructure imposed on public and private land affecting the amenity and environment of the entire community.⁶⁶

The categories of planning law tend to channel opposition into a particular, often highly technical vocabulary: the height of a building, parking space, proper land use, nuisances, and the amenity of the area. As Davina Cooper argued in her analysis of the Barnet eruv case, which also took place within a similar legal framework, planning law functions as an authoritative structure by “providing a procedure and set of institutional sites for conflict.”⁶⁷ This does not mean that the planning process is de-politicised or less prone to bias. As studies of planning disputes show, religious and cultural minority groups that lodge proposals to build houses of worship or religious schools frequently face significant obstacles in the planning process, yet councils are careful to avoid any overt reference to the religious and cultural background of applicants.⁶⁸ Instead, applications are rejected on the grounds that the development would produce excessive noise, have an ‘exotic appearance’ which is unsuitable to the locality, or create parking issues in the area.⁶⁹ The eruv’s supposed impact on the suburb’s amenity indeed played an important role in St Ives. One theme of opposition focussed on the alleged ugliness of the eruv, which presented it as a visual nuisance that had to be rejected because of its unsuitable appearance. The eruv’s materiality makes it an easy target for expressing resentment and ambivalence towards those perceived as strangers in the planning realm. “A fear of difference is projected onto objects and spaces comprising the home or locality which can be polluted by the

⁶⁴ Knoll, “Protecting Religious Freedom and Places of Worship - the Example of the Eruv,” 10.

⁶⁵ Councillor David Citer, quoted in Jessica Rapana, “Ku-ring-gai Council Takes on Prominent Jewish Community over St Ives Eruv,” *North Shore Times*, 30 June 2016 (for URL see note 40).

⁶⁶ Christine Berlioz, quoted in Fiona Brady, “Four Years on, Still Eruv Uncertainty,” *North Shore Times*, 26 August 2011, at 4.

⁶⁷ Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse,” 533.

⁶⁸ See e.g. Noel G. Villaroman, “‘Not in My Backyard’: The Local Planning Process in Australia and Its Impact on Minority Places of Worship,” *Religion and Human Rights* 7, no. 3 (2012): 215-39. Kevin M. Dunn, “Representations of Islam in the Politics of Mosque Development in Sydney,” *Tijdschrift voor economische en sociale geografie* 92, no. 3 (2001): 291-308; Leonie Sandercock, “When Strangers Become Neighbours: Managing Cities of Difference,” *Planning Theory & Practice* 1, no. 1 (2000): 13-30. See also Mariana Valverde, “Toronto: A ‘Multicultural’ Urban Order,” in *Law and the City*, ed. Andreas Philippopoulos-Mihalopoulos (Abingdon, Oxon; New York: Routledge, 2007), 191-204.

⁶⁹ Villaroman, “‘Not in My Backyard’: The Local Planning Process in Australia and Its Impact on Minority Places of Worship,” Dunn, “Representations of Islam in the Politics of Mosque Development in Sydney.”

presence of non-conforming people, activities or artefacts,”⁷⁰ David Sibley explains. This slippage becomes particularly prominent when the eruv is discussed only within the formalistic realm of planning law with its focus on things and objects instead of people and their rights.

Although planning law emphasises the physical features of developments, and hence of the eruv, it considers residents’ understanding of space, community, and identity indirectly through other channels. In evaluating a development proposal, councils take into consideration matters such as the social impact of a development and the public interest, which provides an important opportunity for participants to voice their arguments that do not strictly fall into the technical categories of the planning framework.⁷¹ In addition, the consultative component of the planning process makes it possible for opponents and proponents alike to feed their ideas about issues such as the place of religion in the urban space or community character into the planning process and have them heard. The problem is then not the provisions of planning law *per se*, which exclude or marginalise minority concerns, but that the planning process provides an “outlet for the deep-seated fears, aversions, or anxieties of some residents” when planners fail to respond to such fears in a productive and considerate way, for example by giving in to community pressure.⁷² This was the case for a long time in St Ives, where Councillors based their initial rejection of the eruv on the absence of community support for the eruv,⁷³ thereby giving the majority a significant say in planning decisions.

c. The Context of the St Ives Dispute

Sydney is the Australian city with the highest number of eruvin. Two of these structures operate in the eastern suburbs, the Sydney eruv in Bondi and the Coogee eruv, and have been set up without major controversy.⁷⁴ Yet in St Ives, the erection of an eruv caused a lengthy and fierce neighbourhood dispute. What made the eruv such an offence in the eyes of some St Ives residents? One can only speculate about their reasons. Planning scholars describe Ku-ring-gai, the local government area to which St Ives belongs, as having a reputation of being defiant and frequently at the “frontline of contestations,” mostly concerning planning projects that aim to increase housing density.⁷⁵ The

⁷⁰ David Sibley, *Geographies of Exclusion. Society and Difference in the West* (London; New York: Routledge, 1995), 91.

⁷¹ See e.g. section 1(3) of the NSW Environmental Planning and Assessment Act 1979.

⁷² Sandercock, “When Strangers Become Neighbours: Managing Cities of Difference,” 16.

⁷³ Interview with Ku-ring-gai Mayor, Sydney, December 2016.

⁷⁴ There had been some objection from local residents to the Bondi eruv, but not to the extent of St Ives. Moreover, Woollahra Council, one of the local government areas through which the Bondi eruv runs, had been supportive of the eruv. See the letter by a former Woollahra Councillor in ‘Letters,’ *Sydney Morning Herald*, 25 August 2011, at 14.

⁷⁵ Rumig and Houston, “Enacting Planning Borders: Consolidation and Resistance in Ku-Ring-Gai, Sydney,” 123.

residents of the wealthy suburbs in the North Shore have often successfully mobilised resources to resist planning policies and seem to be willing and capable to contest unwanted developments in their neighbourhoods – a NIMBY attitude is certainly present.⁷⁶ Moreover, some have described Ku-ring-gai as part of Sydney's "bible belt"⁷⁷, suggesting a strong role for Christian culture in the area. St Ives, however, saw in fact a decrease of stated affiliations with any of the Christian denominations, such as Anglican, Uniting Church, or Catholic between 2011 and 2016. However, Christianity still remains the most common religion in St Ives, followed closely by Judaism.⁷⁸

Moreover, the St Ives case is also different from the dispute in Outremont, which appeared to be largely driven by fear of strictly Orthodox Jews, the Hasidim. In the Canadian city, the eruv was a project of the Hasidic community, known for its insular lifestyle and which made no secret of its wish to remain separate through its social practices, which are indeed intended to create walls between themselves and other neighbours through different dress, separate schools, and a kosher diet.⁷⁹ In St Ives, on the other hand, the community using the eruv consists mainly of modern Orthodox Jews. Modern Orthodox Judaism is a stream within Judaism that is committed to Jewish law, the halakha, but also to a lifestyle that aims to combine a Torah based life with the modern secular world. Despite this, as already noted, media reports fuelled the impression that Hasidic Jews were planning the eruv. The misleading *A Current Affair* report, for example, illustrated its feature with a picture of several strictly Orthodox Jewish men in traditional garb, creating the impression of St Ives' Jews as Hasidic.⁸⁰ As one of St Ives' Rabbis notes about the fears of eruv opponents, "They thought they would have lots of black hats and frocks and they didn't want that."⁸¹

Opposition to the eruv may as well be a symptom of broader anxieties of change as globalisation and migration change the local life worlds of people. This can also be felt in St Ives, where the demographic make-up is slowly changing through migration as elsewhere in Australia, although those born in Australia and the United Kingdom remain the majority in St Ives.⁸² Seen from this

⁷⁶ Acronym for "not in my backyard". A NIMBY describes opposition to locating something or someone undesirable in one's neighbourhood, see <https://www.merriam-webster.com/dictionary/NIMBY>. In geographical scholarship, the NIMBY describes an exclusionary tendency perpetuating social and spatial exclusion. For a discussion of the usefulness of NIMBY as a concept in geographical scholarship see Geoffrey DeVerteuil, "Where Has Nimby Gone in Urban Social Geography?," *Social & Cultural Geography* 14, no. 6 (2013): 599-603, at 601 in particular.

⁷⁷ Deborah Stevenson et al., "Religious Belief across 'Post-Secular' Sydney: The Multiple Trends in (De)Secularisation," *Australian Geographer* 41, no. 3 (2010): 323-50, at 345.

⁷⁸ For the data on religious affiliation from the 2016 Australian census see the Australian Bureau of Statistics' community profile for St Ives under <http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/2016%20Census%20Community%20Profiles>.

⁷⁹ Stoker, "Drawing the Line: Hasidic Jews, Eruvim, and the Public Space of Outremont, Quebec," 19.

⁸⁰ The picture is available from <http://ajnwatch.blogspot.com/2010/07/current-affair-report-on-st-ives-eruv.html>.

⁸¹ Interview with Rabbi 1, Sydney, July 2016.

⁸² See the community profile of St Ives on the Guardian website by entering "St Ives": <https://www.theguardian.com/australia-news/datablog/ng-interactive/2017/jun/27/census-stories-how->

perspective, the eruv may appear as another agent of demographic change that challenges the Anglo-Celtic majority of St Ives, a scapegoat and easy target that could be fought through the means of planning law. However, opposition to the eruv was more than a symptom of broader fears of change or simple NIMBYism, although these certainly played a role. The opposition to the eruv had a semitic undertone and the conflict made visible residents' ambivalence about their Orthodox Jewish neighbours as equally rightful inhabitants of their suburb.

II. A Space Out of Place

For St Ives residents, the eruv offered an encounter with visible Orthodox Jewishness, which many of them did not wish to confront. In the following sections, I analyse arguments of opponents against the eruv in St Ives and the way they portrayed the eruv and Shabbat-observant Jews within the vocabulary of planning law, secularism, and multiculturalism. As in my discussion of the German circumcision controversy, the aim is not to engage in a doctrinal analysis of arguments about the permissibility of the eruv within Australian planning law or the eruv's place in a secular legal order. Rather, my aim is to trace how opposition to the eruv, framed in legal terms, created an image of Jews as Others in the neighbourhood of St Ives. My analysis focusses on four different sites – language, planning aesthetics, St Ives as a multicultural space, and St Ives as a secular space – and the ways in which eruv opponents presented Orthodox Jewishness within these frameworks. Again, as in the case of circumcision, my analysis focusses on a certain aspect of opposition to the eruv and does not present the entire debate, although I occasionally include the voices of eruv supporters.

a. A Language of Difference

Space is an important paradigm for the making of collective identities and the local functions as a microcosm for these processes. Imagined communities, Ruth Wodak argues, “are (re)produced in everyday lives by banal forms of nationalism.”⁸³ The ‘we’ of these imagined communities often remains vague but gains its contours by excluding those who ‘we’ are not. Much like in the German case on circumcision, the construction of Orthodox Jews as Others of this ‘we’ ran like a thread through many statements against the eruv. In their depictions of the eruv as a ‘sham’ and ‘fundamentalist trick’, opponents created Shabbat-observant Jews as their cultural Other, who is

has-your-town-or-suburb-changed-over-10-years. Many Jewish migrants from South Africa have settled in the North Shore, see Rutland, *Edge of the Diaspora: Two Centuries of Jewish Settlement in Australia*, 2nd rev., 392.

⁸³ Ruth Wodak, “‘Us’ and ‘Them’: Inclusion and Exclusion - Discrimination Via Discourse,” in *Identity, Belonging and Migration*, eds. Gerard Delanty, Paul Jones, and Ruth Wodak (Liverpool: Liverpool University Press, 2008), 54-77, at 60.

apart from, even antithetical to, ‘modernity,’ which emerges as the positive term in an escalating string of oppositions between supernatural belief and unbelief, literal and critical, backward and progressive, bigoted and tolerant.⁸⁴

Opponents labelled the eruv “patent nonsense,”⁸⁵ “mumbo jumbo,”⁸⁶ and “plainly stupid and irrational.”⁸⁷ The supposed ‘irrationality’ and ‘stupidity’ of the eruv proved for some that Orthodox Jews lived in the “Stone Age,”⁸⁸ evoking images of the primitive and backward. One resident called the eruv an “accessory” deceiving God and refused to be made part of “these theologically and ethically flawed attempts to trick God.”⁸⁹ Echoing not only old Christian accusations of Judaism as legalistic⁹⁰ but also calling Jews “fundamentalist,” another resident stated that

Aluminium poles and wires weren’t around in the days of King Solomon, so if the Jewish religious fundamentalists can use legalistic reasoning to get around Jehova’s edicts, why not delineate the coast of Australia as the eruv and then no one will object and their women can push their pram anytime and anywhere they like?⁹¹

Calling upon Orthodox Jews to modernise, another resident who also took offence at the eruv’s materiality urged

We should be living in an age of science rather than slavishly following some ancient writings that were written for different times when people believed the world was flat. Nowhere in the Old Testament is there any reference to wire or aluminium as they hadn’t been invented.⁹²

Residents rejected the idea that religion itself could provide an accommodation to the burdens emerging from its observance as “hypocritical.”⁹³ Moreover, despite their call for modernisation, opponents dismissed the idea that poles and wires could be such a legitimate modern interpretation of halakha. The fact that rabbinical dictum could provide a ‘way around’ the law of the Torah did not make sense for opponents who thereby took a view of Jewish law as a closed system immune to

⁸⁴ Susan Harding, “Representing Fundamentalism: The Problem of the Repugnant Cultural Other,” *Social Research* 58, no. 2 (1991): 373-93, at 374.

⁸⁵ Opponent 1, ‘Letters to the Editor’, *North Shore Times*, 31 August 2011, at 21.

⁸⁶ Opponent 2, ‘Letters to the Editor’, *North Shore Times*, 6 April 2011, at 23.

⁸⁷ Opponent 3, ‘Letters’, *North Shore Times*, 22 July 2011, at 26.

⁸⁸ Opponent 2, ‘Letters to the Editor’, *North Shore Times*, 6 April 2011, at 23.

⁸⁹ Opponent 4, ‘Your Say – Letters to the Editor’, *North Shore Times*, 29 July 2016, at 40.

⁹⁰ Christian thinkers often portrayed Judaism’s observance of Torah law as legalistic and therefore inferior to Christianity, see e.g. James Pasto, “Islam’s ‘Strange Secret Sharer’: Orientalism, Judaism, and the Jewish Question,” *Comparative Studies in Society and History* 40, no. 3 (1998): 437-74, at 126; William Nicholls, *Christian Antisemitism. A History of Hate* (Lanham; Boulder; New York; Toronto; Oxford: Rowman & Littlefield, 1993).

⁹¹ Opponent 3, ‘Letters’, *North Shore Times*, 22 July 2011, at 26.

⁹² Opponent 1, ‘Letters to the Editor’, *North Shore Times*, 31 August 2011, at 21.

⁹³ Opponent 2, ‘Letters to the Editor’, *North Shore Times*, 6 April 2011, at 23.

dynamic interpretation and evolution.⁹⁴ Underpinning this view of halakha was a contradictory vision of change. On the one hand, eruv opponents demanded critical change to adapt religious provisions to life today. On the other, they rejected such adaptations as subversive, lazy, and untrue to the text.

Whereas some reactions were dismissive or uncomprehending, another line of argument linked Jews to religious fundamentalists, labelling them as “zealots”⁹⁵ whose practices were comparable to “the Aztec religion of cutting out hearts to appease the sun god.”⁹⁶ The anonymous letter sent to residents in 2016 took the moral panic about the eruv a step further by drawing parallels to Israeli Haredi Jews and tapping into classic Antisemitic conspiracy theories about a Jewish take-over of the suburb:

The motivation to build an Eruv has very little to do with the stated purpose of enabling carrying on the Sabbath or mothers pushing a pram, as it is so often stated. It has much more to do with establishing a modern version of the ghetto under Rabbinical control.⁹⁷

The eruv is presented as a sneaky Trojan horse, masquerading as an innocent device for families, while preparing the conquest of St Ives. “Strangers,” Leonie Sandercock writes in the context of planning in cities of difference, “may come to be seen as an invading mass or tide that will engulf us, provoking primitive fears of annihilation, of the dissolving of boundaries, the dissolution of identity.”⁹⁸ Claiming scholarly support for their argument, the leaflet authors referred to the work of two Israeli sociologists to expose the real “desires and intent of the Orthodox” to take over the neighbourhood:

This has been true of every city of the world where an Eruv has been erected. The downstream long term consequence of an Eruv establishment is the division of the community and eventual expulsion of secular people who live within the Eruv and who want nothing to do with it.⁹⁹

Friedman and Heilman, the two sociologists to whom the leaflet attributes this claim, describe a particular group of strictly Orthodox Jews, the Haredim in Israel.¹⁰⁰ Haredi Jews follow an insular

⁹⁴ This view of halakha appears not to be unusual in eruv controversies. Opponents in Barnet took a similar view of halakha as a closed system and the eruv as hypocrisy, see Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse,” 540.

⁹⁵ Opponent 8, quoted in Deborah Cornwall, “The Eruv,” *ABC News*, 12 July 2010.

⁹⁶ Opponent 9, ‘Letters’, *North Shore Times*, 16 September 2011, at 37.

⁹⁷ “Aspects of the Eruv You Should Know About,” Anonymous Letter Sent to St Ives Residents, 7 September 2016 (see note 52).

⁹⁸ Sandercock, “When Strangers Become Neighbours: Managing Cities of Difference,” 23.

⁹⁹ “Aspects of the Eruv You Should Know About,” Anonymous Letter Sent to St Ives Residents, 7 September 2016 (see note 52).

¹⁰⁰ Haredi Judaism (Haredim meaning the ‘trembling’) describes a broad spectrum of strictly Orthodox Jews, often also called ultra-Orthodox, characterised by their rejection of secular culture. Hasidic Jews, such as the Lubavitch Jews in Crown Heights (see chapter five) constitute a subgroup of Haredi Jews. Hasidic Jews place great emphasis on the joy of performing the commandments of the Torah, see the entry in the Jewish Virtual

lifestyle in which the separation from and distance to the secular society is central – quite different from modern Orthodox Judaism which does not reject integration in the secular world. Comparing the politics of Israeli Haredim with the aims of a religious minority in St Ives also ignores the fundamentally different power relations and socio-political context, in which in particular Haredi Jews in Israel, the case to which Friedman's and Heilman's article refers, are able to use spatial strategies to enforce their lifestyle.¹⁰¹

As Kevin Dunn argues, in planning settings, there is an "intertextuality" between local and national discourses, which are "knitted together in a symbolic web."¹⁰² In St Ives, this symbolic web wove a small fraction of strictly Orthodox Jews and their politics into an essentialised and homogenised view of fundamentalist religion, creating a climate of fear around the presence of the Jewish neighbour – a narrative all too well known from the hysterical representations of Muslims as extremists in Western public discourse.¹⁰³ Accommodating the eruv today, the leaflet warned, would lead to the tyranny of fundamentalist religion tomorrow and turn St Ives into Mea She'arim or Beit Shemesh, Haredi neighbourhoods in Israel, where residents block streets and throw stones at cars if they dare to enter the area on Shabbat.¹⁰⁴ Allowing the eruv onto public land was seen as just one step away from harm caused by religious fanatics, as one opponent warned: "I'm sorry, but I don't want zealots of any persuasion, political or religious, next door to me. We left Northern Ireland for that very reason."¹⁰⁵

b. The Aesthetics of Wires and the Rule of the Majority

The alleged ugliness of the physical eruv structure played an important role in St Ives, where many residents framed their opposition as one of aesthetics. Although wires, cables, and poles already clutter the streets of St Ives as in any other modern city, residents argued that the eruv would ruin St Ives' visual character. In their responses to the Council survey, 41 residents stated the alleged negative visual impact of the eruv as the reason for their disagreement. They were concerned with the "visual

Library, "Orthodox Judaism: Hasidim and Mitnagdim," <https://www.jewishvirtuallibrary.org/hasidim-and-mitnagdim>.

¹⁰¹ Yosseph Shilhav, "The Haredi Ghetto: The Theology Behind the Geography," *Contemporary Jewry* 10, no. 2 (1989): 51-64. See also Oliver Valins, "Stubborn Identities and the Construction of Socio-Spatial Boundaries: Ultra-Orthodox Jews Living in Contemporary Britain," *Transactions of the Institute of British Geographers* 28, no. 2 (2003): 158-75.

¹⁰² Dunn, "Representations of Islam in the Politics of Mosque Development in Sydney," 292.

¹⁰³ See e.g. on representations of Muslims in British media Elizabeth Poole, *Reporting Islam. Media Representations of British Muslims* (London; New York: I. B. Tauris, 2002).

¹⁰⁴ Disputes between secular and Haredi Jews in Israel are often fought over space and the regulation of Shabbat, see Gillad Rosen and Anne B. Shlay, "Whose Right to Jerusalem?," *International Journal of Urban and Regional Research* 38, no. 3 (2014): 935-50.

¹⁰⁵ Opponent 8, quoted in Deborah Cornwall, "The Eruv," *ABC News*, 12 July 2010.

and environmental impact the boundary structures would have on residential amenity.”¹⁰⁶ A 2011 petition against the eruv stated that “the poles and wiring would be an eyesore” and that “the streetscape and trees would be destroyed.”¹⁰⁷ Another petition from the same year called the eruv “ugly and intrusive to the landscape.”¹⁰⁸ Eruv supporters, on the other hand, were eager to emphasise the inconspicuous nature of the eruv which they compared to existing poles and cables. Opponents refuted this argument and argued that even minor negative impacts on St Ives’ amenity had to be sanctioned by the majority of residents in order to ensure that harms were outweighed by benefits. Contrasting the “restrictive” lifestyle of St Ives’ Orthodox Jews with “modern society,” one opponent questioned whether the Council had any duty to accommodate the needs of a minority group:

The environment and the general public have more than enough to deal with due mandatory signage, light poles and wires without adding 27 more poles with wiring to assist a small group who embrace a way of life which is very restrictive in modern society.¹⁰⁹

Another St Ives resident, a Jewish Holocaust survivor who had been very outspoken against the eruv, took a similar view distinguishing between Orthodox Jews and Australian people who should not be burdened by minority requests. Calling upon Orthodox Jews to keep their differences to themselves, she argued:

If it is an inconvenience for a minority of orthodox Jews not to be able to push a pram on the Sabbath, they should accept it and not make it a problem for the Australian people.¹¹⁰

For objectors, the clutter of the eruv was an undue burden on the majority and they made clear that in “not representing the views of the majority of the St Ives community, the applications are contrary to public interest and should be rejected.”¹¹¹ The paradigm that underlies such arguments is that public space has to be a space for all and changes or developments have to cater to the needs of all, or most, residents. Installations that would add clutter or negatively affect the visual amenity would only be acceptable when they bring advantage to a majority of residents. Opponents explained this by differentiating between the useful purpose of electricity poles and telecommunication cables as a basic necessity, and the eruv as a luxury for a limited few in the neighbourhood. Although electricity cables and poles look very similar to the eruv structure, they were beneficial to the whole community. In this view, planning law has to protect the interests of the majority against attempts by a minority to claim public space for their sole benefit.

¹⁰⁶ Petition (1) (see note 23).

¹⁰⁷ Petition (2). (see note 23).

¹⁰⁸ Petition (3) (see note 23).

¹⁰⁹ Opponent 13, ‘Opinion/Letters’, *North Shore Times*, 9 July 2010, at 23.

¹¹⁰ Opponent 14, quoted in Karen Michelmores, “Court to Decide on Religious Structure,” *ABC Sydney*, 19 March 2012, <http://www.abc.net.au/local/stories/2012/02/07/3424598.htm>.

¹¹¹ Petition (3) (see note 23).

Planning scholar Leonie Sandercock argues that such an understanding of democracy as majority rule still underpins many Western planning frameworks and is not unique to St Ives. This understanding corresponds with the assumption that “the right to difference disappears once the majority has spoken.”¹¹² In the 2011 Council meeting, one stated reason for the rejection of the applications was the lack of community support. As Ku-ring-gai’s Mayor, who was then a Councillor, explains:

You can’t just make a logical decision based on your own personal perspective when part of the process is to engage the local community who are impacted by it, no matter what the impact is. The overwhelming response from residents was that they didn’t want it. You have to weigh up the public feedback. ... It was within our authority to go ahead or not. There are many instances where Council has to approve something even if they don’t like it, if it complies with state or federal legislation, you don’t have the ability to refuse it otherwise you end up in court with people appealing the decision. In this instance that level of compulsion wasn’t there, and as a Councillor, I feel that if you have latitude to make a decision and the community isn’t with you for whatever reason, it’s much better to not go ahead and take the status quo as your basis for your decision and retain the status quo unless there is a shift in the thinking of your population.¹¹³

New South Wales law requires every public authority to observe certain multicultural principles in its work, which obligates institutions to, *inter alia*, “respect and make provisions for the ... religion of others”.¹¹⁴ Yet, in the local politics of diversity, the law is often toothless. As David Knoll notes, in the daily planning business, many Councils avoid dealing with politically sensitive issues of religious diversity and instead pass the ball to the Court of Environment and Planning after refusing the proposal in order to not be held accountable by their constituency.¹¹⁵ This strategy leads to little protection for minority communities as the Multicultural NSW Act (2000) also stipulates that the multicultural principles do not “give rise to, or can be taken into account, in any civil cause of action.”¹¹⁶ Consequently, the Court of Environment and Planning did not consider multicultural principles as part of the eruv appeal in 2012.

This questionable democratisation of local planning as majority rule makes religious and cultural minorities vulnerable in settings where anxieties of difference become politicised. It creates a dynamic that becomes particularly apparent in local planning processes in which majorities seek to assert their hegemony over the public space against the ‘intrusion’ of groups that are depicted as newcomers with fewer rights to shape the architecture of the locality. Their wish to mark their presence onto the urban space is refuted as illegitimate and rude. In this vein, in St Ives, opponents presented the eruv

¹¹² Sandercock, “When Strangers Become Neighbours: Managing Cities of Difference,” 15.

¹¹³ Interview with Ku-ring-gai Mayor, Sydney, December 2016.

¹¹⁴ Multicultural NSW Act 2000, subsection 3(1d). The Act obliges authorities to observe these principles in subsection 3(4).

¹¹⁵ Knoll, “Protecting Religious Freedom and Places of Worship - the Example of the Eruv,” 12.

¹¹⁶ Multicultural NSW Act 2000, subsection 22.

proposal as an unheard-of demand of newly arrived people which not only contravened the suburb's amenity, but also locally expected appropriate behaviour. The claim to erect poles for an eruv was interpreted as a disruptive and disrespectful act of newcomers to the suburb who showed little consideration for the feelings of long-term residents.

I've been here 50 years and it's been a very congenial, harmonious atmosphere. But these Orthodox people seem to have a different set of values and they're aggressively insensitive to what people feel about them moving in with their poles and wires.¹¹⁷

Drawing a distinction between 'us' and 'them,' the Orthodox Jews, another resident stated that

I'm utterly amazed at what I've been reading about miles of mystical wire and the destruction of many trees, which I strongly object to. I've lived here for more than 40 years and we like it the way it is. Keep your views and religion to yourselves please."¹¹⁸

These statements overlook the fact that Jews have lived in the North Shore for several decades – the North Shore Synagogue opened its doors in 1947 –, and picture Jews within an assimilatory framework as new immigrants that have to acculturate to the longstanding standards of the locality. Jews are written out of St Ives' history – and therefore out of its community. One opponent, emphasising that she had lived in the suburb since 1977, complained about the *chutzpah* of the Orthodox Jews who used their religion as a pretence to fundamentally change the suburb in ways that did not consider the view of its rightful inhabitants:

How is that a minority group of Orthodox Jews who have recently come to live in St Ives, in the name of their religion, have the right to request alteration to the whole environment of this suburb against the opinion of the majority of residents, newcomers and those who have been in this area for many years. What is proposed would further deface St Ives nearly as badly as the new high-rise.¹¹⁹

The status quo, seen as natural and legitimate, is contrasted with the alleged novelty of the eruv and the people it serves. Such an argument normalises the presence of a certain segment of the population, while rendering Orthodox Jews as strangers who do not fully belong. The vision of St Ives reflected here gives the non-Jewish majority the exclusive right to define the landscape and character of their suburb, to which Jewish strangers have to assimilate. Demanding the adjustment of the landscape to their needs is presented as illegitimate overreach of a "newly arrived" minority group which is unconcerned with the needs of the majority. The St Ives eruv conflict is illustrative of how the planning process works towards preserving "the majority's group's lifestyle, way of

¹¹⁷ Opponent 15, quoted in Deborah Cornwall, "The Eruv," *ABC News*, <http://www.abc.net.au/news/2010-07-09/the-eruv/899286>.

¹¹⁸ Opponent 16, 'Letters', *North Shore Times*, 16 July 2010, at 34.

¹¹⁹ Opponent 17, 'Letters to the Editor', *North Shore Times*, 25 June 2010, at 36.

thinking and perceptions of beauty and ugliness.”¹²⁰ Jews, on the other hand, are portrayed as tolerated guests, who are expected to keep a low profile, but who are not seen as fellow residents with equal rights to the city.

c. Ghettos and the Spirit of Multiculturalism

Eruv opponents drew on a language of walls, boundaries, enclaves and ghettos that painted a dark picture of St Ives’ future as a segregated area. In one petition, the signatories warned of the “propensity which an eruv would have in the longer term to develop into a religious enclave.”¹²¹ One resident worried in their survey response that the eruv would “perpetuate societal division and reduce integration into the municipality.” Another resident urged “We need to integrate them rather than segregate communities.”¹²² Consequently, like their Prussian predecessors in Bromberg, eruv opponents saw the refusal of the eruv as a way to liberate Jews from their self-imposed segregation. Whereas opponents perceived of the eruv as a means of separation which had to be prevented, supporters took the opposite view of the eruv as a space of inclusion. As one Councillor, who supported the eruv, stressed: “The eruv has been a part of the Jewish population for over 2000 years – it is an instrument of integration.”¹²³ Similarly, for one of St Ives’ rabbis, the eruv was far from being a separatist device, but instead fostered the integration of Orthodox Jews into the St Ives public. Echoing Fonrobert’s interpretation of the eruv as enabling conviviality with non-Jewish neighbours rather than separatism,¹²⁴ the community’s rabbi argued after the eruv had been set up with Ausgrid’s help that

...it allows us to build community between Jewish and non-Jewish people because people could move on Shabbat. It created no boundaries in the community, it opened up our lives, and caused inclusion.¹²⁵

In a perhaps seemingly contradictory way, by drawing a boundary, the eruv enables observant Jews to integrate into the public space and take part in its life potentially interacting with non-Jews. The religious structure allows Orthodox Jews “to come out as ‘ordinary’ citizens.”¹²⁶ For some, this made

¹²⁰ Villaroman, “Not in My Backyard’: The Local Planning Process in Australia and Its Impact on Minority Places of Worship,” 231.

¹²¹ Petition (1). (see note 22.)

¹²² Opponent 10, quoted in Katrina Adamski, “Siege over Imaginary Wall,” *North Shore Times*, 19 September 2008.

¹²³ Councillor, quoted in Shane Desiatnek, “Eruv Decision a Win for the Community,” *Australian Jewish News*, 10 November 2016, <https://www.jewishnews.net.au/eruv-decision-win-community/56601>.

¹²⁴ See Fonrobert, “The Political Symbolism of the Eruv,” 28-29.

¹²⁵ Interview with Rabbi 2, December 2016, Sydney.

¹²⁶ Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse,” 537.

the eruv quintessentially Australian. Drawing on a multicultural vision of Australia, Vic Alhadeff, Chief Executive Officer of the New South Wales Jewish Board of Deputies, presented the eruv as a prime example of Australian values in practice:

This is not about forming enclosures or separating people from each other. The reverse, in fact. It's about enabling people to get out and mix while respecting their distinctive cultures and faiths. Isn't that what Australia is so proudly, and rightly, all about?¹²⁷

Opponents, on the other hand, disagreed and insisted that the eruv would foster spatial segregation and societal disintegration, which would do exactly the opposite –undermine the vision of Australia as a multicultural space. Australian identity became defined by another vision of multiculturalism and diversity that was about bringing benefits to everyone, a vision which a ghetto clearly contravened:

There is no benefit for St Ives and/or Ku-ring-gai residents who are not eruv supporters. Australia is about multiculturalism and the benefits it brings to everyone; it is not about creating ghettos for the promotion of religious minorities.¹²⁸

The backlash against the St Ives eruv and its community echoes the broader conservative backlash against Australian multiculturalism in which the accommodation of minority cultures is seen as marginalising 'mainstream' Australians at the expense of non-mainstream, that is, non-Anglo-Christian groups.¹²⁹ The Australian shift to multiculturalism has challenged the previous Anglo-privilege by granting more attention to those previously designated as Others. In St Ives, the search for the suburb's 'mainstream' identity through the eruv dispute exposed the tenuous position of Jews within this identity and revealed them as potential Others. Their visible Jewishness appeared for some as a symbolic threat to the privileged dominant identity – white Christian Anglo-Australians.¹³⁰ Allowing a minority identity into the public space carried the risk of turning the cultural majority of St Ives into the new "dispossessed" and "oppressed."¹³¹

The type of multiculturalism that hides behind eruv opponent's language is what Ghassan Hage called "white multiculturalism," a multiculturalism that, clouded in a language of tolerance, works towards

¹²⁷ Bryan S. Turner, "The Cosmopolitanism of the Sacred," in *Routledge Handbook of Cosmopolitanism Studies*, ed. Gerard Delanty (London; New York: Routledge, 2012), 188-97, at 194.

¹²⁸ Opponent 11, 'Letters', *North Shore Times*, 30 June 2010, at 19.

¹²⁹ James Forrest and Kevin Dunn, "'Core' Culture Hegemony and Multiculturalism. Perceptions of the Privileged Position of Australians with British Backgrounds," *Ethnicities* 6, no. 2 (2006): 203-30, at 208; Justine Dandy and Rogelia Pe-Pua, "Attitudes to Multiculturalism, Immigration and Cultural Diversity: Comparison of Dominant and Non-Dominant Groups in Three Australian States," *International Journal of Intercultural Relations* 34 (2010): 34-46.

¹³⁰ For a discussion of the relation between Christianity and Anglo-Whiteness in Australia see Stratton, "Whiteness, Morality and Christianity in Australia." See also the discussion in chapter two.

¹³¹ Cooper, "Talmudic Territory? Space, Law, and Modernist Discourse," 535. See also Forrest and Dunn, "'Core' Culture Hegemony and Multiculturalism. Perceptions of the Privileged Position of Australians with British Backgrounds," 208-10.

“containing the increasingly active role of non-White Australians in the process of governing Australia.”¹³² By normalising Jewishness in public space, the eruv threatened narratives about St Ives as a white Anglo-Christian space. The contest over the eruv thereby laid bare the ambiguous whiteness of Orthodox Australian Jews. As discussed in chapter two, Australian Jews, especially those from a Western European background, had been able to pass as white in the early days of the colonies. In St Ives, the sense of whiteness that many Jews had of themselves was further entrenched by the fact that many community members in the suburb had migrated from South Africa where apartheid had rendered Jews white.¹³³ For many members of St Ives’ Jewish community, the challenge to their belonging to the dominant white identity came as a surprise, as one of St Ives’ Rabbis explained:

... that’s why the Jewish community got such a big shock, because they consider themselves part of the white mainstream, especially the South Africans. The South Africans grew up under apartheid, where we were not part of the blacks, we were part of the whites, and coming here, all of a sudden they are the Other, and being the Other is very frightening because we’ve only heard about that from our grandparents, we’ve never experienced that as a people in Australia, at least not in any major way.¹³⁴

As the eruv made visible Jewish difference, it exposed the ambivalent relationship between whiteness and Orthodox Jewishness in St Ives.

d. Porous Walls: The Secular Space of St Ives

Another central theme in the opposition to the eruv was the vision of St Ives as a secular space in which religion had to remain in the private sphere – a common claim in many eruv controversies.¹³⁵ Opponents took this stance for two reasons: as a matter of principle regarding the secularity of public space and in order to prevent the eruv from violating the rights of other residents. In survey responses sent to the Council, residents argued that “streets should not be for religious purposes” and stated that they were “against religious matters on public land.” Others objected to the “use of infrastructure for religious purposes” and posited that “public land should be secular.” One submission found that “religion should not be a public matter” and others demanded that religion should be practiced “quietly.” Opponents advanced a vision of St Ives as a well-ordered space in which religion had its

¹³² Ghassan Hage, *White Nation. Fantasies of White Supremacy in a Multicultural Society* (New York; London: Routledge, 2000), 19.

¹³³ Australia, in particular Sydney, had been a preferred destination for Jews migrating from South Africa because of similar climate and an easy-going lifestyle. On the role of South African migrants in Jewish Australia see Rutland, “Reflections on ‘Culture Mavens’ from an Australian Jewish Perspective.”

¹³⁴ Interview with Rabbi 1, Sydney, July 2016.

¹³⁵ See the discussion of the contemporary case law in the previous chapter.

clearly assigned place behind walls in order to prevent it from leaking into the public streets in a secular society.

There is no place for religious symbols on public crown land. Religion in a secular state, such as we are fortunate to enjoy in Australia, is foremost for the homes and then for those places zoned by government, including councils for that purpose.¹³⁶

Another explained that

People come to this suburb because it is still a residential area with peaceful green areas, the houses do not have religious symbols outside advertising to which religion they belong. People go to their places of worship where these symbols belong.¹³⁷

Their arguments, echoing the concerns of Bromberg's Prussian authorities, produce a specific politics of visibility in which the practice of religion is tightly controlled through architecture and designated spaces. While opponents acknowledged that religion is not a purely private exercise for the home, the only legitimate public expression is in designated and circumscribed spaces such as the synagogue, whose walls mimic the walls of the house and therefore do not confront outsiders with the religiosity which is contained inside. By attaching lechis to poles, the eruv spilled religion into the street, turning the halakhic fiction of privatised public space into an affront to the secular order of St Ives's public space.

Residents did not only reject the eruv as a matter of principle to safeguard the secularity of St Ives' public space. For some, the eruv violated their rights, in particular their right to freedom *from* religion, the flip side of the right to freedom of religion – again a common argument in most eruv controversies but always dismissed by courts.¹³⁸ Opponents worried that the eruv would be “imposing religious beliefs” and “assert religious authority” over non-Jews. Another resident feared that “the whole area within the eruv becomes a place of worship.”¹³⁹ Underlying this claim was a view of the eruv as imposing itself on all residents, regardless of whether they are Orthodox Jews or not, thereby exerting undue religious coercion. Eruv supporters disagreed profoundly with eruv opponents over the symbolic impact of the eruv, emphasising that the eruv was a “non-intrusive, almost invisible boundary, which will have no impact on the environment.”¹⁴⁰ Nevertheless, objecting residents often believed that the symbolic meaning of the eruv would indeed affect all residents against their will. They refused the idea that symbolism can exist only for some. In their view, the

¹³⁶ Opponent 18, ‘Letters’, *Sydney Morning Herald*, 26 August 2011, at 10.

¹³⁷ Opponent 17, ‘Letters to the Editor’, *North Shore Times*, 25 June 2010, at 36.

¹³⁸ See my discussion of *Rosenberg v. Outremont (City)* in the previous chapter.

¹³⁹ Opponent 19, ‘Opinion’, *North Shore Times*, 18 March 2011, at 36.

¹⁴⁰ Supporter 4, ‘Opinion/Letters’, *North Shore Times*, 26 August 2011, at 33.

eruv “stained”¹⁴¹ space affecting everyone regardless of their membership in the Jewish community or not. In order to prevent the eruv from encroaching on the “civil rights” of “tolerant” Australians,¹⁴² Jewish difference had to remain private. This was seen as a matter of religious equality before Australian law. As one resident argued, “in Australia all religions are equal and should respect and accept the rule of law in Australia.”¹⁴³ In this understanding, the rule of Australian law did not allow for exclusive access to public space for any religion.

This reasoning of eruv opponents shows the pervasiveness of the public-private distinction, “one of the crucial axes of liberal legalism.”¹⁴⁴ As Sophie Watson argues, “the idea that difference is allowable in private rather than in public, that difference is a private matter for expression outside of the public gaze, remains thoroughly embedded in notions of the social in Western thought.”¹⁴⁵ Scholarly analyses of the eruv frequently identify the transgression of the public-private boundary as a ‘core problem’ in these cases.¹⁴⁶ Benjamin Berger, for example, explains this as a matter of legal aesthetics in which the eruv contravenes the spatial aesthetics that underpin religious freedom by taking private religion into the public. Similarly, Susan Lees speaks of a “tacit agreement among suburbanites to limit the appearance of difference” in order to enable coexistence, an agreement which they eruv does not honour.¹⁴⁷

Explaining the threat of the eruv through its transgression of the public-private distinction misses, however, an important point: the incoherent policing of such transgressions. This is not simply a question of how the spatial order of religious difference may disadvantage religions that cannot be reduced to private faith, although this is certainly part of the problem. Another aspect of this spatial order is the instability or porosity of the boundary between private religion and public itself. Law and religion scholars frequently highlight that the enforcement of the public-private distinction is culturally biased.¹⁴⁸ Anxieties around religious difference and demographic change, as Silvio Ferrari observes, have led to

¹⁴¹ Davina Cooper used the term ‘stain’ to capture eruv opponents’ understanding of the relation between symbolism and space, see Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse,” 534.

¹⁴² Opponent 20, ‘Opinion/Letters’, *North Shore Times*, 9 March 2011, at 21.

¹⁴³ Opponent 7, ‘Letters’, *North Shore Times*, 16 September 2011, at 36.

¹⁴⁴ Nicholas Blomley, “Flowers in the Bathtub: Boundary Crossings at the Public–Private Divide,” *Geoforum* 36, no. 3 (2005): 281–96, at 283.

¹⁴⁵ Watson, “Symbolic Spaces of Difference: Contesting the Eruv in Barnet, London and Tenafly, New Jersey,” 609.

¹⁴⁶ See e.g. Benjamin Berger, *Law’s Religion. Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015), 45–52.

¹⁴⁷ Lees, “Jewish Space in Suburbia: Interpreting the Eruv Conflict in Tenafly, New Jersey,” 68.

¹⁴⁸ For a brief overview of this criticism see Silvio Ferrari, “Religion in the European Public Spaces: A Legal Overview,” in *Religion in Public Spaces. A European Perspective*, eds. Silvio Ferrari and Sabrina Pastorelli (Farnham; Burlington: Ashgate, 2012), 139–56, at 146.

a constant oscillation between the impulse to confine religion more strictly to the private sphere, excluding it from the process of building the national identity, and the desire to strengthen national identity through the revitalization (and therefore re-publicization) of the majority religion(s) only.¹⁴⁹

The result is an inconsistent policing of the public-private distinction that often serves to maintain the privileged status of the majority religion.¹⁵⁰ Public Muslim practices, in particular, have been caught up in the identitarian anxieties of Western societies, most notably in Europe. The idea of Islam as a threat to Western values permeates the European case law, as Susanna Mancini shows, and it is the headscarf that has come to embody this threat *par excellence*.¹⁵¹ In *Dahlab v. Switzerland*, the European Court of Human Rights (ECtHR) sanctioned in 2001 a ban on headscarves for teachers in public schools by noting that

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. ... It cannot be denied that the wearing a headscarf might have some kind of proselytising effect...¹⁵²

While the headscarf is seen as an active and powerful symbol, the Court acknowledged at the same time that “the principle of proportionality has led the cantonal government to allow teachers to wear discreet religious symbols at schools, such as small pieces of jewellery.” In short, the discreet Christian crucifix is tolerated, but the “powerful external” headscarf is not; an approach not limited to the ECtHR, as national legislation and other case law confirms.¹⁵³ The same Court again showed a lenient attitude towards the Christian symbol in its *Lautsi* decision in 2011 concerning the permissibility of the display of a crucifix in an Italian school. Here, the Court deemed the crucifix to be an “essentially passive symbol”¹⁵⁴ and, *de facto*, followed the reasoning of Italian courts which had presented the crucifix as a “symbol of our history and our culture ... and also of the principle of secularism.”¹⁵⁵

¹⁴⁹ Ibid., 145.

¹⁵⁰ For critical analyses of the European case law on the headscarf and the crucifix see Bhuta, “Two Concepts of Religious Freedom in the European Court of Human Rights;” Mancini, “The Tempting of Europe, the Political Seduction of the Cross;” Lori G. Beaman, “Battles over Symbols: The ‘Religion’ of the Minority Versus the ‘Culture’ of the Majority,” *Journal of Law and Religion* 28, no. 1 (2013): 67-104; Lorenzo Zucca, “Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber,” *International Journal of Constitutional Law* 11, no. 1 (2013): 218-29; Joseph H. H. Weiler, “Lautsi: Crucifix in the Classroom Redux,” *European Journal of International Law* 21, no. 1 (2010): 1-6.

¹⁵¹ Mancini, “The Tempting of Europe, the Political Seduction of the Cross.” See also Mancini, “Patriarchy as the Exclusive Domain of the Other.”

¹⁵² *Dahlab v. Switzerland*, European Court of Human Rights, 15 February 2001, Appl. No 42393/98, at 13.

¹⁵³ See e.g. the German state laws and the case law on the wearing of the headscarf by Muslim school teachers discussed in Mancini, “The Tempting of Europe, the Political Seduction of the Cross.”

¹⁵⁴ *Lautsi and Others v. Italy*, European Court of Human Rights (Grand Chamber), 18 March 2011, Appl. no. 30814/06, at para 72.

¹⁵⁵ Mancini, “The Tempting of Europe, the Political Seduction of the Cross,” 123.

Some symbols, Lorenza Zucca notes, are apparently “more neutral than others.”¹⁵⁶ Whereas one religious symbol is allowed into the public as either a watered-down and naturalised cultural symbol or as a negligible passive accessory, the other is prohibited as an active and dangerous agent, proving that the wall of separation is only partially enforced – which feeds into the suspicion that, at times, “secularization is just Christianity by another name.”¹⁵⁷

A similar dynamic was at play in St Ives. Although eruv opponents stressed their commitment to religious equality, they did not take offence at the various Christian symbols in their suburb’s public space. This inconsistency did not go unnoticed among eruv supporters. One asked

Have any of them objected to Christmas decorations in the street and flashing lights installed on many homes during Christmas? Why pick on Jews when the impact is far, far less noticeable?¹⁵⁸

Indeed, a Christmas tree is placed every year in front of the chambers of Ku-ring-gai Council and the Council has given significant annual subsidies to sponsor the Christian event *Carols in the Park*, which takes place in the public Bicentennial Park.¹⁵⁹ While this financial and logistical support does not involve the setting up of permanent structures, it affords Christianity a much more prominent and visible forum as compared to the eruv – a structure that is barely noticeable. Moreover, no public subsidies are given to the eruv, as it is maintained by the Jewish community alone. Mayanthi Fernando argues that under secular configurations of space any public expression of religion “must take place under the sign of sharable culture”.¹⁶⁰ Not sharable practices, such as the headscarf in Fernando’s example, or in St Ives, the eruv, become defined as “excess of religion”,¹⁶¹ associated with religious fundamentalism and political claims, such as the fear of the Jewish take-over of St Ives. The similar responses to the eruv in St Ives and to the headscarf elsewhere serve as a reminder that the boundary between ‘us’ and ‘them,’ drawn by secularist discourse, does not merely run between Christianity and Islam, but may at times include Judaism as a potential Other too.

The fact that eruv opponents remained oblivious to Christian symbols in their public space reflects the prominent and normalised position of Christianity in Australia more generally. Australian society

¹⁵⁶ Zucca, “Lautsi: A Commentary on a Decision by the ECtHRGrand Chamber,” 221.

¹⁵⁷ Nermeen Shaikh, “The Jew, the Arab: An Interview with Gil Anidjar.”

¹⁵⁸ Supporter 5, ‘Your Say – Letters to the Editor’, *North Shore Times*, 12 August 2016, at 30.

¹⁵⁹ Julie Huffer, “Song and Dance over Carols,” *North Shore Times*, 22 October 2010, at 5. The article quotes a Ku-ring-gai Councillor who criticised the Council for its support of a Church event: “It’s not fair for one group to get \$15,000 for one event that will not be attended by all residents. What if the Jewish community said we have an eruv approved by Ku-ring-gai Planning Panel you have given support to churches, why can’t you support us to the same extent?”

¹⁶⁰ Fernando, *The Republic Unsettled*, 139.

¹⁶¹ Ibid.

is often described as highly secular or even ‘post-religious’,¹⁶² yet a large proportion of Australians are still affiliated with Christianity.¹⁶³ Despite the constitutional barrier against the establishment of religion, Christianity continues to enjoy a privileged position reflecting its status as majority religion.¹⁶⁴ The practice of parliamentary prayers, for example, reinforces Christian symbolism in an official public setting. Attempts to change this practice in order to reflect the religiously plural make-up of society have been, to date, unsuccessful.¹⁶⁵ The National School Chaplaincy Programme, introduced in 2006 by the conservative Howard government, provides funding to religious chaplains in state schools. Despite several legal challenges to the programme, the policy is still in place, confirming the government’s sympathetic approach to religion and Christianity in particular.¹⁶⁶ Some argue that “historically Australia is a country as ‘Christianised’ as secular, and, in terms of its values possibly more Christianised than secular.”¹⁶⁷

As an ideal, however, the impartial ‘wall of separation’ still shapes the discourse over the place of religion in the public realm, providing powerful and seemingly neutral arguments which in fact camouflage the special place of majoritarian, hence Christian, values and sentiments that seep into everyday culture and perceptions. In Australia and elsewhere in the world, the appeal to secularism and religious equality functions at times as a selective filter that distributes access to public space unevenly. As Connell and Iveson conclude, the push back against the Jewish eruv in St Ives offers an example of “apparently inclusive ideals of ‘neutral’ and ‘open’ public access working to exclude groups who may not fit within particular majoritarian norms that masquerade as universal.”¹⁶⁸

¹⁶² This is often more assumed than “carefully worked out”, argue Stephen Chavura and Ian Tregenza, “Introduction: Rethinking Secularism in Australia (and Beyond),” *Journal of Religious History* 38, no. 3 (2014): 299-306, at 301.

¹⁶³ In the 2016 census, 57.7 percent of people in Australia stated Christianity as their religious affiliation. See http://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/036

¹⁶⁴ Evans, “Religion and the Secular State in Australia,” 87.

¹⁶⁵ Margaret Davies, “The Future of Secularism: A Critique,” in *Law and Religion in Public Life. The Contemporary Debate*, eds. Nadirsyah Hosen and Richard Mohr (London and New York: Routledge, 2011), 52-66, at 60. Some argue that the prayers are in fact unconstitutional, see Luke Beck, “Official Prayers in Federal Parliament are Divisive and Unconstitutional and Should Be Scrapped,” *The Conversation*, 22 August 2017, <https://theconversation.com/official-prayers-in-federal-parliament-are-divisive-and-unconstitutional-and-should-be-scrapped-81673>.

¹⁶⁶ Emma Rowe, “Religion in Australian Schools: An Historical and Contemporary Debate,” *The Conversation*, 23 August 2017, <https://theconversation.com/religion-in-australian-schools-an-historical-and-contemporary-debate-82439>

¹⁶⁷ Stuart Piggin, “Power and Religion in a Modern State: Desecularisation in Australian History,” *Journal of Religious History* 38, no. 3 (2014): 320-40, at 322.

¹⁶⁸ Connell and Iveson, “An Eruv for St Ives? Religion, Identity, Place and Conflict on the Sydney North Shore,” 443.

III. Conclusion: Ambivalent Neighbours

The wires of the eruv make visible how residents patrol, maintain, and defend spatiolegal boundaries against those they perceive as Others by mobilising the arguments, language, and tools of the local planning regime.¹⁶⁹ The participatory nature of the planning process allowed objecting residents in St Ives to channel ambivalence towards their Jewish neighbours through the powerful legal vocabulary of planning aesthetics, multiculturalism, and secularism, rendering Orthodox Jews as strangers in the suburb. Similar to the German debate over circumcision, opponents in St Ives viewed the eruv and its users through an Orientalist gaze¹⁷⁰ positioning themselves in a “flexible superiority” to Jews through a number of discourses without “ever losing the relative upper hand.”¹⁷¹ As Didi Herman notes, an Orientalist view of Jewishness is grounded in a civilisational argument¹⁷² in which ‘our’ culture appears as modern, rational, and measured, whereas Judaism is archaic, fanatic, and irrational.

Whereas in the German case this orientalising language was obscured by legal and medical language, in St Ives, this language was channelled through the terms and tools of planning law. Eruv opponents presented themselves as law-abiding and rational residents in contrast to Shabbat-observant Jews whom they portrayed as pushy newcomers who had overstepped the rules of acceptable behaviour: They had made their difference public, thereby openly challenging the cultural dominance of the majority and undermining the implicit demand of non-majority identities to remain private and invisible. What the opposition made clear is that Jewish difference is only accepted up to a point. The point where it does not threaten the right of the majority to define the cultural and religious landscape on their own terms, and thereby not to be confronted with Otherness. Jewish presence in space is rightful and acceptable as long as it remains within well-defined containers and does not leak into the streets. By not conforming with these demands, Jews were perceived as what Nirmal Puwar describes as ‘space invaders’:

Some bodies are deemed as having the right to belong, while others are marked out as trespassers, who are, in accordance with how both spaces and bodies are imagined (politically, historically and conceptually), circumscribed as being ‘out of place’.¹⁷³

The encounter with the eruv brought the ambivalence of many St Ives residents towards their Jewish neighbours to light. Ambivalence, as I emphasised in chapter one, is not the same as Antisemitism. As Tony Kushner remarks, ambivalence is an attitude that supports some Jews while it opposes

¹⁶⁹ Many of the arguments made by St Ives opponents are remarkably similar to the arguments observed by Davina Cooper in her analysis of the Barnet eruv: Cooper, “Talmudic Territory? Space, Law, and Modernist Discourse.”

¹⁷⁰ For Orientalism’s relation to Jews and Judaism see the discussion in chapter one and two.

¹⁷¹ Said, *Orientalism*, 7.

¹⁷² Herman, *An Unfortunate Coincidence*, 14–16.

¹⁷³ Nirmal Puwar, *Space Invaders: Race, Gender and Bodies out of Place* (Oxford; New York: Berg, 2004), 8.

others.¹⁷⁴ The Jews who are supported are westernised Jews who comply and assimilate to dominant norms by keeping their difference private and mostly invisible within spatially circumscribed boundaries, such as the synagogue. The eruv troubled this quietism by attempting to normalise Jewish identity in public space and to set it *on par* with dominant norms. For many residents, this attempt to normalise and integrate visibility of Jewish difference on equal footing appeared to threaten their dominance in the suburb. The contest over the eruv revealed that the acceptance of Shabbat-observant Jews in St Ives depended for many residents on compliance with the dominant cultural norms of the suburb.

¹⁷⁴ Kushner, “Anti-Semitism in Britain: Continuity and the Absence of a Resurgence?,” 441.

7 LAW'S

AMBIVALENCE

Conclusion

During the early stages of my research I met a middle-aged man in his modest office at the end of a dark corridor on the campus of an Australian university. He described himself as a ‘high-holiday Jew’, by which he meant that he attended synagogue only once a year for Yom Kippur, the day of atonement. I asked him about being Jewish in Australia and after giving my question a few seconds of thought, he replied: “I do think that Australia is a Judeo-Christian country. However, for me as a Jew, it is all about visibility. You just don’t make it too visible that you are a Jew.”¹ His words allude to a tension around Jewish difference, oscillating between inclusion and affirmation on the one hand, and invisibility and exclusion on the other. It is a tension that manifests in affirmations of Jewish belonging to Western societies as ‘Judeo-Christian societies’ on the one hand and rejections of practices that mark Jews as distinct on the other. This thesis has approached this tension as it appears in legal discourse through a close investigation of two specific legal encounters with Jews, Jewishness, and Judaism in conflicts over male circumcision and an eruv. Over the course of six chapters, I have developed the argument that, despite persistent claims about its neutrality and objectivity, the law is not immune to semitic discourse, a discourse that renders Jews as different. My research highlights the enduring significance of ‘the Jew’ as Other, showing not only how acceptance of Jews into mainstream cultures is less stable than many scholars have assumed, but also how law can be mobilised to challenge this acceptance. This research therefore emphasises the need to pay attention to law as a site for the construction of Jewish difference and the relevance of integrating the Jewish experience into existing theorising of law, religion, and race.

In this concluding chapter, I revisit the major findings of the thesis and discuss what the Jewish experience contributes to the study of law and its Others. In the first part, I highlight the relevance of law as a site for the representation of ‘the Jew’ as Other and summarise the legal techniques through which Jews are constructed as different in legal discourse. The second part of the chapter

¹ Interview with A., Australia, April 2015.

discusses the implications of these findings for the literature on the legal construction of religious and racial difference and addresses the space in between binaries that underpin much of this literature. After this account of law as a tool for domination and exclusion, the third part of this chapter turns to another commonality that weaves through both cases: the role of law as a source for successful resistance to exclusion. By discussing some of the ways in which law functioned as a source of resistance for Jews and their supporters, this part questions not only a monolithic picture of a law as hegemonic and oppressive but also of Jews as powerless.

I. Constructing Jewish Difference in Law

Guided by the question of how Jews are constructed in legal discourse, this thesis took a cultural approach to law and analysed images and representations of 'the Jew' in two contemporary legal encounters with male circumcision and an eruv. By placing the notion of ambivalence at the heart of this research, my inquiry went beyond investigating classic Antisemitic stereotypes and imagery in order to capture a range of complex attitudes towards Jews – all of which perceive 'the Jew' as different – and the ways in which these ambivalent attitudes are translated into and transmitted through law. In this first part of this chapter, I discuss law as a site for the representation of Jewish difference and then summarise two legal techniques through which Jews are constructed as different.

a. Law as a Site for the Construction of Jewish Difference

The legal construction of Jewish difference has received scant attention in the critical legal literature on race and religion. A notable exception is the pioneering work of Didi Herman and Davina Cooper who have analysed the English judicial encounter with Jews, Judaism, and Jewishness, shedding light on how processes of racialisation and orientalisating underpin these encounters.² But apart from Herman's and Cooper's work, Jews have so far remained an understudied group in this body of critical scholarship. The lacuna is remarkable given the significance of 'the Jew' as Other in the Western imagination. Scholars in the humanities have provided many important insights about the construction of the figure of 'the Jew' and its various permutations.³ David Nirenberg, for example, reminds us of the work done by the figure of 'the Jew' throughout the history of Western thought, which produced its own 'Jew' as a foil, often with serious implications for real existing Jews, whereas James Shapiro highlights the way that Jewish questions have provided a forum for the cultural and

² Herman, *An Unfortunate Coincidence*; Herman, "The Wandering Jew Has No Nation"; Herman, "An Unfortunate Coincidence: Jews and Jewishness in Twentieth-Century English Judicial Discourse;" Cooper and Herman, "Jews and Other Uncertainties: Race, Faith and English Law."

³ E.g. Shapiro, *Shakespeare and the Jews*; Nirenberg, *Anti-Judaism: The Western Tradition*; Cheyette, *Constructions of 'the Jew' in English Literature and Society. Racial Representations 1875-1945*; Gilman, *The Jew's Body*.

social anxieties of societies – in his particular case study, Victorian England.⁴ However, given this literature's disciplinary focus, the role of law in the construction of Jewish difference has remained under-explored.

In his study *The Jew's Body*, Sander Gilman points to the continuities of images of the Jews in the West throughout the modern era. Gilman argues that over the course of history the perception of Jews as different has not changed. Instead, what has changed is the vocabulary to construct and justify this difference. Gilman highlights the role of science, particularly medicine, biology, and anthropology, in the nineteenth century as such a vocabulary that helped to secularise Jewish difference that had previously been imagined in mainly theological terms.⁵ The claim of scientific knowledge to universality and neutrality, Gilman notes, gave these scientific representations of Jewish difference a powerful status in a new era shaped by the authority of science.⁶ In this thesis, I have drawn attention to a different, similarly powerful vocabulary for the construction of Jewish difference, the vocabulary of law, or, respectively, in the case of circumcision, to a marriage between law and science. My thesis therefore highlights the significance of law as site for the construction of 'the Jew.'

Building on the work of Didi Herman and Davina Cooper, this thesis has aimed to reduce a gap in the critical literature on the legal construction of religious and racial difference by paying attention to Jews as Others in legal discourse. While Herman and Cooper have focussed their analysis on English judicial discourse, my thesis goes outside the courtroom in order to investigate the construction of Jewish difference in two particular moments of law-in-action in two different jurisdictions, showing how the language, arguments, and tools of law are mobilised to construct Jewishness as different. The analysis highlights how a particular cultural repertoire – 'the Jew' as Other – is woven into legal language and arguments in different legal cultures, Germany and Australia, and in two different fields of law – constitutional law in Germany and planning law in Australia.

Despite differences between the two cases, I found many similarities in the legal techniques through which Jews are constructed as different. In the following sections, I describe two legal techniques – legal Orientalism and the rendering of (Christian) hegemonic culture as the universal, yet unstated, norm – and locate these two techniques within the critical literature on law, religion, and race. These two techniques frequently overlap, intersect, and co-depend.

⁴ Shapiro, *Shakespeare and the Jews*.

⁵ See the discussion of the racialisation of Jewish difference through the pseudo-science of race in chapter two.

⁶ Gilman, *The Jew's Body*, 235.

b. Legal Orientalism

One important legal technique through which Jews are constructed as Others, evident in both case studies, is orientalising legal language and arguments. Orientalism, as I described in chapter one, is a discourse that establishes a binary between 'us' and 'them' on a civilisational continuum in which 'they' are inferior to 'us.' There are of course variations in Orientalist discourses depending on their geographical context, but what unites them is their presumed oppositional "relation between an exoticized and irrational Other and a civilized rational Occident."⁷ Scholars argue that legal Orientalism has played a central role in the European encounter with other peoples by "providing an ideological and conceptual frame" through which to manifest and justify Western discourses about Others through the authoritative voice of law.⁸ While the critical literature on law and religion has long acknowledged the role of Orientalism in today's legal encounter with Islam, Jews have, as I noted in chapter one, remained largely absent from such analyses – despite their historical role in Orientalist thought.⁹

Chapter two offered historical illustrations of how Jews were subjected to Orientalist thought, noting for example how Jews were perceived as 'Asiatics' and hence as foreign in the works of German Enlightenment thinkers who intervened in the debate about the possibility of Jewish emancipation. The idea of Jews as 'Asiatic' aliens also appeared in the White Australia Policy, operating between 1901 and 1973, and raised questions about Jewish belonging to a nation defined as white. Chapter four and six explored how legal Orientalism has shaped two particular contemporary legal encounters with Jewishness. In the case of male circumcision in Germany, a certain vocabulary enabled critics to discuss male circumcision within a paradigm of mutilation that was pervaded by Orientalising language. Critics of circumcision drew on notions of 'violence,' 'abuse,' and 'cruelty' in order to describe circumcision, painting a picture of Jews as primitive savages who treated their children like cattle. This language, I argued, aims to replicate the horror that has accompanied debates about practices of female genital cutting, creating yet another innocent child victim of a dangerous and ignorant Other.¹⁰ In many ways, the German legal debate over male circumcision echoes the discourse on FGC which often remains within a "modernity/barbarism paradigm" in which modern secular law comes to the rescue of the subaltern woman, an external Other.¹¹ In the case of male

⁷ Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge: Cambridge University Press, 2013), 49.

⁸ Ibid. On the variants and historical legacies of legal Orientalism see also Teemu Ruskola, *Legal Orientalism. China, the United States, and Modern Law* (Cambridge; London: Harvard University Press, 2013).

⁹ Kalmar and Penslar, *Orientalism and the Jews*.

¹⁰ See e. g. the critique by Juliet Rogers, "A Child Is Being Mutilated," *Australian Feminist Studies* 24, no. 60 (2009): 181-94; Moruzzi, "Cutting through Culture;" Green and Lim, "What Is This Thing About Female Circumcision?"

¹¹ Moruzzi, "Cutting through Culture," 205.

circumcision, however, the civilising mission turns inwards, aiming to safeguard the child of an internal Other through German law.

In Australia, too, eruv opponents deployed an Orientalist imagery to contest the construction of an eruv in St Ives through the planning process. This language not only presented the eruv but also Shabbat-observant Jews as deeply alien to the suburb and, in the arguments of opponents, to Australia as a whole. Opposing residents depicted Jews as unruly and disruptive invaders of their neighbourhood's amenity, as is protected by planning law. The eruv was interpreted as the Trojan horse of a dangerous and underhand coloniser who threatened to marginalise culturally and spatially St Ives's rightful inhabitants, turning them into the new dispossessed. Objectors described Jews as both ignorant of modern Australian law and stuck in their own premodern legalistic tradition, which was set in an implicit contrast to the community of law-abiding residents of St Ives, thereby drawing on a common Orientalist binary between a lawful 'us' and a lawless 'them'.¹² Through each of these oppositions, Jews were constituted as the dangerous, unreasonable, and ignorant Other, who brought disorder into the spatiolegal order of St Ives, a threat to be contained by the civilising discipline of the planning regime.

As Herman has emphasised, "missions to 'improve others' are not just about 'over there', but also about 'right here'."¹³ In both cases discussed in this thesis, the Orientalist depiction of Jews as in need of civilisational reform highlights the relevance of including Jews into analyses of how modern law becomes implicated in perpetuating Orientalist thinking. The insights of this thesis therefore challenge the common scholarly conclusion that "Jews... have now joined mainstream religions and been replaced as the 'other' by Muslims."¹⁴ Instead, my analysis suggests that Jews may continue to be imagined as Others – sometimes alongside Muslims, as in the German case. This research thus provides a contemporary illustration of Gil Anidjar's observation that, historically, both Jews and Muslims have functioned as Others in the Christian-European imagination.¹⁵ This important observation is missed if Jews are identified uncritically with Judeo-Christianity or whiteness and therefore assumed to be immune to legal Orientalism. Moreover, the assumption that Jews have ceased to be perceived as Others by mainstream cultures may inadvertently perpetuate the belief that ambivalent perceptions of Jews are only a problem of a deviant societal fringe.

¹² Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches*, 49.

¹³ Herman, *An Unfortunate Coincidence*, 97.

¹⁴ Susanna Mancini and Michel Rosenfeld, "Introduction," in *Constitutional Secularism in an Age of Religious Revival*, eds. Susanna Mancini and Michel Rosenfeld (Oxford; New York: Oxford University Press, 2014), xv-xxi, at note 46 on xxii.

¹⁵ Anidjar, *The Jew, the Arab: A History of the Enemy*.

c. The Unstated Norm: Hegemonic Culture and the Role of Christianity

A second important technique for the legal construction of Jewish difference that ran through both case studies is the universalising of the hegemonic culture as the unstated norm. This enabled not only the construction of Jews as different but also provided a powerful justification for the sanctioning and containment of this difference. Leti Volpp describes hegemonic culture as

characterized less by what it is than by what it is not: raceless, classless culture that could not be attributed to any particular subculture of ... society. What is considered to be hegemonic culture, the culture of the norm, is a flexible concept that constricts and expands in different contexts, depending upon who 'we' are considered to be.¹⁶

Hegemonic culture is often experienced as invisible and even rendered invisible as the norm, yet this norm comes to undergird legal claims as unstated assumption.¹⁷ Critical legal scholars have long shown how a belief in law's neutrality, objectivity, and universality contributes to the naturalising of Western hegemonic culture and its various dimensions such as gender, race, and religion, thereby allowing whiteness, maleness, and Christianity to figure as the invisible, yet natural and rightful norm to which to aspire. Scholars in the field of whiteness studies, for example, often describe whiteness as having an invisible quality,¹⁸ whereas the critical secularism literature notes how the role of Christianity is muted in dominant understandings of secularism as a universal concept.¹⁹ Claims to universality or references to equality that frequently underpin legal discourse are a common technique in order to demand assimilation to these dominant norms in the name of law, while obscuring the role of a particular culture for interpretations of law. But an unstated, submerged, and concealed norm nonetheless remains a particular cultural norm. "The unstated point of comparison," Martha Minow writes, "is not neutral, but particular, and not inevitable, but only seemingly so when left unstated."²⁰ One aim of this thesis was therefore to critically investigate the unstated norm in each of the cases and to explore some of its particularistic content.

It is, however, not possible to capture the precise and entire content of the cultural norm in each case. As I noted in the first chapter, this is because the 'us' of this cultural norm only gains contours through what it is not. It is, however, possible to note, based on my reading of the two specific cases, the influence of Christianity on this culture and its relation to Jewishness, which remained submerged in references to secularism as an apparently neutral legal principle. In both the German and the

¹⁶ Volpp, "Blaming Culture for Bad Behavior," note 30 on 94.

¹⁷ Minow, *Making All the Difference: Inclusion, Exclusion, and American Law*.

¹⁸ See e.g. Garner, *Whiteness*, 34-47

¹⁹ See e.g. Mancini, "The Tempting of Europe, the Political Seduction of the Cross."

²⁰ Martha Minow, "The Supreme Court 1986 Term – Foreword: Justice Engendered," *Harvard Law Review* 101, no. 1 (1987): 10-95, at 32.

Australian contexts, I argued that Christianity operated in relation to several norms, most notably in norms that were expressed in relation to ‘the body of the child,’ ‘public space,’ and ‘religion.’ By speaking of Christianity, I do not wish to reduce it to a homogeneous tradition. I rather understand it, following Herman, as not only a set of theological principles but also as “ways of knowing and being that are articulated, in legal as well as in political and popular culture, as non-religious or secular, and, in mainstream forms, associated with reason, civility, and progress.”²¹ But as critical law and religion scholarship has highlighted, despite their particular historical lineage these values are frequently presented as ‘secular,’ ‘neutral,’ or ‘universal’.²²

In the German debate on male circumcision, critics presented the uncircumcised body of the male child as the universal secular and natural norm. But from a Jewish perspective, the uncircumcised body is not necessarily the secular and natural body onto which all identities can be inscribed. Rather, being uncircumcised is also the marker of the Christian body, especially given that the rejection of a circumcision of the flesh and its replacement with the circumcision of the heart has been a central narrative of Christian antagonism towards Judaism, as I noted in chapter three and four. By positing the uncircumcised body as the secular and natural norm, the Christian body is universalised and sanctioned as the neutral legal norm, to be protected through the rights of the child, most notably his right to bodily integrity and his right to an open future, a future which he must enter uncircumcised. My reading of the German legal encounter with (Jewish) male circumcision thus provides another example of how human rights can be invoked as part of a civilising mission, in this case for one that aims to save the Jewish male child from the supposed tyranny of religion, culture, and tradition.²³ While scholars have shown how the female body – the body of both women and girls – has served as a site for this “symbolic confrontation”,²⁴ the case of male circumcision takes this confrontation to the male body of boys, pointing to the complex intersections of law, gender, and cultural difference.

Whereas in the German case the body of the child figured as an apparently blank canvas, in St Ives, it was the public space. Eruv opponents advanced a particular vision of public space as well-ordered, secular, and accessible for all, in which no religion should be given preferential treatment. Although eruv objectors grounded their opposition in arguments about religious equality, they failed to acknowledge the public presence of Christianity in the same way. The suburb’s majority religion of Christianity remained invisible as a natural background culture, making it therefore exempt from this strict secular spatial regime. Operating as culture allowed the Christian heritage of the suburb to retain

²¹ Herman, *An Unfortunate Coincidence*, 18.

²² See e.g. Ibid., 18-19; Fernando, *The Republic Unsettled*; Mancini, “The Tempting of Europe, the Political Seduction of the Cross;” Mancini “To Be or Not to Be Jewish;” Asad, *Formations of the Secular: Christianity, Islam, Modernity*. See also my discussion of this literature in chapter one.

²³ On human rights as a civilising project see e.g. Makau Mutua, “Savages, Victims, and Saviors: The Metaphors of Human Rights,” *Harvard International Law Journal* 42, no. 1 (2001): 201-45.

²⁴ See e.g. Benhabib, “The Return of Political Theology,” 453.

its spatial hegemony. The downplaying of Christianity to culture is not unique to St Ives. As I noted in chapter six, this has been a common legal technique to assert Christian hegemony in the public space, most evident in the disparate treatment of Christian versus Muslim symbols. The way that opponents in St Ives presented the eruv as an active religious symbol threatening the secular order shares many similarities with the ongoing discussions about the public presence of Christian symbols such as the crucifix across Europe, which courts and legislators have frequently interpreted as benign and passive symbols of a shared culture, as opposed to Muslim symbols, such as the headscarf. The interpretation of the eruv through its opponents as an active and threatening symbol – much like the headscarf – provides another example for the scholarly critique that some symbols are treated as more neutral than others.²⁵

The way that, in both cases, narratives of Christian superiority are replicated under the veil of secular law is unsurprising given the relevance of Christian knowledge for modern understandings of secularism. This thesis paid attention to one particular aspect of Christian knowledge by investigating how the ambivalence towards Judaism as one important feature of Christianity continues to resonate and is replicated in encounters between Jewishness and dominant notions of secularism. I followed the argument made by scholars such as Stephen Feldman, Ari Joskowitz, Ethan Katz, and Robert Yelle who emphasise the significance of Christian antagonism towards Judaism for the emergence of secular rule.²⁶ One site where this antagonism manifested historically was the distinction between the secular public sphere and the private space of religion which was forced onto Jews as a prerequisite for their emancipation during the nineteenth century. Chapter two thus described how Judaism had to be transformed into a religion in the Protestant-Christian in order to be emancipated, illustrating how the inclusion and acceptance of Jews in Western societies was to some extent premised on their becoming more Christian.

The demand to transform Judaism into first and foremost a matter of belief in mimicry of Protestant Christianity continues to permeate the two contemporary encounters with Jewishness through male circumcision and the eruv, reiterating the significance of Protestant Christianity as a benchmark for what is appropriate religiosity. As an unstated norm for religiosity, the prioritisation of belief may serve to reinforce a hierarchical and oppositional relationship between Christianity and Judaism as a central feature of Western semitic discourse. In both cases, opponents of the practices in question indeed advanced such a vision of proper religion that prioritised belief over practice. In Germany, critics of circumcision located inner belief as the proper site of religiosity, while demanding the subjection of public practice of religiosity to strict rational scrutiny. At the same time, as chapter three and four suggested, the devaluation of circumcision in the German case also cannot be separated

²⁵ Zucca, "Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber;" Mancini, "The Tempting of Europe, the Political Seduction of the Cross."

²⁶ Feldman, *Please Don't Wish Me a Merry Christmas*; Joskowitz and Katz, "Rethinking Jews and Secularism;" Yelle, "Imagining the Hebrew Republic."

from the entrenched discourse on *brit milah* as the dividing marker between Judaism and Christianity and circumcision's role as a trope for difference in Western discourse more generally.

In St Ives, opposition to the *eruv* also drew on a notion of privatised religion in order to reject the *eruv* as a form of public religiosity. Appeals to a strict wall of separation between religion and state itself, although only thinly supported by Australian law itself, provided the justification for a particular regime of secular spatial governance in which religion was to be contained behind walls in the name of separation. By leaking into the street and therefore into the public space, the *eruv* was seen by its opponents as undermining this strict spatial separation in which religion was to be relegated to the private. However, as already noted, the strict separation proved porous when it encountered Christianity. As the case of male circumcision and the *eruv* illustrate, the public-private distinction embedded in this notion of religion continues to regulate boundaries of acceptable Jewishness today,²⁷ thereby replicating some of the historical Christian antagonism towards Judaism as a religion of law and practice.

The rendering of the uncircumcised body as natural in the German case, the downplaying of Christianity's presence in public space as culture in St Ives, and the privatisation of religion in both cases all serve to universalise the hegemonic culture, thereby perpetuating the cultural dominance of white Christian-Europe as the unstated norm.²⁸ By emphasising the persistence of (Christian) ambivalence towards Jews, Judaism, and Jewishness in both cases, I neither wish to suggest either that this ambivalence towards Jews is as rife as in the past nor that ambivalence is the main motivation in these two cases. Such disputes always unfold at the crossroad of many intersecting discourses and involve wider questions about the tensions between universalism and particularism, about the relation between majorities and minorities, and about living with difference. I also do not intend to draw a straight line from past to present and to see today's ambivalence as the simple continuation of historical Christian anti-Judaism. I agree here with Robert Hefner, who warns against the "overintellectualisation" of conflicts regarding religious difference as merely a result of certain philosophical genealogies.²⁹ My thesis suggests however that the persistence of Jewish questions in Western history and the enduring relevance of thinking about Jews as "both inherently Other" and "as potential citizens",³⁰ which emerged in the two case studies, indicates that the past continues to affect the way we think about our present.³¹

²⁷ For this argument see e.g. Levitt, "Impossible Assimilations, American Liberalism, and Jewish Difference: Revisiting Jewish Secularism;" Galchinsky, "Glimpsing Golus in the Golden Land."

²⁸ For a similar conclusion see e.g. Feldman, *Please Don't Wish Me a Merry Christmas*, 266.

²⁹ Robert A. Hefner, "Varieties of Religious Freedom and Governance: A Practical Perspective," in *Politics of Religious Freedom*, eds. Winnifred Fallers Sullivan, et al. (Chicago; London: University of Chicago Press, 2015), 127-34.

³⁰ Cheyette, "English Anti-Semitism: A Counter-Narrative," 22.

³¹ Nirenberg, *Anti-Judaism: The Western Tradition*. See also Jonathan Boyarin, *Storm from Paradise: The Politics of Jewish Memory* (Minneapolis: University of Minnesota Press, 1992), xv.

II. Jewish Others: Same but Different?

In the first chapter, I noted that the way Jews are still imagined as Others has not been adequately captured by the literature on the religious and racial construction of difference, as Jews seem to fall through the binaries that underpin much of this work. Postcolonial theory, on the one hand, with its emphasis on the relation between the coloniser and the colonised which informs much of the important critical work on law and religious difference seems to locate privilege and hegemony within the Judeo-Christian tradition, whereby contemporary Jews become associated with dominance. In critical race approaches to law, on the other hand, Jews have remained largely absent, probably because of their association with whiteness, particularly in a North American context. But as Herman and Cooper have already shown, the story is more complex. The way that Jews continue to be rendered as Others contradicts the idea that Jews have been fully accepted as equals by the dominant cultural group.

Studying the Jewish experience provides important insights for the critical analysis of secularism as a framework to manage religious difference. The encounter with Jewishness has shaped crucial distinctions that the critical scholarship on secularism seeks to deconstruct and contextualise historically. Moreover, the contemporary othering of Jews that I examined in this thesis indicates the importance of acknowledging the significance of 'internal Others' for the construction of dominant identities in the West. Many of the legal technologies that I observed in the two cases are of course not unique to encounters with Jews but have similarities to the way that other non-Christian groups, most notably Muslims, are constructed as different. This similarity is most evident in the German case on male circumcision, where both Jews and Muslims took on the role of Others. Although the Australian eruv concerned a solely Jewish practice, scholarly analyses of conflicts regarding the construction of mosques also reveal many similarities in language and arguments.³² These similarities invite further study of the parallels between contemporary Muslim questions, in which Islam is rendered as a threat to Western values, and historical and contemporary Jewish questions – two of which I analysed in this thesis. Such a comparative study could provide important insights about the shared history of European-Christian prejudice towards Jews and Muslims, which remains buried as long as Islamophobia and Antisemitism/ambivalence towards Jews are played off against each other.³³

³² See e.g. Dunn, "Representations of Islam in the Politics of Mosque Development in Sydney."

³³ Bryan Cheyette has made a similar point by arguing against binaries and what he describes as supersessionist thinking in postcolonial theory in which Jews are seen as past victims. Encouraging placing Jewish and postcolonial studies in critical dialogue, Cheyette notes that supersessionist thinking "makes it impossible to find connections in the past and in our most urgent present between different forms of dehumanization – orientalism, anti-Semitism, and Islamophobia". See Bryan Cheyette, "Against Supersessionist Thinking: Old and New, Jews and Postcolonialism, the Ghetto and Diaspora," *Cambridge Journal of Postcolonial Literary Inquiry* 4, no. 3 (2017): 424-39, at 439. For a similar argument see also Gil Anidjar, "Can the Walls Hear?," *Patterns of Prejudice* 43, no. 3-4 (2009): 251-68, at 267. See also Anidjar, *The Jew, the Arab: A History of the Enemy*. For studies on the relation between Islamophobia and Antisemitism see e.g.

Studying the Jewish experience could also yield important insights for critical race approaches to law. Although processes of racialisation have not been the focus of this research, which has instead drawn on a more flexible notion of difference, it is possible to note that the construction of Jewish difference, in particular through legal Orientalism, also carries a racial component in the way it renders Jews as cultural Others. It is a racism in the sense of Etienne Balibar's understanding of cultural racism, a "racism without race" that foregrounds cultural and religious differences.³⁴ The othering of Jews in both cases thus points to the need to acknowledge the relevance of religion for racial otherness. Moreover, the othering of Jews in both cases invites further reflection on the precarious relationship between Jewishness and whiteness as it manifests in the law. The othering of Jews is a reminder to study racialisation beyond evident colour-lines, a task that scholars such as Cynthia Levine-Rasky, Eric Goldstein, Karen Brodtkin³⁵ and, more broadly, the (European) field of whiteness studies³⁶ have already begun. Jewishness, which continues to trouble the categories of modern notions of religion, race, nationality, and ethnicity, as I discussed in chapter one and two, invites a more careful consideration of how religion, race, and other categories of difference relate to each other and are conceptualised in law.

One of the aims of this thesis was to better understand the tensions around Jewish difference. It is a tension which oscillates between inclusion – embodied, for example, in the discourse of Judeo-Christianity – and exclusion – as analysed in this thesis. It is also a tension of perception, as Cheryl Greenberg explains it, "the tension between Jewish self-perception of vulnerability and external perception of Jewish security," which highlights the uncomfortable Jewish relationship with multicultural theory.³⁷ These tensions seem to be among the reasons for the lack of scholarly engagement with the Jewish experience of legal othering. The persistence of Jews as Others, past and present, indicates the necessity to integrate the Jewish experience into scholarly theorising of how law is engaged in and mobilised for the construction of difference.³⁸ While it would go beyond the scope of this thesis to offer such a theoretical integration, scholarship in the fields of history and social theory offers more nuanced terminology as a useful starting point to think about Jewish difference. Michael Galchinsky once noted that "Jews *as* Jews are neither margin nor center, and there is no middle. And we don't have a patch on the multicultural quilt."³⁹ This scholarship pays

James Renton and Ben Gidley, eds., *Antisemitism and Islamophobia in Europe. A Shared History?* (London: Palgrave Macmillan, 2017).

³⁴ Balibar, "Is There a 'Neo-Racism'?"

³⁵ Levine-Rasky, "White Privilege. Jewish Women's Writing and the Instability of Categories;" Goldstein, *The Price of Whiteness*; Brodtkin, *How Jews Became White Folks and What That Says About Race in America*.

³⁶ See e.g. Garner, *Whiteness*.

³⁷ Cheryl Greenberg, "Pluralism and Its Discontents," in *Insiders/ Outsiders. American Jews and Multiculturalism*, eds. David Biale, Michael Galchinsky, and Susannah Heschel (Berkeley; Los Angeles; London: University of California Press, 1998), 55-87, at 61.

³⁸ For a similar argument see Herman, *An Unfortunate Coincidence*, 13-14.

³⁹ Galchinsky, "Glimpsing Golus in the Golden Land," 366.

attention to this patch in the middle. The common thread in this literature is its strong interest in the dynamic space, the liminal zone, between inclusion and exclusion that stark binaries fail to capture.

One way to understand the boundary position of Jews within the social hierarchy of Others is to draw on Zygmunt Bauman's concept of the stranger, a figure he developed with the Jewish experience in mind through his socio-philosophical analysis of modernity. The idea of the stranger highlights the ambiguous nature of identity formation by drawing attention to the borderland between 'us' and 'them,' between inside and outside. "There are friends and enemies. And there are *strangers*," writes Bauman.⁴⁰ Strangers are those who fall in between categories, those who are neither/nor. Strangers emerge from the quest for order, which Bauman identifies as the central feature of modernity. Strangers are the ones who cannot be included into binary oppositions – they are undecidables.⁴¹ This makes the stranger inherently ambivalent and thus a potential threat, as one cannot know if the stranger belongs or not. For Bauman, Jews are the paradigmatic strangers whose sameness, despite their efforts at assimilation, is never fully trusted. Ambivalence or, in Bauman's terms, Allosemitism,⁴² is in fact the corresponding reaction to the ambivalent boundary position of the Jewish stranger. Fears of the hidden and disguised stranger do not necessarily take the path of destructive violence, but often manifest as an enduring and subtle, yet forceful, domination.⁴³ Jewish history exemplifies the pendulum of domination, which has swung from pressure to assimilate to expulsion, and ultimately, in its most extreme form, to extermination. Today, however, the pendulum of domination has swung back to an often-concealed pressure to assimilate, as manifested, for example, in the legal Orientalism and the comparison with an unstated hegemonic norm in both cases discussed in this thesis.

Being caught between inclusion and exclusion, temporarily or continuously, is of course not a unique Jewish experience, as historians studying the racialisation of certain European immigrants to the United States show. David Roediger uses the term 'inbetweenness' to capture the historical racial experience of those who sat between the colour binary that racially structured US society – most notably immigrants from Eastern and Southern Europe, and the Irish.⁴⁴ Although often classified as white on arrival, the status of these immigrant groups was more ambiguous and uncertain. They were "neither securely white nor non-white" and thus inbetween.⁴⁵ While these inbetween people did not

⁴⁰ Zygmunt Bauman, "Modernity and Ambivalence," *Theory, Culture & Society* 7, no. 2 (1990): 143-167, at 143. Emphasis in original.

⁴¹ Zygmunt Bauman, *Modernity and Ambivalence* (Ithaca: Cornell University Press, 1991), 55.

⁴² Allosemitism, like the term ambivalence, is grounded in a perception of Jews as different. See the discussion of ambivalence, semitic discourse, and Allosemitism in chapter one.

⁴³ Zygmunt Bauman, "Racism, Anti-Racism, and Moral Progress," *Arena Journal*, no. 1 (1993): 9-21, at 10.

⁴⁴ 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).

⁴⁵ Ibid., 12. Roediger's notion of inbetweenness is inspired by the work of Robert Orsi and John Higham, see John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (New Brunswick; London: Rutgers University Press, 2002); Robert Orsi, "The Religious Boundaries of an Inbetween People: Street Feste and

face the hard and exclusionary racism under which black people suffered, they did nonetheless experience racialisation: They were both white and racially distinct from other less ambivalent whites,⁴⁶ an experience Jews also had in Australia, as I described in chapter two. Yet, at the same time there was the opportunity for these immigrants to transcend their racial ambiguity. Their inbetweenness held open a pathway to whiteness not open to people of colour; and it is this pathway that Jews took in the United States and, shaped by the specific colonial context, in Australia as well.⁴⁷

Karen Brodtkin, whose work I discussed in chapter two, suggests terms such as ‘not quite white,’ ‘not-bright-white,’ or ‘conditionally white’ as more accurate descriptions of the range of different experiences of racialisation.⁴⁸ Brodtkin’s phrase ‘conditionally white’ particularly hints at another dimension of this not-quite status: the power to define the conditions of belonging to the dominant group. Although ‘conditionally’ refers to the possibility of change and a pathway towards becoming white, it also suggests that this process can be reversed when those conditionally white fail to meet the conditions of whiteness.⁴⁹ Hence, in 2016 Brodtkin cautioned that, in the wake of President Donald Trump’s flirtation with white supremacist movements, Jews could become ‘unwhitened’ again.⁵⁰ Something similar happened in both of the case studies of this thesis: Jews faced the threat of being unwhitened as they failed to comply with the norms of the dominant culture. Being inbetween therefore also means being still under review. Writing on the Jewish position at the margins of whiteness, Steve Garner notes that particular circumstances can mean that the way Jews are seen comes under intense scrutiny. He also emphasises, however, that this scrutiny can only happen “because there is a pre-existing idea of Jews *as a group* being different.”⁵¹ This pre-existing idea of Jews as different is what I described in this thesis as ambivalence. It may take the form of Philosemitism, allowing German and Australian politicians to include Jews into their new Judeo-Christian narrative as a way to exclude another Other – Muslims. But it may also mean the invocation of law when Jews fail to comply with the implicit demand to keep their difference private and invisible, to not become too visibly Jewish, as my Australian respondent, whose words opened this

the Problem of the Dark-Skinned Other in Italian Harlem, 1920-1990,” *American Quarterly* 44, no. 3 (1992): 313-347.

⁴⁶ Matthew Frye Jacobson, *Whiteness of a Different Color. European Immigrants and the Alchemy of Race* (Boston: Harvard University Press, 1999), 6.

⁴⁷ Brodtkin, *How Jews Became White Folks and What That Says About Race in America*. Jon Stratton, “The Colour of Jews: Jews, Race and the White Australia Policy,” *Journal of Australian Studies* 20, no. 50-51 (1996): 51-65. I discussed how Jews became white in more detail in chapter two.

⁴⁸ Brodtkin, *How Jews Became White Folks and What That Says About Race in America*, 60. See also Eric L. Goldstein, *The Price of Whiteness: Jews, Race, and American Identity* (Princeton: Princeton University Press, 2006).

⁴⁹ Ian Haney López calls this ‘honorary whiteness’ which is extended to some Latinas, Asian-American and light-skinned Blacks, accepting them as “White as a social courtesy, but not as unquestionably White.” See López, *White by Law: The Legal Construction of Race*, 155.

⁵⁰ Karen Brodtkin, “How Jews Became White Folks — and May Become Nonwhite under ‘Trump,’” *Forward*, 6 December 2016.

⁵¹ Garner, *Whiteness*, 109.

chapter, noted. Jews, then, are “unstable Others.”⁵² Or as Herman described it in the context of England: “‘The Jew’ remains the not quite/not yet/not ever ‘Englishman’.”⁵³

Formal equality and perceptions of Jews as privileged and accepted do not necessarily mean the end of deep-seated cultural ambivalences around Jewishness and their manifestation in law. Writing on the pervasiveness of Black subordination in the US, Kimberlé Crenshaw argues that the move to formal equality has created a narrow focus on processes of racial exclusion.⁵⁴ Exclusion is only acknowledged in its most obvious and explicit form and it is difficult “to move the discussion of racism beyond the societal self-satisfaction engendered by the appearance of neutral norms and formal inclusion.”⁵⁵ The problem is, however, that the Otherness dynamic is still at work that casts Blacks as subordinate Others. Similarly, formal equality and legal protections against Antisemitism have created the impression that ambivalence towards Jews has been eradicated, an impression that is further compounded by the rhetoric of Judeo-Christianity that affords Jews a symbolically privileged position. Yet, at the same time, it obscures the persistence of entrenched ideas about a hierarchical relationship between Jewishness and dominant white Christian culture, thereby potentially perpetuating ambivalence towards Jews by making it more difficult to identify and name exclusions for those who experience them.

Thinking about Jews as positioned inbetween acknowledges that the othering of Jews does not begin from a position of hard exclusion. It is different to the othering of other marginalised people, such as Muslims in Europe and elsewhere in the West, People of Colour in the United States, or Indigenous Australians. Not being fully white is not the same as being black.⁵⁶ Jews enjoy relative safety from public discrimination, are less socioeconomically disadvantaged, and therefore have more opportunity to resist through law, a point to which I will turn shortly. But this relatively privileged position should not lead to a dismissal of the significance of ambivalence towards Jews as it manifests in law.

Incorporating Jewish past and present into scholarly thinking about the legal construction of difference would yield a more nuanced understanding of dominant identities and the way the values and sensibilities of these dominant identities come to inform and underpin the law. Jews challenge the myth of a monolithic white European identity by reminding us of the importance of Christianity in this construction as well as of processes of racialisation beyond evident colour-lines. Understanding these dynamic hierarchies of difference and their historicity is something that the

⁵² Goldstein, “The Unstable Other.”

⁵³ Herman, “‘An Unfortunate Coincidence’: Jews and Jewishness in Twentieth-Century English Judicial Discourse,” 300.

⁵⁴ Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,” 1378-84.

⁵⁵ Ibid., 1384.

⁵⁶ Garner, *Whiteness*, 66.

critical field of whiteness studies is exploring.⁵⁷ Integrating the Jewish experience in scholarly theorising of the relation between law, race, and religion would therefore deepen the understanding of the role of law in the creation of these contingent and dynamic hierarchies of inclusion and exclusion.

III. Law as a Tool for Resistance?

By highlighting the role of law in the construction of Jewish difference, this thesis has challenged the idea that that law is the neutral arbiter in legal conflicts regarding Jewish practices. This insight resonates with the wider criticism in the law and religion literature that questions the capacity of Western law in the management of religious and cultural diversity. Law is seen as not fit to the task of accommodating difference either because its arrangements are outdated and therefore non-reflective of new societal realities of diversity,⁵⁸ or because it is understood to be inherently biased towards non-Christian religions.⁵⁹ The idea in this literature is that both the law and its underlying assumptions need to be readjusted in order to better accommodate difference. While my research shows that there is indeed a certain dissonance between dominant legal understandings of notions such as religion, the body, and public space, it draws a different conclusion from the two cases analysed, which results from the way this thesis has approached ‘the law’.

The approach I took in this thesis was grounded in a cultural study of law. I focussed on the legal narratives that different actors generated, instead of analysing what ‘the law’ does. Drawing on Robert Cover’s work on narratives, I paid particular attention to the narratives of opponents who constructed Jews as different and sought to justify the assimilation of this difference through law. But the narrative I analysed in this thesis constituted just one among several narratives in the two cases. Jews and their supporters in fact proposed their own narrative, which advanced a vision of the shared normative world that included Jews as equal members. Most crucially, both *brit milah* and the *eruv* were permitted by the official legal system. Male circumcision remained legal in Germany, affirmed by a new national law that enshrined the parental right to circumcise their sons, following an extensive debate in which Jews and their supporters were confident and outspoken, despite the harshness of the debate. In St Ives, the Local Council approved the *eruv*, granting retrospective consent to a structure that the Jewish community had already set up with the help of other actors, such as the local power provider.

⁵⁷ Ibid.; Garner, “The Uses of Whiteness.”

⁵⁸ See e.g. Marie-Claire Foblets, “Religion and Rethinking the Public-Private Divide: Introduction,” in *Religion in Public Spaces: A European Perspective*, eds. Silvio Ferrari and Sabrina Pastorelli (Farnham; Burlington: Ashgate, 2012), 1-21.

⁵⁹ See e.g. Feldman, *Please Don't Wish Me a Merry Christmas*; Mahmood, “Religious Reason and Secular Affect: An Incommensurable Divide?”

Although law provided the discursive reference point for the exclusionary narrative about Jews, it also offered an active instrument and reference point for Jewish resistance. As Cover highlighted in his essay *Nomos and Narrative*, the creation of legal meaning does not only take place at the sites of official legal systems, such as in courts or parliaments, but also at the level of different communities, including ordinary citizens. This makes the process of legal meaning-making, the creation of alternative narratives to challenge or oppose hegemonic narratives, a potential source of resistance and a restraint on what he terms violence, the imposition of a particular narrative.⁶⁰ In the context of the two cases discussed in this thesis, this means that the law, while providing the tools, language, and arguments for the othering of Jews, at the same time offered Jews the tools to resist this othering.⁶¹ This observation resonates with scholarship in legal anthropology⁶² and critical race theory⁶³ which presents law as a double-edged sword and pays attention to the way it can be used as a means for resistance. From this perspective, law as a practice needs to be investigated not only as a tool for oppression and domination, but also as a site for struggle and contestation. Law and its dominant ideology, as Crenshaw notes, contain both communal and liberating visions alongside hegemonic visions.⁶⁴ Mobilising this liberating potential can provide an avenue for resistance, for example, by manoeuvring, transforming, expanding, and manipulating the dominant vision.⁶⁵ “Law as an ideological weapon,” argues legal anthropologist Sally Engle Merry, “has two edges: it is a source of domination and, at the same time, contains the possibilities of a challenge to that domination.”⁶⁶ In her study of the legal consciousness of working-class Americans, Merry describes law as ambiguous, inconsistent, and contradictory, which opens it up for contestation and interpretation.⁶⁷ These interpretations are of course not completely autonomous and open-ended, but they nonetheless provide an opportunity to challenge and resist cultural domination as transmitted through legal discourse.

A study of the legal construction of difference therefore needs to acknowledge the ambivalent and sometimes limited role of law. In her research on gendered subject positions and images of ‘the Woman’, Carol Smart suggests that law is a productive technology in the creation of identity and

⁶⁰ Cover, “The Supreme Court 1982 Term. Foreword: Nomos and Narrative,” 68.

⁶¹ For an analysis of Jewish strategies for resistance to the regulation of kosher slaughter see e.g. Ronald Kaye, “The Politics of Religious Slaughter of Animals: Strategies for Ethno-Religious Political Action,” *New Community* 19, no. 2 (1993): 235-50.

⁶² See e.g. Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law*, 134; Mindie Lazarus-Black and Susan F. Hirsch, *Contested States: Law, Hegemony and Resistance* (New York; London: Routledge, 1994).

⁶³ Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law.”

⁶⁴ *Ibid.*, 1387.

⁶⁵ *Ibid.*, 1386.

⁶⁶ Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990), 8.

⁶⁷ *Ibid.*, 9.

gender difference. Yet at the same time, she emphasises the need to trace resistance to and negotiations of these constructed identities in order to avoid slipping into determinism.⁶⁸ Just because law has the power to construct, Smart notes, this does not mean that it actually produces subjects who are powerless to resist or contest these images. Rita Kesselring makes a similar argument in her work on legal subjectivities in the South African Truth and Reconciliation Commission when she warns that it is not enough to simply explore the images that are created through law. An analysis cannot stop there but needs to ask whether these images actually produce social realities. Otherwise, Kesselring cautions, “we commit a legalistic fallacy ourselves, by granting way more power to the law than it actually has and painting it as too hegemonic.”⁶⁹ Seen from this vantage point, law can be understood, to borrow from Carol Smart, as a technology of difference that may be mobilised to both restrict and pluralise identities.⁷⁰ Remaining attentive to the internal contradictions and contestations of legal meaning allows us to see law not merely as an oppressive and deterministic force, but to acknowledge law as a potential site for struggle and change. This indeed is the other side of the stories of the two cases at the heart of this thesis.

In both cases, Jews and their supporters drew on the tools and language of law themselves to challenge an exclusionary and assimilationist vision of law. The ways in which Jews and their supporters offered their own legal narrative is particularly apparent in the case of St Ives. In St Ives, the supporters of the eruv skilfully navigated both local politics and the planning process in order to affirm their rights. With stubborn persistence, they challenged an exclusionary vision of St Ives which would relegate them to the margins of their neighbourhood. It should be noted that Jews in St Ives were in a privileged position as compared to other minority groups that may seek to assert their rights but lack the resources, confidence, and support on which St Ives’ Jewish community was able to draw. In order to assert their rights, the Jewish community could rely on important resources, such as legal advice when the eruv had been taken to court, and contacts, such as with Ausgrid, the local power provider, which already had experience with and understanding of the eruv because of its work with the already existing eruv in the eastern suburbs of Sydney. Relying on the legal intricacies of ownership, property, and legal authority over poles enabled the eruv group to affirm their rights to shape and access public space. They mobilised law for resistance, unsettling simplistic depictions of the law as merely oppressive. While the actual provisions meant to protect religious minorities against majoritarian dominance – the multicultural policy of New South Wales and the patchy framework of human rights protection in Australia – proved too weak or even absent, they nonetheless provided a discursive framework on which Shabbat-observant Jews and their supporters were able to draw in order to formulate a more inclusive vision of St Ives in accordance with what they understood to be

⁶⁸ Smart, “The Woman of Legal Discourse,” 40.

⁶⁹ Kesselring, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa*, 7.

⁷⁰ Smart, “The Woman of Legal Discourse,” 40.

Australian values.⁷¹ Using its own logic against it and exposing its contradictions can provide an avenue for challenging a dominant narrative.⁷²

Indeed, St Ives' Shabbat-observant Jews and those who supported them frequently appealed to Australian values of multiculturalism and tolerance by presenting the eruv as a means for inclusion and integration. Such a strategy is not unique to St Ives. In her analysis of the Outremont eruv dispute, Valerie Stoker describes how Hasidic Jews stressed the inclusivism and tolerance of the eruv, thereby drawing on more liberal notions of religious pluralism and minority rights than their non-Hasidic opponents.⁷³ Their insistence on the eruv, Stoker argues, shows a "sense of entitlement to recognition of their rights and freedoms as Canadians and even Quebecois." For Stoker, this indicates a certain degree of assimilation of a group often thought of as strongly resisting assimilation.⁷⁴ However, understanding oneself as a rights-bearing person does not necessarily indicate assimilation to the norms of the majority – unless we perceive entitlement to rights as the unique feature of a cultural majority. Instead, the Hassidic insistence on their secular rights can also be understood as a push for a more multicultural notion of citizenship that includes lifestyles perceived by some as divisive and premodern. This observation also resonates in St Ives, where Shabbat-observant Jews and their supporters offered a more inclusive vision of Australia as a multicultural society than their opponents, drawing on a dominant narrative in a more expansive and therefore transformative way.

The picture is more complex in Germany, where the Holocaust loomed heavily over the whole circumcision debate. It is thus difficult to discern what the driving force was behind the parliament's decision to enshrine the legality of male circumcision through a new provision in the civil code. Was it the affirmation of Jewish belonging? A plural vision of the German constitution? Germany's image abroad? Or the Holocaust, as many commentators suggest?⁷⁵ Probably all of these forces joined together, but it is important not to underestimate how vocal Jews were in defending their rights. Jewish commentators who intervened in the debate, as well as many of their supporters, refused to

⁷¹ American Jews have relied on a similar strategy in order to fight for religious equality based on American principles, see Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (Oxford; New York; Toronto: Oxford University Press, 1992).

⁷² Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," 1367-68.

⁷³ Stoker, "Drawing the Line: Hasidic Jews, Eruvim, and the Public Space of Outremont, Quebec," 25.

⁷⁴ Ibid.

⁷⁵ Many commentators saw the new law not as an expression of a pluralistic vision of German society, but as an act of "political mercy", see e.g. the analyses by Tzuberi and Doughan, "Säkularismus als Praxis und Herrschaft;" Jay Koby Oppenheim, "Jewish Space and the Beschneidungsdebatte in Germany: Multiculturalism, Ritual and Cultural Reproduction," *Anthropological Journal of European Cultures* 23, no. 2 (2014): 85-97; Bodenheimer, *Haut Ab! Die Juden in Der Beschneidungsdebatte*, 46. Seen from this perspective, the decision to keep circumcision legal and therefore grant minorities rights would be because of its values and advantages for the German non-Jewish majority, such as the country's image abroad, but not because of an honest appreciation of equality. This interpretation reminds us of what Derrick Bell described as the interest convergence dilemma in the US when it comes to progress towards racial equality, see Derrick A. Bell, "Brown v. Board of Education and the Interest-Convergence Dilemma," *Harvard Law Review* 93, no. 3 (1980): 518-33.

call for the acceptance of male circumcision merely in the name of atoning for the past or by invoking the fragility of Jewish-German relations. Emphasising Jewish belonging to the German constitutional nomos, Sergey Lagodinsky for example argued that

We want to see these questions answered in conversation with local politics and the local society. We do not wave with our passports, but with the German constitution. We take our constitution at its word. And it says clearly that the human dignity of all must be protected.⁷⁶

This stance was echoed outside Germany too. In a 2018 speech, the president of the French Consistoire Central Israélite, Joel Mergui, refused to be relegated to the “margins of the law” and instead called for the protection of Jewish practices such as male circumcision as “obvious freedoms.”⁷⁷ A similar strategy was adopted by some Jewish organisations in Germany. I noted in chapter four how the medicalisation of the issue pushed Jews towards a framework of health in order to defend their practice, as seen, for example, in the position statement by the American Jewish Committee. The report, however, concludes with an appeal to German self-understanding as a democratic and inclusive society, stating that “the level of freedom accorded to religious and cultural minorities, as well as the acceptance of the majority for differences in lifestyle and the perceived otherness of minorities is the measure of a democratic society.”⁷⁸ The AJC takes Germany’s self-narrative as a liberal and tolerant society at its word. Likewise, the report published by the Central Council of Jews in Germany, the peak political body of the Jewish community, devoted a lengthy discussion of the constitutionality of male circumcision, drawing on German legal commentary, the Convention of the Rights of the Child, and the authority of the WHO.⁷⁹ The Jewish strategy was to hold Germans accountable to their own self-narrative as a community built on human dignity and rights, while embedding this narrative within a larger transnational framework of human rights protection and authoritative medical knowledge, thereby mobilising the liberating potential of law and of dominant hierarchies of knowledge.

Jewish resistance to a potential ban on circumcision was significant for another reason. While Muslims remained remarkably silent, for reasons I addressed in chapter four, the outspoken Jewish advocacy for male circumcision ultimately also benefitted Muslims. Jews offered a vision of a more

⁷⁶ Sergey Lagodinsky, “Warum wir Juden in Deutschland bleiben,” *Deutschlandfunk Kultur*, 2 March 2015, https://www.deutschlandfunkkultur.de/antisemitismus-warum-wir-juden-in-deutschland-bleiben.1005.de.html?dram:article_id=312974.

⁷⁷ Ben Cohen, “‘We Won’t Be Collateral Victims,’ Jewish Leader Tells French President Macron During Special Service at Paris Synagogue,” *Algemeiner*, 5 September 2018, <https://www.algemeiner.com/2018/09/05/we-wont-be-collateral-victims-jewish-leader-tells-french-president-macron-during-special-service-at-paris-synagogue/>.

⁷⁸ American Jewish Committee, “Facts and Myths in the Circumcision Debate,” (2012), at 26-27, https://ajcberlin.org/sites/default/files/update_ajc_berlin_briefing_fakten_und_mythen_in_der_beschneidungsdebatte_web.pdf.

⁷⁹ Zentralrat der Juden in Deutschland, “Warum beschneiden Juden ihre Kinder? Dossier des Zentralrats der Juden in Deutschland zum Thema Beschneidung,” 10 July 2012, available from <http://www.hagalil.com/judentum/2012/beschneidung.pdf>.

pluralist Germany, which provided space not only for them but also for other religious minorities. Scholars note that Jews have often been at the front in struggles for religious pluralism, trailblazing a path that other marginalised groups could then follow.⁸⁰ Jews, for example, played an important role in efforts to challenge the dominance of Christianity in American society and, thereby, to carve out space for other minorities.⁸¹ As Richard Alba observes, Jews fought by both legal and political means against prejudice and discrimination at the hands of the Christian majority. These successes, Alba suggests, also helped “other groups who were behind them in the queue” for social mobility.⁸² Jewish Studies scholars have indeed long noted the potential of Jews, “the subaltern voice of Europe”,⁸³ to challenge, to resist, and even to disrupt the cultural hegemony of the Christian West. Daniel and Jonathan Boyarin express this hope:

When Christianity is the hegemonic power in Europe and the United States [*and I would add: Australia*], the resistance of Jews to being universalized can be a critical force and model for the resistance of all peoples to being Europeanized out of particular bodily existence.⁸⁴

Resisting in and through law requires a consciousness of oneself as a legal person, as an equal member of the *nomos* endowed with equal rights. Constitutional lawyer, Susanne Baer, judge at the German Constitutional Court, urges us to pay attention to the way in which law can be used in empowering ways. Commenting on the ongoing legal cases regarding the Islamic headscarf, she notes the growing confidence and legal agency of Muslim women who initiate judicial review of administrative and legislative decisions that ban them from wearing the headscarf. For Baer, their complaints mark an “exception to the general rule of avoidance and silence that pertains to outsiders in law.”⁸⁵ Their insistence on having rights and to resist silencing by speaking for themselves presumes a person who considers herself to be a legal person with legal agency and a holder of such rights.⁸⁶ Claiming these rights, Baer argues, meant for these women to simultaneously claim “a normality that was not originally designed for you and which has traditionally been assigned to those in positions of privilege.”⁸⁷

⁸⁰ Gantner and Oppenheim, “Jewish Space Reloaded: An Introduction,” 6.

⁸¹ See e.g. Cohen, *Jews in Christian America*.

⁸² Richard Alba, “On the Sociological Significance of the American Jewish Experience: Boundary Blurring, Assimilation, and Pluralism,” *Sociology of Religion* 67, no. 4 (2006): 347-58, at 353.

⁸³ Susannah Heschel, “Jewish Studies as Counterhistory,” in *Insider/Outsider: American Jews and Multiculturalism*, eds. David Biale, Michael Galchinsky, and Susannah Heschel (Berkeley: University of California Press, 1998), 101-15.

⁸⁴ Daniel Boyarin and Jonathan Boyarin, “Diaspora: Generation and the Ground of Jewish Identity,” *Critical Inquiry* 19, no. 4 (1993): 693-725, at 720.

⁸⁵ Susanne Baer, “Speaking Law: Towards a More Nuanced Analysis of ‘Cases’,” *German Law Journal* 18, no. 2 (2017): 271-91, at 284.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, 283-84.

To draw on law as a resource for resistance means to refuse the outsider status that one is assigned, to claim belonging, and to exercise legal agency – a pathway not easily accessible to everyone. This is where the closeness of Jews to the dominant cultures of their societies affords them privileges that may not be available to other groups which have been relegated further down in the social hierarchy of Others. Indeed, Jews can here draw to a significant extent on their white or Judeo-Christian privilege, as ambiguous as it may be. They benefit in such cases from their ambivalent acceptance, as they can draw on resources and networks, and build on centuries of experience as a frequently marginalised and dominated group.⁸⁸ This may not be an avenue accessible to everyone, or indeed to each Jewish community in other contexts. The question of power is crucial. But acknowledging law as a potential source for resistance troubles a depiction of law as simply a tool for hegemony and domination.

IV. Conclusion

This thesis has studied the ways in which people mobilise law in order to construct Jews as different. Paying attention to the legal treatment of inbetween groups such as Jews reminds us that democratic achievements in making societies more inclusive through rights and other legal protections remain open to contestation. The legal encounter with Jewishness invites further reflection on how the past weighs on the present and how the language of law and rights can be enlisted as a tool to perpetuate the hegemony of a white Christian West and entrenched ambivalence towards Jews, veiled by the persistent myth of law's neutrality, objectivity, and universality. Nonetheless, the legal encounter with Jewishness, in particular the two cases explored here, serves also as a reminder to consider the idea of law as a site for struggle, resistance, and emancipation for those deemed to be different. The two cases in this thesis illustrate that law can be imagined otherwise, and that there is space for a more inclusive legal narrative about living with difference.

⁸⁸ On the ability of Jews to exert power in Diaspora see David Biale, *Power and Powerlessness in Jewish History* (New York: Schocken, 1986).

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