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# "An Unfortunate Coincidence": Jews and Jewishness in English Judicial Discourse

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## Not Published Version

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**Abstract:** This paper explores the neglected area of representations of Jews and Jewishness in English legal cases. In considering judicial knowledge of 'the Jew', I ask three primary questions. First, how do English judges understand and represent 'the Jew' and in relation to what material factors do these understandings and representations change? Second, how do English judges construct racial knowledge, what rhetorical technologies are fashioned and deployed? Third, are the effects of contemporary judicial racializations of Jewishness different in substance from earlier ones? The purpose of this paper is to study the encounter between English judges and 'the Jew' in the twentieth century, eschewing a reading that centres 'antisemitism' or 'discrimination' in favour of one that focuses on the complex and contradictory narratives in these judgments and the kinds of work these narratives do.

**Keywords:** *n/a*

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The wandering Jew has no nation. He is a wanderer over the face of the earth.<sup>1</sup>

Lord Denning wrote these words in 1982, in a case that ostensibly had nothing to do with Jews at all. As Master of the Rolls at the Court of Appeal, Denning was writing one of the judgments in *Mandla v. Dowell Lee*, a Race Relations Act 1976 case about whether Sikhs constituted an 'ethnic group'

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<sup>1</sup> Lord Denning, *Mandla v. Dowell Lee* [1982] 3 All E.R. 1108, at 1113 (CA).

for the purposes of the Act. He and his colleagues determined Sikhs did not; however, on appeal, the House of Lords overturned their decision in what became, and remains, the leading case on the meaning of 'ethnic group' under the Act.<sup>2</sup> While Denning rejected the legitimacy of Sikhs as an ethnic group, albeit through affirming Jews as a (stateless) racial group, the House of Lords made little mention of Jews at all, despite relying heavily for their definition of 'ethnic group' on a New Zealand case about Jews.<sup>3</sup> Subsequent cases relying on *Mandla* also failed to acknowledge the role played by 'the Jew'<sup>4</sup> in the development of United Kingdom race relations law.

In this paper, I take this perhaps puzzling appearance (and disappearance) of 'the Jew' in *Mandla* as a springboard to begin mapping the terrain of English judicial representations of 'the Jew'.<sup>5</sup> I say *begin* mapping because very little work exists in this field. When Davina Cooper and I wrote a piece some years ago on 'the Jew' of twentieth-century English trust law, we drew heavily on Jonathan Bush's work about the deployment of 'the Jew' in early English legal developments,<sup>6</sup> practically the only work we could find in the field. Unfortunately, since the publication of our piece in 1999, to the best of my knowledge, only one further, related, piece has been written in the area.<sup>7</sup>

The absence, in the United Kingdom, of legal studies scholarship on 'the Jew' is not surprising given the paucity of work on law and racial repre-

2 *Mandla and another v. Dowell Lee and another* [1983] 1 All E.R. 1062.

3 *King-Ansell v. Police* [1979] 2 NZLR 531 (NZ CA).

4 Like B. Cheyette, *Constructions of 'The Jew' in English Literature and Society* (1993) 10–11, and others, I use 'the Jew' to refer to the subjects of (legal) discourse.

5 This paper is thus *not* about how Jews, Jewish judges (see, for example, B. Jackson, 'Brother Daniel: The construction of Jewish identity in the Israel Supreme Court' (1993) 17 *International J. for the Semiotics of Law* 115–146), or Jewish social scientists (M. Hart, *Social Science and the Politics of Modern Jewish Identity* (2000), for example) understand Jews and Jewishness. Recent preoccupations with the figure of 'the Jew' in ethical jurisprudence are also beyond the scope of this paper.

6 D. Cooper and D. Herman, 'Jews and other uncertainties: Race, faith and English law' (1999) 19 *Legal Studies* 339–66; J. Bush, "'You're gonna miss me when I'm gone": Early modern common law discourse and the case of the Jews' (1993) 5 *Wisconsin Law J.* 1225–85. See, also, J.A. Shapiro, 'The Shetar's effect on English law – A law of the Jews becomes the law of the land' (1983) 71 *Georgetown Law J.* 1179–200.

7 See G. Godfrey, 'The judges and the Jews' (2003) *Ecclesiastical Law J.* 50–61, although this piece is not a scholarly critique. David Fraser's important contributions, *The Jews of the Channel Islands and the Rule of Law, 1940–1945* (2000), and "'This is not like any other legal question": A brief history of Nazi law before U.K. and U.S. courts' (2003–2004) 19 *Connecticut J. of International Law* 59–125, are also not about racial representation *per se*, but about the role of law and legal professionals in the Holocaust. Louise London's thorough account of United Kingdom law and policy towards Jewish refugees in the Second World War is not focused on judicial racial representations: see L. London, *Whitehall and the Jews, 1933–1948: British Immigration Policy, Jewish Refugees and the Holocaust* (2003).

sensation more generally.<sup>8</sup> While numerous United Kingdom scholars have written about the content and impact of race relations legislation, very few can be said to work in the field of ‘critical race legal studies’ (CRLS). While an impressive body of CRLS-related scholarship has existed in North America for some time,<sup>9</sup> albeit with little taking account of ‘the Jew’,<sup>10</sup> Qudisia Mirza, amongst others, has noted the extraordinary underdevelopment of this field in the United Kingdom.<sup>11</sup> In searching the United Kingdom legal literature for studies of racial knowledge and representation in English law, very little presents itself,<sup>12</sup> and so a legal literature on ‘the Jew’ can not be expected.<sup>13</sup>

At the same time, sociological and social policy studies on ‘race and racism’ tend to underplay both the historical importance and continuing relevance of actual and conceptual Jews to processes of racialization in England.<sup>14</sup> This appears also largely true of work in diaspora studies. Despite

8 In this paper, I use the words ‘race’, ‘racialization’, and ‘racial representation’ not as terms of art, but to signify ways of thinking about persons perceived as ‘alien’ to the environment, and the material practices that attend such understandings. I am conscious that there is much debate about appropriate terminology; however, it is not a debate to which I contribute here.

9 See, for example, R. Delgado, J. Stefania, A. Harris (eds.), *Critical Race Theory* (2001); K. Crenshaw, N. Gotanda, G. Peller, K. Thomas (eds.), *Critical Race Theory: The Key Writings That Formed the Movement* (1996); A. Wing, R. Delgado, D. Bell (eds.), *Critical Race Feminism: A Reader* (2003).

10 But see J.W. St.G. Walker, ‘Race’, *Rights and the Law in the Supreme Court of Canada* (1997).

11 See Q. Mirza, ‘Critical race feminism: The Anglo-American experience’, paper presented at the Annual Meeting of the Law & Society Association, Chicago, May 2004. Also, P. Goodrich and L. Mills, ‘The law of white spaces: Race, culture, and legal education’ (2001) 51 *J. of Legal Education* 15–38.

12 Although, see D. Fraser, ‘To belong or not to belong: the Roma, state violence and the new Europe in the House of Lords’ (2001) 21 *Legal Studies* 569–93; P. Fitzpatrick, ‘Racism and the innocence of law’ (1987) 14 *J. of Law and Society* 119 and *The Mythology of Modern Law* (1992); R. Sandland, ‘The Real, the Simulacrum, and the Construction of “Gypsy” in Law’ (1996) 23 *J. of Law and Society* 383–405; P. Tait, *Race, Law, Resistance* (2004).

13 There is a small literature in the field of law and religion considering the treatment of the Jewish faith in British law; however, these texts are not concerned with the rhetorics and processes of racialization vis-à-vis ‘the Jew’. See, for example, A. Bradney, *Religious, Rights and Laws* (2003); M. Freeman, ‘Is the Jewish get any business of the state?’ in *Law and Religion*, eds. R. O’Dair and A. Lewis (2001); St. J.A. Robillard, *Religion and the Law* (1984); S. Poulter, *English Law and Minority Customs* (1986) and *Ethnicity, Law and Human Rights* (1999).

14 See, for example, M. Banton, *Racial Theories* (1998); J. Solomos, *Race and Racism in Britain* (2003, 3rd edn.). Compare R. Miles, *Racism After ‘Race Relations’* (1993). This is also true for early modern studies of race: for example, Kim Hall’s otherwise fascinating account of race and gender underplays the racial and religious role of ‘the Jew’ in shaping the categories she explores, see K.F. Hall, *Things of Darkness: Economies of Race and Gender in Early Modern England* (1995). See, also, Kushner’s critique of some of this literature: T. Kushner, ‘Remembering to

nods towards 'the Jews' as the 'classic' or 'paradigmatic' example of the diasporic phenomenon, the literature is overwhelmingly concerned with modern processes of colonialization and globalization.<sup>15</sup> There are many reasons for these absences, in particular the fact that some of these fields have been largely developed by non-white, non-Jewish academics writing, understandably, about concerns closer to home.

However, Jews were amongst the earliest racialized peoples in England. Jews probably arrived first with the Romans, were violently expelled in the thirteenth century, and not readmitted until the seventeenth, when a largely Sephardic business class could be put to use in a situation of changing economic relations.<sup>16</sup> They suffered the effects of numerous legal discriminations until the late nineteenth century. There is a debt, therefore, that contemporary racialization processes owe to 'the Jew' that has remained largely unexplored. This historical trajectory, and its contemporary legacies, is not adequately accounted for in work that finds the genesis of 'race' or 'strangerhood' or 'alterity and difference' exclusively in modern imperial and colonial projects.<sup>17</sup>

forget: Racism and anti-racism in postwar Britain' in *Modernity, Culture and 'the Jew'*, eds. B. Cheyette and L. Marcus (1998) 226–41. A similar critique has been made by Hickman in relation to the absence of 'the Irish' in scholarship on race and ethnicity: M. Hickman, 'Reconstructing deconstructing "race": British political discourses about the Irish in Britain' (1998) 21 *Ethnic and Racial Studies* 288–307. The other side of the coin here is the tendency amongst some postmodern theorists to use 'the Jew' as a 'figure (or trope) employed to define a new universalism, the reified marker of all resistance to rootedness, fixity and closure – the nomad *par excellence*' (M. Silverman, 'Refiguring "the Jew" in France' in *Modernity, Culture and 'the Jew'*, eds. B. Cheyette and L. Marcus (1998) 201).

- 15 See, for example, F. Anthias's otherwise useful analysis of this field, 'Evaluating "diaspora": Beyond ethnicity' (1998) 32 *Sociology* 557–80.
- 16 There are numerous historical sources for my necessarily cursory remarks here, including: C. Roth, *A History of the Jews in England* (1949); G. Alderman, *Modern British Jewry* (1992); W.D. Rubenstein, *A History of the Jews in the English-Speaking World* (1996); T. Kushner (ed.), *The Jewish Heritage in British History* (1992).
- 17 For example, P. Gilroy, *After Empire: Melancholia or Convivial Culture?* (2004); C. Hall, K. McCelland, and J. Rendall, *Defining the Victorian Nation: Class, Race, Gender, and the Reform Act of 1867* (2000). In his earlier work, Gilroy argued eloquently for analyses attentive to the similarities between Jewish and Black experience, see P. Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (1993) ch. 6. Robert Young's work is one obvious example of the failure to understand this history, indeed, his *Colonial Desire* (1995) arguably rewrites the English history of racialization to entirely erase Jews (except as an example of English 'acceptance' of those racially classified as 'Caucasian', see pp. 84–5). Even Goldberg, in a text that otherwise takes significant account of the racialization of Jews, suggests that the racialization of 'the urban' is a postcolonial phenomenon: D.T. Goldberg, *Racist Culture* (1993) ch. 8. See, also, Miles's critique of an approach to racism focusing solely on processes of colonialization: Miles, *op. cit.*, n. 14, ch. 3. While McClintock's *Imperial Leather* is a far more nuanced account than Young's, and she refers to the racialization of Jews several times, her 'imperial'

And yet, if we turn to the fields of English and Cultural Studies, British work on racial representation has been highly attentive to ‘the Jew’ for some time. Bryan Cheyette, for example, has written extensively on images of ‘the Jew’ in English literature, arguing for the centring of ‘a dominant racialized discourse at the heart of what constitutes the received definitions of literary “culture”’.<sup>18</sup> Other scholars, for example, the contributors to various edited collections in literary studies, have produced similar work.<sup>19</sup> At the same time, British historians have also made an impressive contribution to our understandings of the relationship between dominant English culture and Jews, Judaism, and Jewishness.<sup>20</sup> Taken as a whole, this humanities scholarship represents a significant consideration of the role of Jews and ‘the Jew’ in English culture, a role left largely unexcavated when it comes to legal studies and the social sciences. As English and history scholars repeatedly remind us, understanding the role of ‘the Jew’ is as important for what it reveals about ‘the English’ and Englishness as for what it tells us about Jews and Jewishness.<sup>21</sup> Legal discourse, I would argue, is one of the key sites throwing this encounter ‘of the interior’ into relief.<sup>22</sup>

In mapping the terrain of Jews and Jewishness in English legal judgments, I will draw extensively on the cultural studies and historical work above; however, whilst judicial discourse on ‘the Jew’ is heavily indebted to the texts

framework prevents ‘the Jew’ from making more than a cursory appearance (A. McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (1995)). I am not suggesting that these scholars ought to have centred ‘the Jew’ in their analysis, only that their sometimes grand theoretical claims need to be assessed with the history of ‘the Jew’ in mind.

- 18 B. Cheyette, *Constructions of ‘The Jew’ in English Literature and Society* (1993) 4; also B. Cheyette (ed.), *Between ‘Race’ and Culture: Representations of ‘The Jew’ in English and American Literature* (1996); see, also, M. Ragussis, *Figures of Conversion: ‘The Jewish Question’ and English National Identity* (1995); J. Shapiro, *Shakespeare and the Jews* (1996); J. Steyn, *The Jew: Assumptions of Identity* (1999). See, also, Paul Gilroy’s call for us to understand thinking on race as being ‘in the core rather than at the fringes of English political life’: id. (1993), p. 12.
- 19 For example, D. Boyarin and J. Boyarin, *Jews and other Differences: The New Jewish Cultural Studies* (1997); Cheyette and Marcus, op. cit., n. 14; D. Boyarin, D. Itzkovits, and A. Pellegrini (eds.), *Queer Theory and the Jewish Question* (2003); D. Cohen and D. Heller, *Jewish Presences in English Literature* (1990).
- 20 See D. Cesarani (ed.), *The Making of Modern Anglo-Jewry* (1990); T. Endelman, *The Jews of Britain, 1656 to 2000* (2002); D. Feldman, *Englishmen and Jews: Social Relations and Political Culture 1840–1914* (1994); C. Holmes, *Anti-Semitism in British Society 1876–1939* (1979); T. Kuhner, *The Persistence of Prejudice: Antisemitism in British Society during the Second World War* (1989); London, op. cit., n. 7.
- 21 I am not suggesting that ‘the Jew’ is unique in this respect, only that its role is underappreciated in legal studies. On the relationship between sexuality and nation, for example, see C. Stychin, *A Nation by Rights: National Culture, Sexual Identity Politics, and the Discourse of Rights* (1998).
- 22 Miles, op. cit., n. 14, ch. 3.

of English literature, they are not equivalents. Legal judgments, especially those that function as ‘precedent’, are authoritative statements of official state discourse. Judicial discourse has immediate, far-reaching, and often long-lasting material effects. More specifically in relation to the themes of this paper, judges are active creators of official *racial knowledge*.<sup>23</sup> They are also *nation-builders*, engaging in strategies of *estrangement* and defining the boundaries of belonging.<sup>24</sup> It is also important to recognize that, with few exceptions, English judges express and consolidate class power; their discourse on ‘the Jew’ is shaped by their elite class position and is thus different to working-class racial ideologies.<sup>25</sup> Judicial racial discourse is thus about the intimate connection between cultural representation, class and state power, and resource allocation.

In considering judicial knowledge of ‘the Jew’, I ask three primary questions. First, how do English judges understand and represent ‘the Jew’ and in relation to what material factors do these understandings and representations change? Second, how do English judges construct racial knowledge, what rhetorical technologies are fashioned and deployed? Third, are the effects of contemporary judicial racializations of Jewishness different in substance from earlier ones?

In responding to these questions, I have chosen for the purposes of this paper to focus on the twentieth century and just one set of judicial articulations:<sup>26</sup> race, nation, and character. I make three key arguments. First, understandings of race, nation, and character – vis-à-vis ‘the Jew’ – as McClintock has argued in a different context, ‘come into existence *in and through* relation to each other’.<sup>27</sup> Second, this categorical articulation, and the delineation of ‘alien’, Jewish character in contrast to ‘English’ (by definition Protestant) character, is evident throughout the century’s legal judgments. While the terms of that articulation shift, principally in how new rationalities of difference replace old ones, the association of Jews with ‘alien’ character remains alive and well. Third, I argue that judicial knowledge about ‘the Jew’ has played an important constitutive role in the making of ‘Englishness’.<sup>28</sup>

The purpose of this paper, then, is to study the encounter between English

23 I use the phrase ‘racial knowledge’ following Goldberg’s development of the concept (op. cit., n. 17). See, also, Hall, McClelland, and Rendall’s analysis of the Reform Act 1867 in op. cit., n. 17.

24 See Sara Ahmed’s development of ‘stranger fetishism’ in S. Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality* (2000).

25 On popular expressions of antisemitism in Britain, see sources in n. 20 above. For a theoretical account of working-class racism and the investment in ‘whiteness’ in the United States of America, see D. Roediger, *The Wages Of Whiteness: Race and the Making of the American Working Class* (1991, rev. edn.).

26 Many other themes present themselves from a study of this material (see concluding remarks).

27 McClintock, op. cit., n. 17, p. 5.

28 See, also, Sandland’s discussion, op. cit., n. 12. Note that I use the word ‘English’ intentionally. While the nation-state in question is jurisdictionally defined as the

judges and ‘the Jew’ in the twentieth century, eschewing a reading that centres ‘antisemitism’ or ‘discrimination’ in favour of one that focuses on the complex and contradictory narratives in these judgments and the kinds of work these narratives do.<sup>29</sup> At the same time, this paper takes as given the long historical record on the varieties and contours of English antisemitism, most particularly the manifestations of antisemitism in ‘polite and established’ English society, whose ideologies, the judges, to a large extent, reflect.

Finally, a word about methodology. While there are literally hundreds of twentieth-century cases deploying Jews and Jewishness in various ways, this paper makes a modest start by analysing several dozen, across a range of legal areas, only a selection of which I consider in any detail here. This broad brush enables me to map overarching themes, and to explore (dis)continuities over time. However, these objectives come at the expense of a more textured approach,<sup>30</sup> including micro-analyses of particular areas of legal doctrine, a focus on ambivalence and contradiction,<sup>31</sup> or any real consideration of how English courts adjudicate appeals from the Beth Din, an area I have purposefully bracketed here.<sup>32</sup> I should also note this study sweeps across the entirety of the twentieth century mainly because it is not possible to trace and analyse the discourses I am interested in otherwise. Judgments from the earlier part of the century reveal particular understandings of ‘the Jew’ in a context of intensified Jewish immigration from ‘the east’, while later cases reshape racial knowledge in different, but related, ways. While this paper’s periodization is at times left somewhat uncontextualized, my primary aim is to bring to light and analyse the cases.

#### RACE, NATION, AND CHARACTER, 1920s–1950s

An understanding of race as ‘nation’, and the role of these two in shaping the most fundamental aspects of personhood and character have a long pedigree in England.<sup>33</sup> Long before (and indeed after) the ‘race sciences’ made their

United Kingdom, and the nationality of its citizenry as ‘British’, I am interested in how the articulation of race, nation, and character is predicated on an imagined ‘Englishness’. Furthermore, the cases I consider are from the English not Scottish courts, and the judges I consider, for the most part, are ‘English’ in this sense.

29 For a thorough review of the history of religious discrimination in England, see J. Bush, ‘“Include me out”: Some lessons of religious toleration in Britain’ (1991) 12 *Cardozo Law Rev.* 881–923.

30 See J. Young’s discussion in the Introduction to his *The Texture of Memory* (1993).

31 This has been my focus elsewhere, see Cooper and Herman, *op. cit.*, n. 6.

32 See Freeman, *op. cit.*, n. 13; this is something I intend to pursue in future work.

33 See, generally, amongst many others, Goldberg, *op. cit.*, n. 17, ch. 4; Hall, *op. cit.*, n. 14; Hall, McClelland, and Rendell, *op. cit.*, n. 17. I use the word ‘race’ deliberately here despite the debate over when ‘race’ as a concept took hold. Goldberg argues that what is ‘modern’ about ‘race’ is its incorporation by the state into state ‘racial projects’: D. Goldberg, *The Racial State* (2001) 161.

mark on knowledge, race was largely understood as heritage or *lineage*. Racial difference was familial, national, and environmental difference, albeit difference usually encoded in a racialized system of domination and subordination.<sup>34</sup> In England, those persons originating from outside the British Isles, or even those indigenous to British territory deemed not descended from the 'Anglo-Saxon race' (for example, the Celts), were viewed as having a very different character from the English. Indeed, the process of nation-building was and remains partly a process of character-building.

The construction of the nation space takes place alongside the production of national character as instances in which 'the nation' itself is fleshed out as *place and person*.<sup>35</sup>

The development and incorporation of the slavery enterprise into English 'normality', despite its later renunciation, is one of the most heinous examples of the production and consequences of these forms of racial belief in the modern period. However, in relation to Jews and Jewishness, understandings of race were also complicated by a much older Christian theology identifying Jews as the 'chosen people' of a sacred (if somewhat superseded) Christian text (the so-called 'Old Testament'). Jewishness implicated racial, religious, and national difference,<sup>36</sup> although this was further complicated by the understanding of Jews, like the Roma,<sup>37</sup> as a 'nation' without a territory: '[Jews] were the ultimate incongruity: a *non-national nation*'.<sup>38</sup> In *Mandla*, Denning puzzles over these incongruities:

... 'a Jew' may mean a dozen different things. It may mean a man of the Jewish faith. Even if he was a convert from Christianity, he would be of the Jewish faith. Or it may mean a man of Jewish parentage, even though he may be a convert to Christianity. It may suffice if his grandfather was a Jew and his grandmother was not. The Jewish blood may have become very thin by intermarriage with Christians, but still many would call him 'a Jew'. All this leads me to think that, when it is said of the Jews that they are an 'ethnic group', it means that the group as a whole share a common characteristic which is a racial characteristic. It is that they are descended, however remotely, from a Jewish ancestor ... There is nothing in their culture of language or literature to mark out Jews in England from others. The Jews in

34 Goldberg, *id.* (1993), ch. 8; N. Stepan, *The Idea of Race in Science: Great Britain 1800–1960* (1982); Banton, *op. cit.*, n. 14.

35 Ahmed, *op. cit.*, n. 24, p. 99, italics in the original.

36 See, also, Ragussis, *op. cit.*, n. 18.

37 Z. Barany, *The East European Gypsies: Regime change, marginality, and ethno-politics* (2002); also D. Fraser, 'To belong or not to belong: the Roma, state violence and the new Europe in the House of Lords' (2001) 21(4) *Legal Studies* 569–93.

38 Z. Bauman, *Modernity and Ambivalence* (1991) 85. I am not suggesting that the paradox of a non-national nation is peculiar to Jews (see Gilroy's critique of Bauman in *op. cit.*, n. 17, pp. 213–14), only that 'the Jews' represent one of the earliest peoples embodying this incongruity in Europe. See, also, Feldman's critique of Bauman's 'totalising' approach to 'the Jews and modernity': D. Feldman, 'Was modernity good for the Jews?' in Cheyette and Marcus, *op. cit.*, n. 19, pp. 171–87.

England share all of these characteristics equally with the rest of us. Apart from religion,<sup>39</sup> the one characteristic which is different is a racial characteristic.<sup>39</sup>

In this passage from his Court of Appeal judgment in *Mandla*, Denning encapsulates the confusion and untidiness 'the Jew' engenders. 'A Jew' may have a faith-based meaning, and so include converts. Or, it may mean a person with some genetic connection to ancient Israel, in which case even a convert to Christianity remains 'a Jew'.<sup>40</sup> Denning opts for the latter interpretation, that Jews share 'Jewish blood', a 'racial characteristic' conversion can not overcome.<sup>41</sup> His phrase 'the Jews in England' also points to another important feature of the racialization of Jews and Jewishness. For several centuries (following the earlier expulsion), Jews formed part of a racialized 'interior' in England.<sup>42</sup> They, along with some others, most notably numerically the Irish, constituted a racialized 'stranger' *within* the nation state long before more recent diasporic populations emerged out of what has become known as 'postcoloniality'.<sup>43</sup>

Although, in 1982, Denning's use of a phrase like 'Jewish blood' was out of keeping with other representations of Jews at this time,<sup>44</sup> and neither his colleagues at the Court of Appeal nor those at the House of Lords were prepared to use such language, an understanding of race as ancestry 'in the blood' was common place in English courts until the mid-twentieth century. As authority for his understanding, Denning notes a series of 1940s trust law cases that race Jews in this way, and also quotes with approval the definition

39 *Mandla* (CA), *op. cit.*, n. 1, p. 1112. Anxieties over similarities between 'the English' and 'the Jews' is a separate theme I am not able to pursue here, but see D. Cohen's fascinating study, 'Who was who? Race and Jews in turn-of-the-century Britain' (2002) 41 *J. of Brit. Studies* 460-83. The case Cohen analyses is usually mentioned in criminal law textbooks as a famous example of miscarriage of justice – the fact that it revolved around an 'Englishman' taken for a 'Jew', along with the pervasive race discourse of the case, is not discussed.

40 Of course, as Feldman notes, the most famous English example is Disraeli (a convert to Christianity) who was 'identified as a Jew by friends and enemies alike', in Cheyette and Marcus, *op. cit.*, n. 19, p. 178. Perhaps tellingly, Disraeli is also identified as a Jew by postcolonial critic, R. Young, *Colonial Desire: Hybridity in Theory, Culture and Race* (1995) 84. Young uses Disraeli's political career as evidence of 'the tolerant and even positive attitude towards the Jews that could be found in nineteenth-century Britain' (p. 84). Young cites Cheyette, *op. cit.* (1993), n. 18 for this point: however, Cheyette's book, in my understanding, makes a point quite the opposite.

41 Note that this understanding of Jewishness is medieval in its origins.

42 Miles, *op. cit.*, n. 17.

43 See, also, Ragussis, *op. cit.*, n. 18 regarding 'the conversion of the Jews' being central to English national identity, and J. Adelman, 'Her father's blood: Race, conversion, and nation in *The Merchant of Venice*' (2003) 81 *Representations* 4-30.

44 See, also, his colourful language in *Re Weston's Settlements* [1968] 3 All E.R. 338, where his distaste for a Jewish tax evader leads him to the image of 'the wandering Jew'. Thanks to Anne Bottomley for bringing this case to my attention.

of 'Jew' in the 1934 Concise Oxford Dictionary: 'a person of Hebrew race'.<sup>45</sup>

I have examined elsewhere the series of cases upon which Denning relies.<sup>46</sup> This line of cases shares a conception of 'the Jew' that is, literally, 'Hebraic' in the biblical sense, and within which Denning's explicit invocation of 'the Wandering Jew' seems wholly unremarkable (if anachronistic). While 'the Jew' is clearly racialized, the discourse of early twentieth-century race science is largely absent from these trust law cases about the transmission of wealth by propertied Jews.<sup>47</sup> Instead, these twentieth-century judges seem to display an eighteenth-century understanding of race and nation as implicating bloodline and lineage,<sup>48</sup> and to understand the 'ancient Israelite' as a kind of 'noble savage'.<sup>49</sup> At times there is almost a certain sentimental reverence in which ancient Hebrews are held, of whom these wealthy testators are seen to be distant progeny.<sup>50</sup> Inheritance, as expressed through the law of trusts, lends itself to this interpretation of Jewishness, as its subject-matter necessarily concerns propertied Jewish families reasonably well-settled in England.<sup>51</sup> However, in cases in other legal spheres, race, nation, and character were usually deployed quite differently.

45 *Mandla*, op. cit., n. 1, p. 1112. On how dictionaries construct racial knowledge of 'the Jew', see G. Sarfati, 'Cultural study, doxa, dictionaries: The case of Jewish identity' (2002) 23 *Poetics Today* 489–91. Note Denning complains about the 1972 revision of the Oxford English Dictionary; the OED revision of the 'Jew' entry is a fascinating study in its own right. There can also be little doubt that the trope of 'the Jew' in English literature must have been equally influential in his – and other judges' – understandings. Denning was a great admirer, for example, of Kipling, an author very keen on such 'Hebraic' images of 'the Jew': see Cheyette, op. cit. (1993), n. 18, ch. 3; J. Nyman, 'Re-reading Rudyard Kipling's "English" heroism: Narrating nation in *The Jungle Book*' (2001) 56 *Orbis Litterarum* 205–20. The influence of English literature on judicial representations of 'the Jew' is a topic I am not able to pursue here in any depth; however, I do return to this theme briefly later in the paper.

46 Cooper and Herman, op. cit., n. 6.

47 See Stepan, op. cit., n. 34 and Banton, op. cit., n. 14 for the development of the race sciences.

48 See, also, K. Wilson, *The Island Race: Empire and Gender in the Eighteenth Century* (2002) 6–8.

49 See, also, Cheyette, op. cit. (1993), n. 18, p. 5.

50 A different example is this quote from a 1891 edition of the *Manchester Guardian*, cited in J.A. Garrard, *The English and Immigration 1880–1910* (1971) 86:

Christians have reason to walk humbly in the presence of a Jew, for, if they associate themselves at all with the deeds of their ancestors, or take upon themselves the historical reputation of the faith they possess, they have a debt to bear which can never be discharged.

See, also, Kushner, op. cit., n. 20, p. 106. Occasionally, this form of philo-Semitism is found in other areas, for example, family law:

the community of which these are members [the Jewish community] is a great community and their marriage is an exceptional system of marriage.

(*Spryack v. Spryack* [1930 All E.R. Rep 133] per Lord Merrivale.)

51 See, also, Staves's exploration of the relationship between nationality, property and 'Englishness' in S. Staves, 'Chattel Property Rules and the Construction of Englishness' (1994) 12 *Law and History Rev.* 123–53. There is also much evidence that many English judges respected Jewish law, and its familial and property relations.

Rather than identifying Jews with the nation of ancient Israel, many judges were clearly perturbed by the 'eastern' immigrants arriving on British shores in the early part of the twentieth century. For these judges, Jewishness signified not the nobility of the ancient Israelites but the foreignness of the 'eastern character'. It was also in the first decades of the twentieth century that the figure of the 'Wandering Jew' became less associated with ancient Israelites and more with unwanted immigrants.<sup>52</sup> Interestingly, insurance cases provide a wealth of material.

*Horne v. Poland*, for example, concerned an insurance claim which the underwriter was refusing to meet on the basis that a material fact had not been disclosed on the original insurance application.<sup>53</sup> Lush J explains:

the plaintiff was an alien. He was born in Rumania [*sic*], where his father followed the occupation of a Hebrew teacher. His real name was Euda Gedale.<sup>54</sup>

When he was twelve, Mr Horne came to England, and, in 1917, he married an 'Englishwoman' under his Romanian name. He was also registered under the Aliens Registration Act in this name. However, when he applied for insurance he did so as Harry Horne, the name by which he was known in England, and did not reveal that 'he was a Rumanian'.<sup>55</sup>

In finding that indeed there had been a failure to disclose a material fact – his Romanian nationality – Lush J was careful to note that not every foreign status would necessarily be material:

One can easily think of cases in which it could not affect the mind of a reasonable underwriter. The assured might have come here from a state where the business and social habits, the training and education that a child or young person received, and the view taken as to the observance of legal and other obligations might be notoriously exacting, the same as those prevailing here. The assured might have spent his whole life in the United Kingdom and acquired a recognised position ... Each case must depend upon its own circumstances, which here were that the plaintiff came from Eastern Europe, he and his parents being members of a race, or subjects rather, of a state of whose habits and traditions the underwriters would naturally know nothing ... To say that matters such as nationality, caste and place of residence might be of no importance ... is to say that there is no racial difference regarding training and education and the other matters I have mentioned. I say nothing, of course, against the national characteristics of the race to which the plaintiff belongs.<sup>56</sup>

Lush J, in linking 'Hebrew', 'race', 'Rumanian nationality', 'Eastern Europe', and 'caste', understanding these terms only in relation to each

52 J. Goldstein, 'The wandering Jew and the problem of psychiatric anti-semitism in fin-de-siècle France' (1985) 20 *J. of Contemporary History* 521–52.

53 *Horne v. Poland* [1922] 10 L.L.Rep. 275 K.B.D.

54 *id.*

55 *id.*

56 *id.*

other, takes a very different approach to the relative deference accorded the parties<sup>57</sup> in the trust cases. In *Horne*, Jewishness must be distinguished by 'type' – Mr Gedale/Horne is not an 'English Jew', he is a 'foreign Jew' and his very character bears the marks of his alien origins. It is in fact the business of insurance underwriters to know with what sort of Jew they are dealing.

Lush's reference to English habits, training, education, and observance of the law being 'notoriously exacting' is not simply the encoding of a pre-existing common-sense. The judge is also doing the never-ending work of nation-building, articulating inclusions and exclusions through imagining the nation 'as a body in which personhood and place are precariously collapsed'.<sup>58</sup> Written on the body of Harry Horne is such a confusing array of alien signifiers, and yet the impossibility of knowing his character would be solved by a declaration of 'Rumanian' nationality on an insurance form. But what are the 'national characteristics' of a 'race'? Is the 'Eastern Europe' designation sufficient to trigger an appropriate degree of character suspicion? Would 'the underwriter', the presumptively English Protestant character hovering in the background of this case, read the name 'Euda Gedale' as Jewish? Is there a hierarchy of designations where one (Romanian? Hebrew? Eastern European?) triggers suspicion more than others? And is it that 'the underwriter' would 'know nothing', or that he would know too much?

A foreign Jew again came to the attention of the courts in *Glicksman v. Lancashire & General Assurance Co. Ltd.*, another 1920s case where the underwriters were refusing to meet a claim.<sup>59</sup> Here, according to Viscount Dunedin, in his House of Lords judgment, the plaintiff's 'natural and best language was Yiddish'. Viscount Dunedin, in contemplating the meeting between this 'wretched little ladies tailor' and an unscrupulous Jewish insurance salesman (a 'Mr Cohen'), could only imagine how distasteful such an encounter must be.

... I am left with the impression, that those, shall I call them, attractive qualities which we are prone to ascribe to the Hebrews, among whom Shylock has always been the prototype, have been quite as satisfactorily developed on the part of this insurance company as ever they were by the little Polish Jew.<sup>60</sup>

Here we have a Jewish insurance salesman compared to Shylock – presumably wanting his pound of flesh from the 'wretched' Mr Glicksman

57 But not their Jewishness, see Cooper and Herman, *op. cit.*, n. 6.

58 Ahmed, *op. cit.*, n. 24, p. 99.

59 *Glicksman v. Lancashire & General Assurance Co. Ltd.* [1926] 26 L.L.Rep.69 H.L.

60 *id.* Note again the literary reference. See, also, M. Metzger, ' "Now by My Hood, a Gentle and No Jew": Jessica, *The Merchant of Venice*, and the discourse of early modern English identity' (1998) 113 *PMLA* 52-62 on race and manners in *The Merchant of Venice*. I am conscious that Dunedin is Scottish, not English; however, his elite background and education have clearly shaped his understandings of Jews and Jewishness in similar ways.

who speaks only the inferior foreign language known as a mark of 'the east'<sup>61</sup> – while the latter's Jewishness is inextricably linked to his eastern European origins.

The description of Jewish men as 'little', in this case an entirely irrelevant fact to the claim, is an often remarked upon phenomenon in the depiction of Jewish masculinity. Gilman has suggested the circumcised penis serves as the prototype for the accusation of diminution.<sup>62</sup> It is obviously also an accusation of effeminacy, an 'orientalized' belittlement that, accompanied by the unmanly phrase 'ladies tailor', serves to distinguish further the Sapsy Glicksmans from the Viscount Dunedins of this world. The accusation of 'littleness' is also largely absent from, for example, the trusts line of cases where the Jewish man (and to some extent woman) is instead invested with the stature of the biblical patriarch, controlling their children's lives from beyond the grave. I am thus arguing here that the particular understanding of Jewishness, and Jewish masculinity in particular,<sup>63</sup> at play in *Glücksman* may be specific to the sort of Jew the English judges were increasingly confronting – the eastern, 'oriental' Jew, 'the Jew' that was most unlike 'the rational man' of the European Enlightenment.

In understanding how nationality and race were co-dependent in judicial discourse during this period, it is important to understand the historical context in which these English judges lived and worked. From the time that Jews were permitted to live in England (following their earlier expulsion), a well-off, and politically and economically influential Jewish community had established itself. In the early part of the nineteenth century, this largely Sephardic community (many of whom arrived via the Netherlands where they had lived following their expulsion from Spain) was augmented by a number of prominent European Ashkenazi families, mainly from Germany and other parts of western Europe. Some of these Jewish families prospered very well in England, despite living under conditions of severe legal discrimination. In time, and once all legal barriers were removed (not until

61 S. Gilman, *The Jew's Body* (1991) 12, 34. See also *Hyams v. Paragon Insurance Co.* [1927] 27 Ll.L.Rep. 448 where Salter J, despite finding for the Jewish plaintiff, reads much into the fact that he is 'a Polish Jew, a very poor scholar and an illiterate person'.

62 *id.*, p. 160. It should also be noted that the use of ostensibly feminized signifiers in relation to Jewish men is not always a product of racist discourse. One of the first radical Yiddish newspapers was called *Der Polyfischer Yidl* – the Little Polish Jew (Endelman, *op. cit.*, n. 20, p. 139). D. Boyarin, in *Unheroic Conduct: The Rise of Heterosexuality and the Invention of the Jewish Man* (1997), makes the argument that Jewish masculinity historically developed in a more 'feminized' way.

63 At the same time, the 'feminization' of the Jewish man in English culture generally should not be over-emphasized; just as importantly, Jewish men were often perceived to embody an aggressive, predatory masculinity. Note also that the relation between Jewishness and masculinity will be understood differently in different national contexts: for example, see D. Itzkovits, 'Secret temples' in Boyarin and Boyarin, *op. cit.*, n. 19, pp. 176–202, regarding the United States.

the late nineteenth century), several became influential politically, and entered the legal and other professions. While these established Jews, despite their prominence, not to mention the fact that many incorporated Anglican trappings into their religious ritual, were not considered by most English to be part of 'the English race', they nevertheless were tolerated by, married into, and to some extent were respected within the most elite circles of English power.<sup>64</sup> Their class position required it.

At the same time, a slow but steady influx of poorer, eastern Jews came to settle in British cities. By the late nineteenth century, these *osghuden* were arriving in ever-increasing numbers. Penniless and rural, fleeing war, famine, and antisemitic persecution, the 'intensification'<sup>65</sup> of eastern Jewish immigration precipitated a perceived crisis. While this is not the place to relate this story in detail,<sup>66</sup> for the purposes of this paper it is important to note that the United Kingdom's first legislation restricting immigration and refugees, the Aliens Act 1905, was passed explicitly in response to the entry of poor, eastern Jews,<sup>67</sup> as was the introduction of the United Kingdom's first 'citizenship' test.<sup>68</sup> The explicit exclusion of Jews of 'bad character' was initially written into the Alien Bill and only dropped due to pressure from the Liberals.<sup>69</sup> While official anti-alienism subsided briefly during the Coalition government of Lloyd George, the Conservative's campaign and election in 1924 renewed 'an anti-alien, anti-Jewish furore'.<sup>70</sup>

So, while in trusts law the judges were confronted with familiar Jews and Christian converts, the propertied business class well known (if often despised) by the English upper class, Dunedin's 'little Polish Jew' and Lush's son of a 'Rumanian Hebrew teacher', were differently raced subjects,

64 For one readable account, see C. Bermant, *The Cousinhood: The Anglo-Jewish Gentry* (1971). For a recent, comprehensive history of the diverse Jewish communities of this period, see Endelman, *op. cit.*, n. 20, chs. 1–3. For a poignant and fictional account of these dynamics, see Amy Levy's controversial novel *Reuben Sachs* (1888).

65 B. Williams, 'East and West': Class and Community in Manchester Jewry, 1850–1914' in Cesarani, *op. cit.*, n. 20, p. 20.

66 See, amongst many others, Endelman, *op. cit.*, n. 20, ch. 4; Feldman, *op. cit.*, n. 20, ch. 11; also, more generally, Miles, *op. cit.*, n. 14, ch. 5. Also Helena Wray's piece in this volume, pp. 302–23.

67 For one thorough account of parliamentary and press debates, see Garrard, *op. cit.*, n. 50, and B. Gainer, *The Alien Invasion: The Origins of the Aliens Act of 1905* (1972). See, also, Miles's argument that the racism of the Aliens Act 1905 was masked by the economic framework within which these exclusions played out (*op. cit.*, n. 14, pp. 143–8).

68 Feldman, *op. cit.*, n. 20, pp. 371–2.

69 Garrard, *op. cit.*, n. 50, p. 45. As London, *op. cit.*, n. 7, and others have demonstrated, twenty years later the United Kingdom government's continued preoccupation with 'alien immigration' resulted in both a failure to save lives and the internment of many of those that did manage to escape, an approach that continues to this day in relation to contemporary refugee communities.

70 Cesarani, *op. cit.*, n. 20, p. 471.

reflecting how the intersections of class, race, and nationality told a story about a more *alien* Jew. If, as Lewis has argued, Daniel Deronda, a well-mannered Sephardic Jew, was 'orientalised' by Eliot, how much more 'oriental' were these ill-mannered easterners, seemingly characterized by dirt, disease, destitution, and superstition?<sup>71</sup> If 'good' character was 'English' character, and the relationship between blood, nationality, and manners was deeply entrenched in English culture,<sup>72</sup> it is not surprising that a bright line was drawn between the 'Anglo-Jews' and the new 'strangers'.<sup>73</sup> Insurance cases, often, as in my examples, involving allegations of fraud, highlight these understandings. In yet another of such cases involving Jewish claimants, a Lord Justice asked a jury to try to 'forget that the plaintiff is a Polish Jew'.<sup>74</sup>

The apex of the 'eastern' threat can be traced to the earlier decades of the twentieth century; however, the Second World War and the post-war years were not periods in which antisemitism abated. On the contrary, as various scholars have demonstrated,<sup>75</sup> anti-Jewish sentiment, in both popular and official discourse, intensified during the war and subsisted after its conclusion, albeit remaining marked by an ambivalence characteristic of the liberal state.<sup>76</sup> Nationality continued to play a crucial role, for example, in decisions about internment;<sup>77</sup> and in determinations over which Jewish refugees would be admitted before and during the war, those from the east remained the least desirable.<sup>78</sup> Even after the war, the legacy of race and

71 R. Lewis, *Gendering Orientalism: Race, Femininity and Representation* (1996) 222. I am not suggesting 'the judges' always characterized 'the Jews' in this way, rather, that these qualities were seen to be characteristic of eastern Jews in English culture generally during this period: see, for example, Garrard's review of the evidence before the Royal Commission at the time, *op. cit.*, n. 50, ch. 4, and also Steyn, *op. cit.*, n. 18, ch. 4.

72 Metzger, *op. cit.*, n. 60; Wilson, *op. cit.*, n. 48, p. 10.

73 Bauman, *op. cit.*, n. 38, ch. 2. As Gilman has shown, the 'eastern Jew' also played an important spectral role in the 'Jack the Ripper' episode (*op. cit.*, n. 61, ch. 4). For an interesting account of Anglo-Jews' attempts to 'naturalize' East-End easterners, see R. Voeltz, "'A good Jew and a good Englishman": The Jewish Lad's Brigade, 1894–1922' (1988) 23 *J. of Contemporary History* 119–27.

74 *Weinstein v. The Army, Navy and General Assurance Association* [1922] 10 L.L.Rep. 558 K.B.D. In another, similar case, a judge describes Lloyds, on the other hand, as 'almost a national institution', *Silver v. Mountain* [1922] 10 L.L.Rep. 431. See, also, the finding of fraud against a 'Russian Jew' in *Shoot v. Hill* [1936] 55 L.L.Rep. 29.

75 See, for example, R. Griffiths, 'The reception of Bryant's *Unfinished Victory*: insights into British public opinion in early 1940' (2004) 38 *Patterns of Prejudice* 18–36; Kushner, *op. cit.*, n. 20; G. Macklin, "'A quite natural and moderate defensive feeling'?: The 1945 Hampstead "anti-alien" petition' (2003) 37 *Patterns of Prejudice* 277–300; London, *op. cit.*, n. 7; Fmser, *op. cit.*, n. 7.

76 T. Kushner, *The Holocaust and the Liberal Imagination* (1994).

77 Kushner, *op. cit.*, n. 20, ch. 5.

78 London, *op. cit.*, n. 7.

nationality persisted in legal discourse on ‘the Jew’: suspect ‘Rumanians’ and Poles continued to appear in cases through the 1950s. This is not unexpected for, as Kushner has shown, the disparaging of the ‘eastern Jew’ persisted unabated in post-war English political culture generally.<sup>79</sup>

In *Hatton*, for example, a case concerning a contractual sales dispute, foreign Jews were again ‘the villains of the piece’.<sup>80</sup> Although there were four sets of defendants in the case, Cassels J was most disapproving of the Jewish set:

... the man Pypet ... an adventurer, not overburdened with principle where finance is concerned, and a Mr J.I. Cowan, a mere tool, and Mr Littman, said to be a Rumanian Jew. It was an unattractive combination ...<sup>81</sup>

The use of the word ‘unattractive’ resonates with Dunedin’s sarcastic reference to ‘the attractive qualities’ of ‘the Hebrews’ in *Glicksman*. There is a ‘racial aesthetic’ in operation explicitly designating ‘the Jew’ as different, as something unpleasant.

In another case from the same period, this time involving a war-related dispute over property, Harman J feels he can clearly assess the content of a defendant’s character from the mixing of his national and racial origins.

The defendant [Ryder] is a Polish Jew, born in Galacia, and educated in Vienna. He lived until 1938 on the continent, either in Rumania or in Brussels, and though he has been in this country since shortly before the war and was naturalised in 1947, he remains very much a foreigner. He is obviously an impulsive and emotional person, and has espoused Lewis’s [a co-defendant] cause wholeheartedly and immoderately ... he allowed himself to be made her catspaw ...<sup>82</sup>

Here, the defendant’s Polishness, Romanianness, and Jewishness completely overwhelm his Viennese education, his possible sojourn in Brussels, and his subsequent residency in England, which, in a sense, hover in the background as proof of the cosmopolitan rootlessness of his ‘strangerhood’.<sup>83</sup> In championing his co-defendant’s cause in such an un-English manner, Ryder has effectively prejudiced his ability to be heard and taken seriously. He is also clearly unassimilable: ‘he remains very much a foreigner’. Harman J effectively rejects Ryder’s social ‘naturalization’ even as his legal status remains intact.<sup>84</sup>

79 Kushner, *op. cit.*, n. 14, as it did also, for example, in Canada, see Walker, *op. cit.*, n. 10.

80 *Hatton v. Millburn Garage Co.* [1951] 1 Lloyd’s Rep. 379, per Cassels J.

81 *id.*

82 *Lewis v. Lewis, Lewis v. Ryder* [1953] Ch. 423. Note that there was a popular campaign against the naturalization of Jewish refugees in the post-war period, see Macklin, *op. cit.*, n. 75, p. 299. Ryder was one of the lucky ones to have been naturalized in 1947 at all.

83 See, also, A. Pellegrini, ‘White face performances: “Race”, Gender, and Jewish bodies’ in Boyarin and Boyarin, *op. cit.*, n. 19, p. 112.

84 One could argue that a distinction drawn between social and legal naturalization is now a mark of ‘the Jew’ and certain others.

The perceived failure of the eastern Jew to assimilate to English culture was a common refrain during this period,<sup>85</sup> and distinguishes, in part, the English from the American articulation of race and nation.<sup>86</sup> Despite 'naturalization' and the acquisition of civil and political status in the United Kingdom, the eastern Jew would never be 'natural' to the environment. It is hardly surprising that Jews from the east, unless they could buy their way in, were, more often than not, refused entry to the United Kingdom before, during, and after the war. Judicial acknowledgement of the mass murder of millions of European Jews by the German government in the 1940s did not begin until the 1970s,<sup>87</sup> and, until that time, judges showed little sympathy for the 'Jewish refugee'.<sup>88</sup>

The growing recognition of the Holocaust, and indeed that term's incorporation into an historical common sense, instigated a rupture in judicial discourse on 'the Jew'. It was no longer possible to identify 'the Jew' in explicitly racialized terms. The Holocaust's acknowledgment (as opposed to its occurrence) constituted an abrupt end (at least temporarily) to overt declarations of racial superiority within the official discourse of liberal states.<sup>89</sup> This period also witnessed substantial reforms in English legal education (some of this instigated by German-Jewish refugees<sup>90</sup>), as well as a somewhat more diverse legal profession and judiciary. However, that is not to say that the racialization of 'the Jew' subsided; but, rather, that such racializations took on a new and different form. It is to the later decades of the twentieth century's judgments on 'the Jew' that I now turn.

85 See, for example, Kushner, *op. cit.*, n. 76.

86 Further, on the American example, see Itzkovits, *op. cit.*, n. 63. Arguably, Jews in America were active in constructing 'Americanness' (most notably in popular culture) in a way that could never have been the case in the United Kingdom. Many qualities associated with the United States, brashness, loudness, and so on, are also associated with 'the Jew'.

87 As far as I can gather from preliminary research in this area, the first case to contain any real acknowledgement of the Holocaust is the combined action of *Oppenheimer v. Gattermole/Nothman v. Cooper* [1976] A.C. 249 at the House of Lords, the most detailed depiction being given by a Jewish judge, Lord Salmon. As Kushner has demonstrated, Britain was one of the last liberal states to recognize the Holocaust (*op. cit.*, n. 76).

88 One exception is Lord Merrivale in *Spivack v. Spivack*, *op. cit.*, n. 50.

89 Though see E. Barkan, *The Retreat of Scientific Racism: Changing Concepts of Race in Britain and the United States Between the World Wars* (1992), who argues that British scientists were themselves rejecting race science prior to the war and that this movement would have continued anyway.

90 See C. Glasser, 'Radicals and Refugees: The Foundation of the Modern Law Review and English Legal Scholarship' (1987) 50 *Modern Law Rev.* 688–708.

By the 1970s and 1980s, the discourse had shifted. Amongst other developments, including the gradual acknowledgement of the Holocaust as a powerful symbolic marker, 'race relations' law and culture had come to dominate the field. Judicial approaches to 'the Jew' took on a new form. In most cases, judges no longer referred to foreign nationality but instead used other signs to mark out 'the Jew's' difference from 'the English'. In certain legal spheres such as, for example, education law, the concept of 'ethnicity' gradually took hold, replacing 'race'. In such contexts, a 'multicultural liberalism' at times prevailed, constructing Jews as a legitimate minority whose 'culture' required judicial investigation and, perhaps, protection.<sup>91</sup> However, in other contexts, for example, employment law, Jewish parties continued to be held in disregard, through a series of articulations that, whilst ostensibly 'raceless', succeeded in presenting the Jewish parties as not-quite/ yet-white, not-quite/yet-English. *Seide* illustrates this technique.

Mr Seide was a Jewish employee who became the victim of remarks from a colleague, 'G', that were recognized by all parties as antisemitic and 'clearly to be deplored'.<sup>92</sup> In response to this situation, the employer transferred Seide to a different shift. Seide then became the focus of a complaint by another co-worker on this new shift, 'M', who accused Seide of creating a 'provocative atmosphere' by apparently attempting to enlist M in his continuing battle with G. Once again, Seide was transferred, this time to a position at a lower wage. He complained to an Industrial Tribunal under the Race Relations Act 1976, arguing that he had been the victim of race discrimination. His claim was dismissed, the Tribunal being 'quite satisfied that there was no racial discrimination on the part of the individuals concerned in the management'.<sup>93</sup> The employer had been 'careful and patient', 'democratic and fair'. The managers 'were not anti-Semitic and they did not succumb to anti-semitism'.<sup>94</sup>

On appeal, Slynn J reaffirmed the rejection of Seide's claim. In coming to his decision, Slynn J's recitation of the facts of the case make interesting reading. We are told that M complained of Seide's 'habit of incessantly humming in a tuneless way', that both G and M believed that Seide 'was making too much of the situation and tending to assume that people were

91 See, for example, these cases about whether Jewishness constituted a 'special educational need': *R v. Sec. St. Education, ex parte E* [1996] E.L.R. 312 Q.B.; *G v. LB Barnet and SENT* [1998] E.L.R. 480; *A v. (1) SENT (2) Barnet LB* (Lawtel summary) 19/11/2003 (Q.B.D.). This focus on 'ethnicity' occurred despite the fact that neither 'Jewish', nor 'Irish', another designation with a long history of English racist discrimination, are official 'ethnicities' for the purposes of state data collection.

92 *Seide v. Gillette Industries Ltd* [1980] 1 RLR 427, per Slynn J.

93 Tribunal judgment quoted by Slynn J, *id.*

94 *id.*

saying things about him when they really were not', and that the employer had come to the view that they could not know 'who really was to blame'.<sup>95</sup> Slynn J concluded that race was not the 'activating' cause of Seide's final transfer, the cause was M's discomfort at Seide's inappropriate behaviour, conduct that Slynn J clearly viewed as justifying M's complaint to management. The appropriateness of the *first* transfer, that racism in the workplace should be resolved by transferring the victim, was never addressed.

Instead, the Jewish employee was constructed as oversensitive, believing people were talking about him when they were not, refusing to 'let matters rest' and passively resume work on his new shift.<sup>96</sup> The paranoid excesses of his behaviour then became good reason for transferring him again, this time resulting in a loss of wages. Not only has he not been the subject of racist discrimination, this Jewish man has caused such disruption to the workplace that his very body has been expelled from it, twice. In contrast to Seide's unmanly paranoia, neurotic obsession with his treatment, and 'incessant humming', the employer is represented as 'careful and patient', 'democratic and fair' – the essence of English masculine virtues.<sup>97</sup>

In another case, also from the early 1980s, an Industrial Tribunal dismissed the complaint of a member of the Musician's Union.<sup>98</sup> Mr Garnel alleged that the failure of the Union's Brighton Branch to nominate him to sit on a committee, and his resulting suspension from the Union when he complained about this, were racially motivated. The Tribunal accepted the Union's position that Garnel was 'engendering a feeling of anti-Semitism which did not yet exist', and found that 'if there was discrimination therefore it was not because the applicant was a Jew but because of his own personal behaviour'. According to the Tribunal, Garnel's behaviour in the hearing was 'so intemperate' an adjournment had to be ordered.<sup>99</sup>

95 *id.*

96 See Goodrich and Mills's discussion of the Quereshi case – they argue Quereshi's refusal to accept the status quo was constructed as a kind of madness (*op. cit.*, n. 11).

97 *Seide*, *op. cit.*, n. 92. For further discussion of 'character' and English masculinity, see J.S. Duncan, 'The struggle to be temperate: Climate and "moral masculinity" in mid-nineteenth century Ceylon' (2000) 21 *Singapore J. of Tropical Geography* 34–47; M. Sinha, *Colonial Masculinity: The 'Manly Englishman' and the 'Effeminate Bengali' in the Late Nineteenth Century* (1995); and on law and English masculinity, A.M. Liddle, 'State, masculinities and law' (1996) 36 *Brit J. of Criminology* 361–80.

98 *Garnel v. Brighton Branch of the Musician's Union* EAT 682/82 (1983).

99 Tribunal judgment quoted by Browne-Wilkinson J., *id.* On 'Englishness' and 'intemperacy', see Duncan, *op. cit.*, n. 97; also D. Herman and D. Cooper, 'An archaic amadas, Brussels bureaucrats, and the valiant Maple Leaf: Sexuality, governance, and the construction of British nationhood through the Canada-Spain fish war' (1997) 17 *Legal Studies* 415–33, at 424. Judith Butler, in commenting on the reception of her own 'Jewish lesbian body' in Germany, writes: 'this southern, darker, more emotional, gesticulating, excessive, sexually confusing Other becomes a site for an anxiety over the loss of both gendered and racial boundaries', see J. Butler, 'Reflections on Germany' in Boyarin, Itzkovitz, and Pellegrini, *op. cit.*, n. 19, p. 402.

On appeal, Browne-Wilkinson J began by noting his ‘surprise’ at this allegation of race discrimination as ‘many of our most talented musicians are, indeed, Jews by race, and that is true of the Brighton Branch’.<sup>100</sup> In reciting the Tribunal’s findings, Browne-Wilkinson repeated the accusation of ‘intemperacy’ on Garnel’s part, and lamented,

It is an unhappy feature in this case that anybody who has come in contact with it, whether in the union or elsewhere, has been accused of untruth, racialism and discrimination.<sup>101</sup>

In contrast to Garnel’s ‘strange’ behaviour, Brown-Wilkinson J described the Tribunal as ‘fair, orderly, and ‘proper’.<sup>102</sup>

The similarities between the judicial discourse in *Seide* and *Garnel* are striking. In both cases, a ‘strange’, ‘intemperate’, ‘provocative’, and paranoid Jew is seen to have deserved what he got, a characterization echoing earlier rationales for refusing to admit Jewish refugees fleeing German persecution.<sup>103</sup> Both *Seide* and *Garnel* are as ‘unnaturalised’ as the explicitly orientalised easterners in the earlier cases; however, the focus now is upon their ‘strange’ behaviour. It is no longer possible to use the shorthand of nationality to signify strangeness; the judges knew the ‘Rumanian’ and ‘little Polish’ Jews were alien, it was not necessary to say much beyond noting their eastern status. Now, however, the strange(r)ness of ‘the Jew’ must be demonstrated through references to distinctly unEnglish, *unattractive*, conduct.

*Garnel* adds the allegation that the Jewish claimant is failing to understand and accept the English rule of law, an accusation with a long history,<sup>104</sup> and one we can associate with ‘the Jews’ ‘intractable’ refusal to accept Christ.<sup>105</sup> As important as cataloguing the excesses of Jewish character are the ways in which the judges, through their description of law itself as fair, measured, and ruly, laud English character. ‘The law’ is the perfect English gentleman; the feminized hysterics of ‘the Jew’ revealed in his very voice, his ‘Jewish voice’.<sup>106</sup>

100 *id.*

101 *id.*

102 *id.*

103 See Kushner’s citation of a Home Office memo re Jews being too ‘assertive’ and ‘gregarious’ to be given asylum in 1944, *op. cit.*, n. 16, p. 206. Of course a dominant discourse in 1930s England was that the continental Jews had brought persecution on themselves by virtue of their unassimilable Jewishness. See, also, *Brookner v. Cranbrook Trains* (EAT) EAT/753/93, EAT/2094, 4 October 1994, Mummery J., where the Jewish claimant is again constructed as ‘the instigator of the abuse’.

104 See Feldman, *op. cit.*, n. 20, pp.; also D. Hirsch, ‘Dickens’s queer “Jew” and Anglo-Christian identity politics: The contradictions of Victorian family values’ in Boyarin, Itzkovitz, Pellegrini, *op. cit.*, n. 19, pp. 311–33.

105 Gilman, *op. cit.*, n. 61, p. 19.

106 *id.*, ch. 1. The opposition between the irrationality of the Jew, and the measured impartialities of the state, is again posed, and more recently, in *R (Gibbs) v. Sec of State for Social Security*, [2001] EWHC Admin 742, CO/4292/2000 Q.B.D. See, also, J. Harrington and A. Manji’s discussion of Denning’s representations of

In *Simon*, although the judicial language is not so explicit, the result is the same.<sup>107</sup> Here, a Jewish man was interviewed by a recruiting agency and told during the interview that the employers were 'Arabs' and that if he was Jewish he would not be hired. Simon was asked his 'religion', refused to answer, and walked out. Although the recruiter testified that he 'suspected' Simon 'might be a Jew', the Tribunal and Appeal Tribunal dismissed Simon's complaint on the basis that all candidates were asked their religion and it was not proper to draw the inference that the recruiter 'knew' Simon was Jewish. If Simon had not walked out, but had completed the interview and then not been put forward for the position, there may have been a case to answer – here there was not. In other words, Simon's behaviour was equally 'intemperate' – he walked out in a huff when he should have stayed, despite having been told unequivocally that there was no chance he would be hired. Like Seide and Garnel, Simon had violated appropriate codes of behaviour, English codes of behaviour.

*Elias*, the final case I will discuss, involved an appeal, in 1998, of a conviction for handling stolen goods.<sup>108</sup> Misha Chaim Baruch Elias alleged that the jury had been prejudiced by the Crown counsel's 'racially and religiously offensive' remarks about him and that, as a result, he did not receive a fair trial. Potter LJ's decision contains a long quote from the Crown counsel's closing speech:

I turn just before lunch to start on Mr Elias. He is a completely different sort of man, isn't he? [different to 'Saunders' the other defendant, who is described as 'guileless'] Completely and utterly and thoroughly dishonest to the heart, I suggest to you. The most self-regarding, utterly cynical, greedy and world weary ... master of deceit ... I draw the analogy with Oliver Twist who is seen in the musical where Fagin ... goes through all the money and the lolly and the jewels ... because, like Fagin, he is in the end keeping his hands on his own material ... he is very similar because of course ... he doesn't actually go out and directly grubby his hands with the burglars.<sup>109</sup>

Defence counsel complained to the trial judge about this speech, and while the judge said that he thought Elias 'might be Jewish',<sup>110</sup> any offence caused 'was because of an unfortunate coincidence', adding that 'references to Fagin in the handling of cases occurred almost daily in the courts by way of analogy'. The Court of Appeal agreed that the 'fusillade of insults' did not exceed 'the permissible limits of advocacy'. In addition, Potter LJ noted that

English law in the African context, "'Mind with mind and spirit with spirit": Lord Denning and African legal education' (2003) 30 *J. of Law and Society* 376–99. Qudsiya Mirza has also pointed out to me how Muslim opposition to Rushdie's *Satanic Verses* was represented as being outside the values of 'English law'.

107 *Simon v. Birmingham Associates* (1987) AC1 2578.50.

108 *R v. Elias* (15 December 1998) (CA).

109 *id.*

110 Note the similarity of language with *Simon* above. The very assumptions of 'racelessness', for example, that it is impermissible to 'tell' a person's race from how they look, allows the racism to go unchecked.

while Fagin was an ‘offensive racial stereotype’, only Elias could think that this could possibly be an intentional racial slur that would prejudice a jury. The fact that the other defendant, Saunders, had been acquitted was not ‘evidence of actual bias’.<sup>111</sup>

While there is much to despair at in the Crown’s speech, it is the comments of the judges that are perhaps more interesting. While the trial judge clearly thinks everyday references to what the appeal judge calls ‘an offensive racial stereotype’ are unproblematic, both judges agree that the ‘coincidence’ of the literary reference with a Jewish defendant was merely ‘unfortunate’. That the prosecutor used the analogy intentionally was inconceivable, as was any possibility that jury members might be influenced by such a comparison – despite the fact that the judges (and the prosecutor? and the jury?) might ‘suspect’ Misha Chaim Baruch Elias was Jewish.

Arguably, the judicial adoption of wilful blindness in *Elias* is an example of what Goldberg refers to as ‘racelessness’ – that modern, liberal condition of the state that eschews any explicit invoking of race discourse in favour of a refusal to acknowledge specific instances of racism.<sup>112</sup> As both Hirsch and Steyn have observed,<sup>113</sup> in Dickens’s *Oliver Twist*, Fagin is usually referred to as ‘the Jew’; in 1990s ‘raceless’ Britain, ‘the Jew’ is known as ‘Fagin’. In 2005, a Labour Party election poster depicted Jewish, Tory leader Michael Howard as a Fagin-type character: another ‘unfortunate coincidence’? Goldberg has argued, ‘racelessness implies not the end of racial consciousness but its ultimate elevation to the given’,<sup>114</sup> and these examples, I suggest, embody this spirit. At the same time, it is important not to overemphasize the phenomenon of ‘racelessness’, particularly given that Jews in English courts continue to be described as ‘Jewish looking and loud-mouthed he had a big nose’<sup>115</sup> or as ‘obviously bearing the outward signs of their origins’.<sup>116</sup>

111 *Elias*, op. cit., n. 108.

112 See also P. Tait’s development, in *Race, Law, Resistance* (2004), of how the deployment of ‘reasonableness’ through racial knowledge results in institutional racism and, also, G. Dench’s elaboration of a discriminatory imperative on the part of liberal states, in *Minorities in the Open Society* (1986). Note, also, that anti-immigration agitation at the turn of the twentieth century was also, purportedly at the time, ‘not about’ Jews but about ‘aliens’, see Gamard, op. cit., n. 50, ch. 5. See, also, Hickman, op. cit., n. 14 on contemporary racializations of ‘the Irish’.

113 Hirsch, op. cit., n. 104; Steyn, op. cit., n. 18, p. 46.

114 Goldberg, op. cit., n. 33, p. 236. A similar understanding is developed by Goodrich and Mills in their ‘law of white spaces’, op. cit., n. 11; however, their analysis is overly dependent on understanding ‘race’ through the prism of skin colour only.

115 These are the remarks of a witness not the judge; however they are read into the record by the judge without comment, see *Caton v. Security Pacific Finance* (1995) (CA), per Hirst LJ.

116 *Re G (a minor)* [1990] FCR 881, per Purchase LJ. In this case, the court took seriously arguments that it might be against a ‘blond’ child’s interests to be raised in a ‘darker’ Jewish family.

2005 marked the centenary of the United Kingdom's first anti-immigrant legislation, the Aliens Act. One of the Conservative Party's election posters that year read: 'It's not racist to be against immigration', a claim made on behalf of the Aliens Act's advocates a hundred years ago. Arguably, in terms of immigration controls, many Jews (by no means all) now pass for 'white',<sup>117</sup> in a way most could not at the time of the Aliens Act 1905. 'Assimilation' provides benefits, even if:

The meaning of the liberal offer in general, and the 'cultural assimilation' programme in particular, is the affirmation of the dominance of that site in the society from which the offer has been made.<sup>118</sup>

However, Michael Howard's experience indicates the assimilatory paradox: elevated to lead an anti-immigration campaign of a major political party, and, yet, as with the convert Disraeli a century earlier, never allowed to forget his 'real' identity.<sup>119</sup> What is interesting about the Labour Party 'Fagin' poster is not its 'antisemitism', but the avowed failure of its designers and their Labour Party masters to *notice* and, once brought to their attention, to displace responsibility by remarking on the 'oversensitivities' of those who found the images offensive. What is also interesting is how deeply the investment in 'Englishness' remains indebted to 'the Jew'.

Throughout the twentieth century, the cases I have discussed represent Jews and Jewishness in problematic ways, ways directly impacting on the lives of litigants. The judgments sharply illustrate the links between cultural representation and governance strategies that the racial projects of the state, through law, pursue. For example, the discourse of the early 1950s cases complements the United Kingdom government's post-war policy of rejecting for resettlement Jews in Displaced Persons' camps due to their 'eastern' character.<sup>120</sup> Eventually, the reading of 'alien' Jewish character through eastern nationality fell away, as 'racelessness' became more pervasive;<sup>121</sup> at the same time, the identification of 'the Jew' with un-English behaviours persists. While the earlier cases read off all there was to know from the individual's national/racial pedigree, a process no longer 'rational' in the

117 See, also, K. Brodtkin, *How Jews Became White Folks & What That Says About Race in America* (1998).

118 Bauman, *op. cit.*, n. 38, p. 71.

119 On Howard's own ambivalent relationship with his background, see A. Roth, 'Michael Howard: the first Jewish Prime Minister?' (2004) *Political Q.* 362-6. On the paradoxes of Jewish assimilation in England see, also, L. Rozmovits, "'Now you see 'em, now you don't': Jewish visibility and the problem of citizenship in the British Telecom "Beattie" campaign' (2000) 22 *Media, Culture & Society* 707-22.

120 Kushner, *op. cit.*, n. 14.

121 This is not to say that 'easterness' no longer operates as a racial mark in the case of others, for example, the Roma.

post-Holocaust era, the later judges continue to justify racialized exclusions based on the acceptable rationalizations of a post-Holocaust, racial state.

I have argued in this paper that the racialization of 'the Jew' in twentieth-century English judicial discourse is shaped by both the area of law under consideration, dynamics of class and gender, and by the changing nature of state rationalities over time. I suggest that despite these distinctions, a coherent thread runs throughout – the character of 'the Jew' remains one alien to 'the English'. 'The Jew' remains the not quite/not yet/not ever 'Englishman'.<sup>122</sup> I have sought to pursue these arguments through a consideration of just one of many possible themes running through the twentieth-century cases – race, nation, and character. I have further argued that the racialization of 'the alien', my particular example being 'the Jew', continues to play an important role in constituting English nationhood and law, and that the judges are instrumental in this process. There is a further implication to these arguments, which is that post-colonial and imperial accounts of 'race' and 'nation' are not sufficient. The figure of 'the Jew' offers an important way into understanding and theorizing racialization processes that pre-date, infect, but are also transformed through such post-colonial encounters.

This paper treads a fine line between acknowledging 'the Jew' as only one of many instances of racial representation in English legal discourse, and, yet, also attempting to explore what sorts of racial representations might be peculiar and/or owe a debt to 'the Jew'. While many of the discourses I have analysed here would find similar counterparts in relation to other minorities,<sup>123</sup> the nearly 2000-year history of Jewish peoples in England, combined with the role Jews, the 'Old Testament', and a 'Jewish State' play in Christian theology,<sup>124</sup> have produced a very particular trajectory of 'race' in England – one that, as I argued at this paper's start, has been left largely unexplored in legal studies.

There are many further avenues for research on 'the Jew' in English judicial discourse. These include the ways in which the judges understand and respond to Jewish law, the role of non-legal experts and expertise on persons and things Jewish, the move from 'race' to 'ethnicity', the deployment and memorialization of 'the Holocaust' in English law, English legal responses to Zionism and the creation of Israel, and the uses of 'the Jew' in cases without Jewish parties.<sup>125</sup> Even this agenda would still not

122 The use of 'man' here is intentional.

123 Particularly Irish, Romany, and more recently Muslims.

124 I have discussed this theological element in other work, see D. Heman, *The Antigay Agenda: Orthodox Vision and the Christian Right* (1997) 19–24; D. Buss and D. Heman, *Globalizing family values: The Christian Right in International Politics* (2003) 9–17.

125 In terms of this last aspect, some of the most interesting cases here involve refugee and (like *Mandla*) race relations claims.

touch the need for historical studies of these aspects and others prior to the twentieth century as well as analyses exploring the myriad contradictions within and between these differing areas, and between understandings of 'the Jew' and other racialized figures. This paper seeks to advance new critical legal scholarship, not only in understanding 'the Jew' of legal discourse, but also in contributing more generally to a growing field of 'critical race legal studies' in the United Kingdom.