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Martin Lockshin

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Book Review

AN UNFORTUNATE COINCIDENCE: JEWS, JEWISHNESS, AND ENGLISH LAW, by Didi Herman¹

MARTIN LOCKSHIN²

ARE JEWS TREATED FAIRLY in today's courts in the West? Most of us would answer in the affirmative without a second thought. But a new, well-documented, and provocative book by Didi Herman, Professor of Law and Social Change at the University of Kent in England, *An Unfortunate Coincidence: Jews, Jewishness, and English Law*, raises some serious doubts about the way that Jews have been and continue to be treated in English courts.

Herman analyzes dozens of cases involving disparate areas of law from the twentieth century and one famous case from the twenty-first. She argues that judges often have shown a shocking lack of sympathy when faced with discrimination against Jews. The book takes its title from a 1998 case³ where a Jew and a non-Jew were on trial for handling stolen goods.⁴ The prosecution claimed in its summary that the Jewish defendant was

the most self-regarding, utterly cynical, greedy man, you can't believe a word he says... A master of deceit... I draw an 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 keeping his hands on his own material ... he is very similar...⁵

The Jewish defendant's counsel complained that the speech was "racially and religiously offensive" and that, accordingly, his client had been denied a fair

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1. (Oxford: Oxford University Press, 2011) 193 pages.
 2. Professor, Department of Humanities, York University.
 3. Herman, *supra* note 1 (discussing the unreported case *R v Elias* (15 December 1998), (CA (UK)) [*Elias*]).
 4. Herman, *supra* note 1 at 45-46.
 5. Herman, *ibid* at 46; *Elias*, *supra* note 3.

trial.⁶ Both the trial judge and the Court of Appeal rejected this argument. The fact that the jury found only the Jewish defendant guilty proved nothing, the Court of Appeal ruled. The court held that Crown counsel's "fusillade of insults" did not exceed "the permissible limits of advocacy,"⁷ and that it was simply "an unfortunate coincidence" that the Jewish defendant who was found guilty had been compared to Fagin, Dickens' Jew in *Oliver Twist*.⁸ The trial judge said that he had thought the defendant (named Misha Chaim Baruch Elias) "might be Jewish," but since the point of his Jewishness had not been made at trial, no clear case existed to prove that the jury had heard a discriminatory charge.⁹

Another example of indifference to discrimination against Jews comes, less surprisingly, from a 1947 case.¹⁰ Jewish refugees from the Holocaust were stopped by British authorities as they attempted to enter Palestine on the ship, the *President Warfield*.¹¹ The Jewish Agency retained a noted lawyer to apply for a writ of *habeas corpus*, alleging that the Jewish refugees were being unlawfully detained at sea by the British government. As many will remember, the writ was denied.¹² Herman notes that the judge did not even mention the fact that the detainees on the ship had just survived the horrors of the Holocaust, nor that most of them were essentially stateless refugees¹³ (the decision simply refers to them as "immigrants").¹⁴ In fact, nowhere in the decision did the judge even mention that the detainees were Jewish (although the judge did refer to the local "champions" of these "immigrants" as "the Jews").¹⁵ Neither did the judge consider the irony of the fact that the British authorities were taking the 'immigrants' on the ship against their will to Germany.¹⁶

A few times in the book Herman notes that in the last three or four decades, a number of claims have been filed under the *Race Relations Act 1976 (RRA)* alleging discrimination against Jews.¹⁷ All of these have failed except for one

6. *Ibid.*

7. *Ibid.*

8. *Ibid.*

9. *Ibid.*

10. *Ibid* at 103-04; R v Secretary of State for Foreign Affairs, ex parte Greenberg, [1947] 2 All ER 550, 14 ILR 69 Ch [Greenberg].

11. The case is well-known; the *President Warfield* was renamed the *Exodus* by its Jewish crew.

12. Herman, *supra* note 1 at 103-104.

13. *Ibid* at 106.

14. *Ibid*; Greenberg, *supra* note 10 at 556.

15. Herman, *ibid*; Greenberg, *ibid* at 551.

16. Herman, *ibid*.

17. *Ibid* at 138-42; *Race Relations Act 1976 (UK)*, c 74; and *Race Relations Amendment Act 2000 (UK)*, c 34.

famous case in 2007 (*Jewish Free School (JFS)*; more on that case below), and the only party ever found guilty of racial discrimination against a Jew under the *RR4* was an Orthodox Jewish school!¹⁸

Herman's argument is even stronger than this. Not only have English courts been insensitive to discrimination against Jews, they have also tolerated and adopted discriminatory attitudes themselves. For example, in 1922, a court supported an insurance company's decision not to honour a claim on the policy of a Jewish client who had suffered a burglary.¹⁹ The court ruled that the client had not disclosed an allegedly relevant fact on his application for insurance—he had failed to list the name that he had been known under in Romania before he immigrated to England. The court accepted the argument that the insurance company might well have refused to insure the client, named Harry Horne, had they realized that he was born under the name Euda Gedale and had lived in Romania until age twelve.²⁰ Court documents describe Harry/Euda as the son of a “Hebrew teacher.”²¹ As the court wrote, “It is impossible to say that matters such as nationality, caste and early domicile cannot be of importance in judging as to the risk that underwriters run in entering into such a contract.”²²

Not quite as egregious as the suggestion that a Jewish background is reasonable grounds for denying insurance is the judicial claim that Jewish identity is essentially so strange as to be unknowable. Courts in many countries struggle with the question of the validity of conditions in wills stipulating that an heir will inherit only if he or she remains or marries within the faith. Various grounds have been used to void such conditions. Herman dedicates a whole chapter to this issue, concentrating much of her discussion on decisions from the early 1940s.²³ In one decision, an English court struggled with the validity of a will's provision that the beneficiaries would inherit provided that they did not “contract a marriage with a person who is not of Jewish parentage and of the Jewish faith.”²⁴ The House of Lords (acting then in its role as the court of last resort) supported the trial judge, who had ruled that such language was overly vague and that no clear meaning could be attached to the phrases “of Jewish parentage” or “of the

18. *R (E) v Governing Body of JFS*, [2008] EWHC 1535 (Admin), [2008] ELR 445 Ch [*JFS*, Ch], rev'd (2009), [2009] EWCA Civ 626, 4 All ER 375 (CA) [*JFS*, CA], rev'd (2010), [2009] UKSC 1, IRLR 136 (UKSC) [*JFS*, UKSC].

19. Herman, *supra* note 1 at 33-34; *Horne v Poland*, [1922] 2 KB 364, 38 TLR 357 Ch [*Horne*].

20. Herman, *ibid* at 34; *Horne*, *ibid* at 366.

21. *Ibid*.

22. *Ibid*.

23. Herman, *ibid* at 50.

24. *Ibid* at 54; *Re Samuel, Jacobs v Ramsden*, [1941] 1 All ER 539 Ch [*Re Samuel*].

Jewish faith.”²⁵ One of the Lords explained that he was sure that “the testator meant no more than that the husband should be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess? ... These are questions to which no answer has been furnished by the testator. ... [T]he condition is voided for uncertainty.”²⁶ As Herman notes, the testator had made no reference at all to “blood,” but the judges assumed that Jewish identity had to be blood-based.²⁷ Herman also notes that in these very same years English courts had no problem enforcing a condition in a will stipulating that a beneficiary had to be “a Protestant in religion and a whole hearted believer in the Deity of Christ.”²⁸ The courts felt that this language was not vague, but they felt that the phrases “of Jewish parentage” and “of the Jewish faith” were.

Herman cites many more cases and categories of law to show that these judicial attitudes to Jews in English courts persisted into more modern times. Readers will come to their own conclusions about the strength of her evidence. I was generally convinced, but felt that a small number of the arguments were stretching the point. Nevertheless, the main thesis of the book deserves attention: Herman’s claim that judges in the English system often used “racialist” and “Orientalist” thinking towards Jews, and understood them through the lens of Christianity, not in their own terms.²⁹

Herman’s strongest argument for the persistence of this approach into the twenty-first century is from the *JFS* case, which made great waves in the United Kingdom and in Jewish communities around the world. She dedicates two full chapters to this case.³⁰

The rules of the Jewish Free School [the “school”] stipulated that the Office of the Chief Rabbi (OCR) of the United Kingdom had the right to determine who was Jewish and thus eligible for admission to the school. The claimant in *JFS* was a Jewish man alleging racial discrimination against his ex-wife and son; she was a convert to Judaism and the son was denied admission to the school. The school argued that they had denied the son admission on religious grounds and on the advice of the OCR, who did not feel that the child passed the test of being Jewish since his mother’s conversion had allegedly been done in an invalid

25. Herman, *ibid* at 55; *Re Samuel*, *ibid* at 542-43.

26. Herman, *ibid* at 56; *Clayton and another v Ramsden and others*, [1943] 1 ALL ER 16, [1943] AC 320 HL (Eng) at 22.

27. Herman, *ibid*.

28. *Ibid* at 57-58; *Re Mylne, Potter v Dow*, [1941] 1 All ER 405, 57 TLR 311 Ch.

29. Herman, *ibid* at 15.

30. *Ibid* at 126, 157.

way.³¹ (The issue of validity of conversions is a source of great tension within the contemporary Jewish community worldwide.) The trial judge ruled in favour of the school,³² but on appeal to the new Supreme Court (which replaced the House of Lords), the school was found guilty of racial discrimination and now has to use a different criterion for determining the eligibility of students for admission.³³

It was not really the policies of the school but rather the Jewish definition of who is a Jew—a definition that has been in use for at least two thousand years (namely, a person whose mother is Jewish, or who converted in a valid conversion)—that the Court ruled to be discriminatory and racist.³⁴ As Herman explains, this decision makes sense only if Jewishness is racialized (*i.e.*, if Jews are understood to be a race).³⁵ Only then one could argue that the claimant's son was a victim of racial discrimination. But if, as any serious scholar would argue, Jews are not a race, then the school was simply applying a religious test to its potential students.

Herman shows that some of the judges of the Court failed to understand Judaism in its own terms. Lady Hale, one of the then seven Supreme Court justices, noted that “[t]he Christian Church will admit children regardless of who their parents are” and assumed that Jewish schools ought to do the same.³⁶ Herman also notes that most of the Court failed to understand the most basic aspects of Jewish identity. For example, some of those judges alleged that the mother of this potential student had suffered discrimination because she was Italian and not Jewish—as if it were impossible to be both Italian *and* Jewish!³⁷ As Herman concludes, “One of the ironies of the *JFS* decision is that as the court calls the school a racial discriminator, the judges themselves indulge in some of the clumsiest racial discrimination we have seen amongst the cases discussed in this book.”³⁸ (Herman makes it fairly clear that she is not a supporter of the school's old admissions policy, but she strenuously objects to the way that the Court ruled against it.)³⁹ In summary, Herman makes a convincing case for the claim that Jews have often been given unfair treatment in English courts. But why is this the case?

31. *Ibid* at 149-50.

32. *Ibid* at 151; *JFS*, Ch, *supra* note 18.

33. Herman, *ibid* at 161-62; *JFS*, UKSC, *supra* note 18 at para 66.

34. Herman, *ibid* at 166.

35. *Ibid* at 167.

36. *Ibid* at 157, 168; *JFS*, UKSC, *supra* note 18 at para 69.

37. Herman, *ibid* at 161; *JFS*, UKSC, *ibid* at para 66.

38. Herman, *ibid* at 165.

39. *Ibid* at 162.

Since I am a scholar of Jewish Studies, not of law, it is this last question that intrigued me as I read the book. Herman makes it clear in the beginning of the book that she would avoid as much as possible using the term “antisemitism” in her analysis, apparently because she sees the term as politically charged.⁴⁰ She claims that she is following the pattern of “critical Jewish Studies” scholars who, she says, avoid that term.⁴¹ She suggests that the type of problems that she is identifying in English legal decisions about Jews may well apply to any minority in England that is perceived as deviating from the accepted pattern of secular—*i.e.*, Christian—behaviour.⁴²

Some people understand antisemitism as simply one manifestation of the common antipathy to the “other.” That is certainly part of the story. For example, the Chief Rabbi of England, Lord Jonathan Sacks, writes in a 2011 book: “Anti-Semitism, the ‘oldest hatred,’ is ultimately dislike of the unlike—the fear mutating into hate of the stranger. ... Anti-Semitism, though it begins with Jews, never ends with Jews. It is the paradigm case of the hatred of difference.”⁴³

But scholars of antisemitism also outline a very particular aspect of this discrimination that has arguably been endemic to Western countries in many different forms for the last two millennia, and which has led to the killing of the largest number of members of any minority group in the West in the twentieth century.

Here and there in Herman’s analysis we see hints that she has identified a specifically anti-Jewish animus at work in English society and its judiciary. Consider one of her points about an aspect of the Court’s *JFS* decision: the assumption that no religious group can self-define even in part on the basis of a person’s birth, as such a criterion would be, by definition, racist. Herman astutely notes:

Pauline Christianity placed itself against a Jewish notion of ‘inherited contract,’ replacing it with a different narrative—one about consent. In *JFS* we can see the same dynamics at play. The judges cut off the Jewish story, labelling it blood-based and therefore ‘racial,’ replacing it with a Christian myth of individuality and autonomy. This is the rejection of Judaism at the heart of Christian ... supersessionary ... discourse. The fact that non-Jews have been welcomed into Jewishness through conversion for well over 2,000 years ... does not fit the Christian triumphalist narrative, and so the judges simply ignore it.⁴⁴

40. *Ibid* at 25.

41. *Ibid.*

42. *Ibid* at 24, 26.

43. *Koren Sacks Rosh HaShana Mahzor*, translated by Jonathan Sacks (Jerusalem: Koren Jerusalem, 2011) at 450.

44. Herman, *supra* note 1 at 167.

Just as we find a troubling tendency in some right-wing circles to exaggerate the amount of antisemitism in the West today, so too is there an equally troubling tendency on the Left to avoid calling antisemitism by its name. While antisemitism is not the most dangerous form of discrimination in Western countries today, it does exist, and it is disconcerting that Herman is loath to use the word. The evidence she presents in this book goes beyond what she writes in the opening pages: “What I have found in the cases [discussed in this book] is not ‘hatred,’ but *distaste*, not ‘malice’ but *unease and confusion*.”⁴⁵ I think she has found more than that: the persistence of long-standing and discriminatory anti-Jewish beliefs, some of which originated in supersessionist Christianity and have since become secularized. These beliefs have been adopted by too many judges on the bench in England.

In any case, Herman should be given credit for producing a fascinating book based on wide-ranging research, which is accessible to any intelligent reader and which provides us with food for thought.

45. *Ibid* at 25.