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Racializing Antisemitism: The Development of Racist Antisemitism and Its Current Manifestations

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NOTE

RACIALIZING ANTISEMITISM: THE
DEVELOPMENT OF RACIST ANTISEMITISM AND
ITS CURRENT MANIFESTATIONS

*By Zahava Moerdler**

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INTRODUCTION

I sit at a Friday night Sabbath meal and listen as my peers go around the table introducing themselves. One young woman introduces herself and says, “I am going to say something really controversial. I don’t think Jews are white.” Another person says that although he knows he isn’t white, that as a Jew he is something “other,” he still feels like the world perceives him as white. He finds it relatively easy to pass as white. These stories illustrate a growing

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trend of individuals grappling with questions of identity and categorization. These identifications color our perception of the world, the way the world views us, and our personal identity. Yet, in the 1930s, many Jews, who may have felt white and German and assimilated, faced very different circumstances.¹ Their generation, men and women who had been passing without incident for years, were suddenly faced with a block—an inability to belong because they were categorized as a racial “other.”² National Socialism brought to the fore the power of racist antisemitism in one of the most devastating events in human history—the Holocaust. Antisemitism has been understood as both a religious and racial form of discrimination.³ Although Jews today continue to pass in white society, attacks on Jewish institutions and those who are viewed as Jewish based on their dress or facial features persists. Understanding antisemitism through the framework established to combat racism provides avenues and tools to combat it.

Antisemitism is not only the expression of religious discrimination, but a form of racism.⁴ Antisemitism has been expressed in different ways throughout history and has focused on different elements of what characterizes an individual as Jewish.⁵ While most people think about antisemitism in terms of religious rather than racial discrimination, there is significant evidence that supports a racial analysis of antisemitism.⁶ Antisemitic prejudice has

1. See *infra* Part I (discussing the race regulations in Nazi Germany that categorized Jews as “other”).

2. For more on the concept of working your identity, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279 (2000) (discussing the way people choose to “work” their racial identity in different contexts and situations); Adia Harvey Wingfield, *Being Black—but Not Too Black—in the Workplace*, ATLANTIC (Oct. 14, 2015) (describing the way that black professionals tread carefully not to upset the majority group), <https://www.theatlantic.com/business/archive/2015/10/being-black-work/409990/>.

3. See ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 76 (1996) (discussing religious antisemitism); see *supra* Part I (describing racist antisemitism in Nazi Germany and Fascist Italy).

4. See YOUNG-BRUEHL, *supra* note 3 (discussing the ways Jews have been discriminated against over time); *European Antisemitism from its Origins to the Holocaust*, U.S. HOLOCAUST MEM’L MUSEUM, [hereinafter *European Antisemitism Origins*], <https://www.ushmm.org/confront-antisemitism/european-antisemitism-from-its-origins-to-the-holocaust> (last visited Mar. 1, 2017) (describing the various periods and manifestations of antisemitism through history).

5. See *European Antisemitism Origins*, *supra* note 4.

6. See *infra* Part I (describing racial antisemitism under National Socialist Germany and Fascist Italy).

often relied on notions of biology.⁷ This form of antisemitism has developed and expanded in the modern era.⁸ Antisemitism has morphed and changed as perceptions of identity, categorizations, and classifications have changed over time.⁹ Today, Jews are seen as a religious group, a distinct people, a race, and the representatives of a State.¹⁰ This change allows for expressions of right-wing populist antisemitism, neo-Nazi movement focused on racial categories, and left-wing liberal antisemitism, focused on the attack of Jews as representatives of the State of Israel.¹¹

Some of the clearest examples of racist antisemitism were the race laws in Nazi Germany.¹² Nazi Germany deployed anti-miscegenation laws, race laws reliant on biology, and laws segregating Jewish from “Aryan” children.¹³ The lessons of the Holocaust demonstrate the extent to which racist antisemitism can go. Post-WWII treaties like the International Convention on the Elimination of all forms of Racial Discrimination (“ICERD”) acknowledge and attempt to address racist antisemitism.¹⁴ The Committee on the Elimination of all forms of Racial Discrimination (“CERD”), the UN body tasked with monitoring the enforcement of the ICERD treaty, has issued general comments expanding the definition of racism to include antisemitism.¹⁵ It has also heard cases through the Complaint Procedures on antisemitism and has developed

7. *Id.*

8. *See infra* Part II (describing modern international legal protection against antisemitism).

9. *See infra* Part III (discussing newer more modern developments of antisemitism).

10. *Id.*

11. *See generally* YOUNG-BRUEHL, *supra* note 3, at 542-43; Kenneth Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371 (2009); Kenneth Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 WM. & MARY BILL RTS. J. 837 (2007).

12. *See infra* Part I (discussing racist Nazi ideology).

13. *Id.*

14. International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (providing for the protection against racial discrimination under international law); *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS COUNCIL, <http://indicators.ohchr.org/> (showing the various states who have signed or ratified ICERD).

15. *See, e.g.*, General Recommendation No. 35, Combating Racist Hate Speech, Committee on the Elimination of Racial Discrimination, CERD/C/GC/35 (Sept. 26, 2013), ¶ 6 (discussing hate speech targeting groups based on racial distinction); *Zundel v. Canada*, Communication No. 953/2000, U.N. Doc. CCPR/C/78/D/953/2000, ¶ 5.5 (2003) <http://juris.ohchr.org/Search/Details/955> (discussing General Recommendation No. 15).

important international legal norms for understanding and combatting antisemitism.¹⁶

Antisemitism is particularly challenging to combat because it has turned on multiple adapting factors and signifiers like race, religion, national origin, and ethnicity.¹⁷ As such, the goal of this Note is to place antisemitism within a racial lens in order to provide a framework to (1) understand antisemitic acts today as racialized and (2) to stress the importance of utilizing all the tools available to combat antisemitism. The Note is divided into four sections. Part I explores the historical elements of racist antisemitism through its most toxic implementation under National Socialism. Part II describes modern manifestations of antisemitism to illustrate the continued racialization of Jews. Part III develops the international legal protections against antisemitism that were developed following World War II. Namely, the section analyzes ICERD and the Committee's work in understanding and developing international legal norms protecting against antisemitism. Finally, Part IV tracks the modern trajectory of antisemitism and the ways that racism still plays a prominent role in antisemitic discourse and conduct.

*I. RACIST ANTISEMITISM UNDER NATIONAL SOCIALISM AND
ITALIAN FASCISM: COMPARATIVE PERSPECTIVE TO RACISM
IN THE US*

The emergence of racial distinction between Jews and their neighbors marks a change in perspective that requires deep exploration, not only in historical form, but also in the prevalent representations of racist antisemitism today.¹⁸ Part I of this Note will investigate the rise of racist antisemitism in the twentieth century and compare it to the US race context in order to demonstrate the ways race is understood outside the classic binary of black and white. Like

16. See *infra* Part III (discussing the various cases brought before CERD and comments adopted by CERD dealing with antisemitism); See also *P.S.N. v. Denmark*, Communication No. 036/2006, CERD/C/71/D/36/2006, ¶ 6.3 (2007), <http://juris.ohchr.org/Search/Details/1733> (discussing the instance of double discrimination); *Zundel v. Canada*, *supra* note 15, (describing a case of antisemitism).

17. See YOUNG-BRUEHL, *supra* note 3, at 76 (describing multiple forms of racism); DAVID M. SEYMOUR, *LAW, ANTISEMITISM AND THE HOLOCAUST* 21 (2007) (describing “[m]odern racist antisemitism then developed and inserted itself into this milieu. What had previously been explained in religious or theological terms came now to be expressed in the naturalist language of ‘race’ and of ‘blood’[.]”).

18. See *infra* Part II (discussing emerging antisemitism trends).

with gender identity and sexual identity, race has been understood in a binary.¹⁹ Yet, the legal landscape surrounding racial discourse has consistently constructed race beyond the binary model.²⁰

Antisemitism is not a new concept, but a form of discrimination that has existed for centuries.²¹ National Socialist Germany expanded on growing views of Jews as a race and implemented legislation to classify them as such.²² Until the twentieth century, antisemitism was reflected through religious discrimination and understood as a religious distinction.²³ Judaism acted as the differentiating principle between Jews and their Christian neighbors.²⁴ Ghettos were set up around Europe to create physical boundaries between the two

19. See generally Peter Westmoreland, *Racism in Black White Binary: On the Reaction to Trayvon Martin's Death*, Annual Spring Lecture "At Close Range: The Curious Case of Trayvon Martin", (Mar. 2013) http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1002&context=csrrr_events (discussing the effects of binary discourse on redress of the victim); Juan Perea, *The Black/White Binary Paradigm of Race: The Normal Science of American Racial Thought*, 85 CAL. L. REV. 1213 (1997) (describing the roles that books and text play in constructing out thoughts and perceptions of race as binary).

20. See, e.g., *Perez v. Sharp*, 32 Cal.2d 711 (1948) (maintaining the race anti-miscegenation laws as effective in the case of a Mexican-American woman and black man); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (holding that a Chinese citizen was not denied equal protection when placed in a class of "colored races" in Mississippi); *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134 (1806) (finding that Native Americans are presumptively not slaves and the claimant bears the burden of proving Native Americans' classification as slaves based on their maternal ancestor's identity).

21. See YOUNG-BRUEHL, *supra* note 3 (discussing the ways Jews have been discriminated against over time); *European Antisemitism Origins*, *supra* note 4 (describing the various periods and manifestations of antisemitism through history).

22. See *European Antisemitism Origins*, *supra* note 4 (describing the various periods and manifestations of antisemitism through history; see *Antisemitism in History: Nazi Antisemitism*, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007167> (last visited July 6, 2017) (discussing Nazi manifestations of antisemitism and racism).

23. See Thomas Pegelow, "German Jews," "National Jews," "Jewish Volk" or "Racial Jews"? *The Constitution and Contestation of "Jewishness" in Newspapers of Nazi Germany, 1933-1938*, 35 CENTRAL EU. HIST. 195 (2003) (discussing how "[u]ntil 1933 and for at least a good century before that, the German Jews were entirely German and nothing else They were and remain (even if now they no longer wish to remain so) Germans."); *Anti-Semitism*, ANTI-DEFAMATION LEAGUE, <http://archive.adl.org/hate-patrol/antisemitism.html> (last visited Mar. 2, 2017) (describing the progression of antisemitism through history).

24. See SEYMOUR, *supra* note 17, at 23 (discussing Jewish communities during the Middle Ages); *Antisemitism in Medieval Europe*, ENCYCLOPEDIA BRITANNICA [hereinafter *Medieval Europe*], <https://www.britannica.com/topic/anti-Semitism/Anti-Semitism-in-medieval-Europe> (last visited Mar. 24, 2017) (discussing antisemitism against Jews in the Middle Ages including denial of citizenship and exclusion from guilds and professions).

religious groups.²⁵ Jewish communities were attacked under claims of blood libel and were blamed for the killing of Christ.²⁶ However, Jews could easily be incorporated into society through conversion, both forced and voluntary.²⁷ In this way, Jews could shed their religious identity and meld into society.²⁸

Ancient Persians, Greeks, and Romans discriminated against Jewish populations through an “ethnocentric hostility” that focused on uniquely Jewish characteristics like the Jewish concept of remaining a separate people.²⁹ Early Christian forms of antisemitism, prominent in the Middle Ages, focused on Judaism as the link that differentiated Jews from their neighbors.³⁰ Jews, although confined to separate parts of the city in ghettos, could shed their Jewish identities and pass as Christians through conversion and religious Christian practice.³¹ As antisemitism progressed at the turn of the nineteenth century and into the twentieth century, the focal point of prejudice became the association of “the Jew” with the manipulation of the state.³²

25. See SEYMOUR, *supra* note 17, at 23 (describing antisemitism and use of ghettos in the Middle Ages); *Medieval Europe*, *supra* note 24 (discussing the creation of ghettos and the requirement of wearing the Jewish star in the 12th Century).

26. See SEYMOUR, *supra* note 17, at 23 (discussing antisemitism in religious Christian society); *Blood Libel: A False, Incendiary Claim Against Jews*, ANTI-DEFAMATION LEAGUE, <http://www.adl.org/anti-semitism/united-states/c/what-is-the-blood-libel.html> (last visited Mar. 2, 2017) (“The “blood libel” refers to a centuries-old false allegation that Jews murder Christians – especially Christian children – to use their blood for ritual purposes, such as an ingredient in the baking of Passover matzah (unleavened bread).”).

27. See SEYMOUR, *supra* note 17, at 23 (quoting Bauman who stated “Jews had been able to escape from Judaism into conversion; from Jewishness there was no escape.”); Pegelow, *supra* note 23 (describing the way that German Jews assimilated into German society).

28. See *supra* note 27 (discussing Jewish conversion and assimilation into Christian society).

29. See YOUNG-BRUEHL, *supra* note 3 (discussing hostility between ethnicities in Ancient times); Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 394-95 (“Previously, the Jewish community’s perceived isolation and exceptionalism had stirred resentment during ancient Egyptian, Greek, and Roman times, exacerbated by widespread xenophobia during those periods.”).

30. See YOUNG-BRUEHL, *supra* note 3 (describing antisemitism in Christian kingdoms during the middle ages); SEYMOUR, *supra* note 17, at 23 (describing the ways in which Jews were seen as “other” in Christian society).

31. See YOUNG-BRUEHL, *supra* note 3 (describing antisemitism in Christian kingdoms during the middle ages); SEYMOUR, *supra* note 17, at 23 (describing the ways in which Jews were seen as “other” in Christian society).

32. See YOUNG-BRUEHL, *supra* note 3, at 79 (discussing the use of the Jews as a scapegoat for political purposes); Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 400 (“In addition, the involvement of some Russian Jews in radical politics gave

According to antisemites, Jewish manipulation of the government and the economic and political centers of power led to all the problems societies faced.³³ This association, coupled with the rise of Eugenics movements and biological distinctions of Jews, formed the basis for racist antisemitism.³⁴ Whereas religious antisemitism allowed for shedding Jewish identity by accepting Christ, racist antisemitism locked on to biological differences and restricted the ability to assimilate.³⁵ Racist antisemitism, the form of antisemitism trumpeted by the National Socialist movement and its allies, focused on biological differences between Jews and their “Aryan” neighbors.³⁶ Unlike Judaism, Jewishness within the conception of racist antisemitism could not be shed through conversion or assimilation.³⁷ Under this principle, the Nazi government looked at a person’s heritage and bloodline to determine whether he or she would be identified as Jewish, whether or not the person himself or herself identified as such.³⁸ Racial identity was imposed by the State onto the individual.³⁹

conservative anti-Semites a pretext to divert popular political discontent ‘away from the regime and against Jewry by means of pogroms.’”).

33. See YOUNG-BRUEHL, *supra* note 3, at 79 (describing how Jewish evil became a pretext to explain economic hardship and social unrest); Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 400 (describing in particular Russian antisemitism and its use of the Jew for political purposes); *Protocol of the Elders of Zion*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007058> (last visited Mar. 25, 2017) (discussing the Protocols of the Elders of Zion which accused the Jews of having “secret plans” to rule the world by manipulating the economy, controlling the media, and fostering religious conflict.”).

34. See YOUNG-BRUEHL, *supra* note 3, at 358 (describing the rise of racist antisemitism and eugenics movement); Janet L. Dolgin, *Personhood, Discrimination, and the New Genetics*, 66 BROOK. L. REV. 755, 766 (2001) (discussing the rise of eugenics in Europe in the 1920s and its increasingly racist nature).

35. See YOUNG-BRUEHL, *supra* note 3, at 358 (describing the rise of racist antisemitism and eugenics movement); Dolgin, *supra* note 34, at 766 (discussing the rise of eugenics in Europe in the 1920s and its increasingly racist nature).

36. See YOUNG-BRUEHL, *supra* note 3, at 358 (arguing that Jews murdered by the Nazis were those who were defined as Jews by Nazis more so than by their own identification); Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 397 (arguing that with “changing European attitudes towards religion and religious prejudice,” Nazi policymakers chose not to identify Jews as Christ-killers, but rather to develop a “racial conception of the threat which the Jewish people posed to German culture and modern life”).

37. See YOUNG-BRUEHL, *supra* note 3, at 358 (describing how Jewishness became a form of both self and other identification); see generally Pegelow, *supra* note 23 (describing the shift in Jewish newspaper identification of Jewishness in Germany during the rise of National Socialism).

38. A similar trend was prominent in racist discourse in the United States. In the seminal case, *Perez v. Sharp*, 32 Cal.2d 711 (1948), Justice Traynor delivered the opinion of

Similarly, racist doctrine in the United States adopted state-sponsored language about biological differences at the turn of the twentieth century.⁴⁰ Eugenics argued that character and physical traits were determined by biology and, as such, the “genetic quality of society could be made better or worse through artificial selection.”⁴¹ The Racial Integrity Act of 1924, Virginia’s law concerning racial differences, focused not just on racial composition determined by blood, but by ancestry as well.⁴² Under Virginia’s Race Integrity Act, in order to marry, neither spouse could have a discernable trace of nonwhite blood—otherwise the marriage would be prohibited as an interracial union.⁴³

The California Supreme Court struck down an anti-miscegenation ordinance in 1948 in *Perez v. Sharp*.⁴⁴ The court held that the ordinance violated equal protection under the US Constitution

the court on the question of the validity of California’s anti-miscegenation laws. He found that determinations of race based on blood were ambiguous and led to uncertainty. He struck down the ordinance. This case demonstrates the complexities of legal regulation of race—what determines race and how that determination can be regulated by the state. *See also* Lisa Lindquist Dorr, *Arm in Arm: Gender, Eugenics and Virginia’s Racial Integrity Acts of the 1920s*, 11 J. WOMEN’S HIST. 143 (1999) (discussing Virginian legislation that used blood and heredity to define race).

39. *See* YOUNG-BRUEHL, *supra* note 3, at 22 (discussing how race laws were based on the “essence” of a Jew, a nature to Jews that couldn’t be “hidden under the mask adopted in the name of a false and unnatural ‘equality’”); *see also* Dorr, *supra* note 38 (describing imposition of race by the Virginia state legislature on African Americans).

40. *See* Dorr, *supra* note 38, at 143 (describing the eugenics movement in the United States in the 1920s); Dolgin, *supra* note 34, at 766 (“In the decades immediately following World War II, American society began to favor explanations of behavior and of relationships among people based on cultural, rather than natural, factors—socialization, education, and choice over biological determinism.”).

41. *See* Dorr, *supra* note 38, at 145 (discussing the application of eugenics theory in the United States); Dolgin, *supra* note 34, at 796 (describing how eugenics “dedicated itself to “upgrad[ing] the hereditary quality of the American people”).

42. *See* Dorr, *supra* note 38, at 144 (describing the construction of the Racial Integrity Act of 1924); Dolgin at 796 (describing the view of some eugenics proponents that believed their dislike of Jews and African Americans stemmed from “science and not of prejudice or ill-will”).

43. *See* Dorr, *supra* note 38, at 144 (describing marriage restrictions based on tracing a person’s bloodline); *see also* Dolgin, *supra* note 34, at 788 (describing special screenings before marriage to someone of a different ethnicity like screening for sickle cell).

44. *Perez v. Sharp*, *supra* note 20 (holding that an anti-miscegenation law was arbitrary and ambiguous); *see generally* Robin A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839 (2008) (describing the *Perez* holding and its use in advocacy for same-sex marriage). It is important to note that anti-miscegenation was not legally abolished until *Loving v. Virginia*, 388 U.S. 1 (1967).

because it impaired an individual's right to marry on the basis of race alone and that it "arbitrarily and unreasonably discriminating against certain racial groups."⁴⁵ Perez, a Mexican-American, was considered white for purposes of anti-miscegenation legislation, yet considered "other" in different circumstances.⁴⁶ Her race was put to work for specific reasons—with the anti-miscegenation legislation, Mexican-Americans were considered white because of their land holdings, yet their darker skins relegated them to separate seating in cafes and theaters.⁴⁷ Thus, race was imposed upon the individual in different ways under different circumstances for specific reasons.⁴⁸

The Nuremberg Race Laws, passed in 1935, relied on biological distinctions to set out specific parameters for citizenship within the German state.⁴⁹ The laws were divided into two categories.⁵⁰ The first law, the Reich Citizenship Law of September 15, 1935, limited citizenship and political rights based on biological compositions of blood.⁵¹ Article 2 stated that "[a] Reich citizen is a subject of the state who is of German or related blood, and proves by his conduct that he

45. Perez v. Sharp, *supra* note 20, at 731-32 (holding that California's anti-miscegenation law was arbitrary and unreasonable); Lenhardt, *supra* note 44, at 849 (discussing Traynor's reliance on social science discrediting of eugenics theories).

46. Perez v. Sharp, *supra* note 20, at 743 (describing Perez's race as white for purposes of a marriage license); Lenhardt, *supra* note 44, at 841-42 (describing how "Andrea was a mestizo who, by all accounts, did not appear phenotypically white and who, given the racial politics of California at the time, likely received none of the social privileges associated with whiteness.").

47. Perez v. Sharp, *supra* note 20, at 743 (describing Perez's race as white for purposes of a marriage license); Lenhardt, *supra* note 44, at 841-42 (describing how "Andrea was a mestizo who, by all accounts, did not appear phenotypically white and who, given the racial politics of California at the time, likely received none of the social privileges associated with whiteness.").

48. Perez v. Sharp, *supra* note 20, at 746-47 (describing the various variations of race and "whiteness"); Lenhardt, *supra* note 44, at 842 (discussing the application of race in the Perez case in the context of marriage).

49. Greg Bradsher, *The Nuremberg Laws: Archives Receives Original Nazi Documents That "Legalized Persecution of Jews"*, 42 PROLOGUE 4 (Winter 2010), <https://www.archives.gov/publications/prologue/2010/winter/nuremberg.html> (providing an overview of Nazi race laws, which created classes of Jewish identity based on Aryan and Jewish blood); *Nuremberg Race Laws: Translation*, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007903> [hereinafter *Nuremberg Race Laws*] (providing a translation of the 1935 Nuremberg Race Laws, which created biological distinctions for Jews).

50. Bradsher, *supra* note 49 (describing the racial categories created by the race laws in Germany in 1935); *Nuremberg Race Laws*, *supra* note 49 (providing a translation of the Nuremberg race laws and the classes within society and categories based on race).

51. Bradsher, *supra* note 49 (defining an Aryan citizen); *Nuremberg Race Laws*, *supra* note 49 (defining Aryan and non-Aryan citizens).

willing and fit to faithfully serve the German people and Reich.”⁵² The Article continued by stating that the “Reich citizen is the sole bearer of full political rights.”⁵³ The second category, the Law for the Protection of German Blood and German Honor of September 15, 1935, specifically regulated interracial marriages and relationships. Article 1 provided that “[m]arriages between Jews and subjects of the state of German or related blood are forbidden. Marriages nevertheless are concluded invalid, even if concluded abroad to circumvent this law.”⁵⁴ Article 3 provided that “[e]xtramarital relations between Jews and subjects of the State of Germany or related blood are forbidden.”⁵⁵

The Nuremberg Race Laws also provided for which ancestry would constitute Jewish blood.⁵⁶ The determination was simple if a person had at least three Jewish grandparents, in which case he or she was immediately considered Jewish.⁵⁷ If a person had exactly two Jewish grandparents, then he or she was considered to be either a Jew or a Mischling (mixed blood) of the first degree.⁵⁸ That individual would be deemed a Jew if either (1) he was a member of the Jewish religious community on November 14, 1935, or later became a member; (2) he was married to a Jew on November 14, 1935, or later

52. Bradsher, *supra* note 49 (discussing the Nuremberg Race Laws as the first step in the framework that eventually led to the Holocaust); *Nuremberg Race Laws*, *supra* note 49 (detailing what German citizenship requires).

53. Bradsher, *supra* note 49 (providing for which citizens would have political rights and which would not); *Nuremberg Race Laws*, *supra* note 49 (providing for political rights as they connected to citizenship).

54. Bradsher, *supra* note 49 (prohibiting interracial marriage); *Nuremberg Race Laws*, *supra* note 49 (providing that marriages that pre-existing interracial marriages were invalid).

55. Bradsher, *supra* note 49 (prohibiting interracial intercourse); *Nuremberg Race Laws*, *supra* note 49 (providing that Aryans and Jews could not have intimate relations).

56. Bradsher, *supra* note 49 (describing different categories of Jewish race based on ancestry); *Nuremberg Race Laws*, *supra* note 49 (providing tiers of “Jewishness” and “Aryanness” based on ancestry).

57. Bradsher, *supra* note 49 (providing a chart for Jewish racial composition, including two section on the far right under “Jude” that demonstrate clear Jewish ancestry and thus blood); *see also* First Regulation to the Reich Citizenship Law of November 14, 1935, §5(1) [hereinafter First Regulation], *translation at* <http://germanhistorydocs.ghi-dc.org/pdf/eng/English32.pdf> (providing a breakdown of difference racial “classes”).

58. *Holocaust Encyclopedia: Nuremberg Race Law Chart Photograph*, U.S. HOLOCAUST MEM’L MUSEUM [hereinafter *Race Law Chart*], https://www.ushmm.org/wlc/en/media_ph.php?ModuleId=0&MediaId=8837 (last accessed Mar. 2, 2017) (providing a chart for Jewish racial composition, including a section in the center entitled Michling 1. Grade for those with two Jewish grandparents); *see also* First Regulation, *supra* note 57 (providing translations of the Reich Citizenship Law (Sept. 1935) and the First Regulation to the Reich Citizenship Law (Nov. 1935)).

became married to one; (3) his parents were married on or after September 17, 1935, and one of his parents was Jewish; or (4) he was born out of wedlock after July 31, 1936, and one of his parents was Jewish.⁵⁹ If that person did not meet any of the above criteria, then he was considered a Mischling of the first degree.⁶⁰ Finally, a person who had only one Jewish grandparent was considered a Mischling of the second degree. So long as that individual did not belong to the Jewish religious community, he or she would be considered full-blooded German under the law.⁶¹

These laws demonstrate a number of interesting elements concerning the National Socialist conception of race and racial identity.⁶² First, policymakers created ancestry charts and degrees of “Jewishness” in order to determine what constituted Jewishness.⁶³ Second, regulations surrounding “full Jews” were relatively easy to mandate, however, regulating mixed race children was difficult.⁶⁴ The laws provide a presumption of Jewishness that, unless certain conduct was refrained from, would dictate race under the law. Mischlings of the second degree, those with only one Jewish grandparent and who were not affiliated with the Jewish religious community, were considered Aryan.⁶⁵ For Mischlings of the first degree, those with two Jewish grandparents, there were more specific restrictions that would

59. *Id.*

60. *Id.*

61. *Race Law Chart*, *supra* note 58 (providing a chart for Jewish racial composition, including a section in the center entitled Mischling 2. Grade for those with only one Jewish grandparent); *see also*, First Regulation, *supra* note 57 (providing a translation for the Reich Citizenship Law of 1935).

62. It is also important to note that limitations on Jews extended beyond citizenship, access to political rights and marriage. The Race Laws also limited property rights, they mandated that German citizens could not work in the homes of Jews, and that any Jew holding civil service positions would be retired. *See generally* First Regulation, *supra* note 57. Additionally, the regulations of November 1935 did not specify school segregation, but eventually Jewish teachers were fired from public schools and Jewish students banned from attending public schools. *See generally* First Regulation, *supra* note 57 (discussing the eventual dismissal of Jewish teachers and segregation of schools).

63. *See* First Regulation, *supra* note 57 (providing the specific restrictions and elements pertaining to citizenship under National Socialism); *Race Law Chart*, *supra* note 58 (providing a chart for Jewish racial composition, including a section in the center entitled Mischling 2. Grade for those with only one Jewish grandparent).

64. *See generally* First Regulation, *supra* note 57 (discussing regulations that differentiated between full and mixed race Jews); *Race Law Chart*, *supra* note 58 (describing the various classes of Jews).

65. *See supra* notes 61-64 (discussing Mischling status).

determine their race.⁶⁶ Based on this classification scheme, Nazi officials were grappling with major issues concerning biological and cultural determinants of race.⁶⁷ Because Jews could easily pass as Germans, particularly women and uncircumcised men, blood and ancestry alone was insufficient for strict racial determination.⁶⁸ In certain instances, specific conduct demonstrated whether an individual associated with the Jewish or German communities.⁶⁹ Thus, such Mischlings were deemed Aryan or Jewish depending on their performance of racial identity, i.e. their association with Jews and the Jewish religious community.⁷⁰

The classifications of Mischling that were dependent on conduct or association bear striking similarities to race cases in the United States.⁷¹ For example, in *In Re Monks' Estate* (1941) Antoinette Monks fought for access to her late husband's estate.⁷² During the proceedings, her racial background was called into question by the opposition in an attempt to invalidate Antoinette's marriage to Mr. Monks.⁷³ Evidence was adduced as to her true racial heritage by

66. See generally First Regulation, *supra* note 57 (discussing regulations that differentiated between full and mixed race Jews); *Race Law Chart*, *supra* note 58 (describing the various classes of Jews).

67. The Reich Citizenship Law of September 15, 1935, § 2 (discussing Reich citizenship predicate on German blood), *translation at* <http://germanhistorydocs.ghi-dc.org/pdf/eng/English32.pdf>; First Regulation, *supra* note 57, § 2 (discussing Mischlinge and their classification based on blood).

68. See First Regulation, *supra* note 57, §5(2) (discussing the various conditions to determine someone's Jewish blood where the person has two fully Jewish grandparents); see generally MICHAEL A. LIVINGSTON, *THE FASCISTS AND THE JEWS OF ITALY: MUSSOLINI'S RACE LAWS, 1938-1943* (2014) (discussing the Italian criteria for determining Jewish identity for mixed-blood through ancestry and conduct).

69. See LIVINGSTON, *supra* note 68 (discussing the Race citizenship law and how conduct could influence connection to a Jewish community).

70. First Regulation, *supra* note 57, § 5(2)(a) (discussing Jews with mixed blood performing identity through belonging to a "Jewish religious community"); see generally LIVINGSTON, *supra* note 68 (discussing Italian Jewish performance similar to Nazi construction of identity where association with the Jewish community was a factor for identifying race).

71. See First Regulation, *supra* note 57, § 5(2) (discussing Jewish performance of identity); *In Re Monks' Estate*, 120 P.2d 167 (1941) (discussing performance of identity in the United States based on appearance, conduct and association).

72. *In Re Monks' Estate*, *supra* note 71 (describing a trust and wills case where a widower was forced to prove her race in order to receive benefits from the decedent's estate); Kevin Noble Maillard, *The Color of Testamentary Freedom*, 62 SMU L. Rev. 1783, 1784 (2009) (discussing the ways in which courts will restrict the testator's wishes in the context of interracial marriage).

73. *In Re Monks' Estate*, *supra* note 71, at 171 (describing the contest over Monks' estate and the questions as to his wife's racial background); Maillard, *supra* note 72.

analyzing her hands and hair.⁷⁴ *In Monks' Estate* and other cases like it, the court tackled the issue of race through the lens of biology, conduct, and appearance.⁷⁵

In a similar case, *Rhineland v. Rhineland* (1924), Leo Rhineland filed a fraud suit against his wife Alice claiming that she misrepresented her race.⁷⁶ The case revolved around her biology, ancestry, her parents' interracial marriage, and even her appearance as indicators of race.⁷⁷ Alice's attorney requested she bear her breasts to the jury in order to prove no deceit since there was no way Leo could mistake her for a white woman having seen her naked body prior to marriage.⁷⁸ Like in the *Monks' Estate* case, *Rhineland* was not just about biology, but also about performing race.⁷⁹ Both cases demonstrate how color is not the only indicator of race, but rather the many factors courts used to determine an individual's racial identity.⁸⁰

As in Nazi Germany and in the race context in America, fascist Italy also employed race laws that combined biology and conduct.⁸¹ The laws, enacted in 1938, were passed at the culmination of a

74. In *Re Monks' Estate*, *supra* note 71, at 171 (describing how Antoinette's hairdresser was even brought in to testify); Maillard, *supra* note 72 (noting that "representations of testamentary diversity—the after-death interests of nontraditional "family" over the unnamed interests of collateral heirs—tested courts' dedication to observing the unorthodox wishes of testators").

75. See generally *Barden v. Barden*, 12 N.C. (3 Dev.) 548 (1832); *Kirby v. Kirby*, 206 P. 405 (Ariz. 1922); Angela Onwuachi-Willig, *A Beautiful Lie: Exploring Rhineland v. Rhineland as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393 (2007).

76. Onwuachi-Willig, *A Beautiful Lie*, *supra* note 75 (describing the relationship between Leo and Alice Rhineland and their subsequent fraud suit); Angela Onwuachi-Willig, *A Room with Many Views: A Response to Essays on According to Our Hearts: Rhineland v. Rhineland and the Multiracial Family*, 16 J. GENDER RACE & JUST. 793, 818-19 (2013) (discussing perceptions of the Rhinelands and the author's view that they were both victims).

77. Onwuachi-Willig, *A Beautiful Lie*, *supra* note 75; Onwuachi-Willig, *A Room with Many Views*, *supra* note 76, at 810 (describing how Whites describe race in terms of biology and genes).

78. Onwuachi-Willig, *A Beautiful Lie*, *supra* note 75, at 2429; Onwuachi-Willig, *A Room with Many Views*, *supra* note 76, at 823 (describing the way the jury may have been influenced by race even without Alice bearing her breasts).

79. In *Re Monks' Estate*, *supra* note 71, at 171 (describing performance of identity in a trust and wills case); Onwuachi-Willig, *A Beautiful Lie*, *supra* note 75 (discussing performance of identity in a fraud suit).

80. See *supra* note 79 (discussing fraud suits and performance of identity).

81. See Regulation to the Reich Citizenship Law of November 14, 1935, § 5(2), translation at <http://germanhistorydocs.ghi-dc.org/pdf/eng/English32.pdf> (discussing the racial distinctions based on biology and association); see generally LIVINGSTON, *supra* note 68 (discussing the Italian criteria for determining Jewish identity).

propaganda campaign and the publication of the “Manifesto of the Racial Scientist.”⁸² As in Nazi Germany, the question of Jews with four Jewish grandparents was uncomplicated: their ancestry made them full-blooded Jews.⁸³ Another similarity to the Nuremberg Race Laws and their progeny was the prevention of interracial marriages, the segregation of schools, universities, and other organizations, and the effects on property rights.⁸⁴ However, unlike Nazi Germany, the presumption in Italy tended towards Aryan rather than Jewish, and those with three Jewish grandparents were considered mixed-race.⁸⁵ In a memorandum on the definition of “Jew”, Italian policymakers stated that “integrating biological criteria with the racial superiority of Italian blood and with [one’s] personal ethical, religious and political manifestations” allowed for those with even fifty percent and twenty-five percent Jewish blood to be considered Aryan.⁸⁶ The memorandum, and the law that later followed, presumed a person to be Aryan unless he or she manifested one of the five qualities of Jewishness.⁸⁷ The Jewish indicia included: (1) membership in the Jewish community on or after January 1, 1933; (2) affirmation of Judaism after 1931; (3) marriage to a Jewish spouse after October 1, 1938; (4) children educated in or affirming their Jewish religion after

82. LIVINGSTON, *supra* note 68, at 22 (describing the passing of the Race Laws in 1938); David B. Green, *This Day in Jewish History // 1938: Fascist Italy Announces Its First Anti-Jewish Laws*, HAARETZ (Sept. 1, 2014), <http://www.haaretz.com/jewish/this-day-in-jewish-history/.premium-1.613435> (discussing the passing of Italy’s anti-Jewish racial laws on September 1, 1938).

83. LIVINGSTON, *supra* note 68, at 27 (describing the class distinction for “full blooded” Jews); The Reich Citizenship Law of September 15, 1935, §2, *translation at* <http://germanhistorydocs.ghi-dc.org/pdf/eng/English32.pdf> (discussing Reich citizenship, which was closed to those of Jewish blood).

84. LIVINGSTON, *supra* note 68, at 27 (discussing the specific restrictions on Jewish schools, jobs and marriages); The Reich Citizenship Law of September 15, 1935, *translation at* <http://germanhistorydocs.ghi-dc.org/pdf/eng/English32.pdf> (discussing restrictions on Jewish associations)

85. LIVINGSTON, *supra* note 68, at 39 (discussing the criteria for being considered Jewish of Aryan); *cf.* First Regulation, *supra* note 57, §2(2) (describing Jewish blood with a presumption on Jewishness).

86. LIVINGSTON, *supra* note 68, at 39 (2014) (quoting the Demorazza memorandum, on the Definition of the Jew); Green, *supra* note 82 (noting that “a government-appointed committee of academics released a study meant to prove that the country’s 70,000 Jews were racially different from Italians and other Aryans”).

87. LIVINGSTON, *supra* note 68, at 39 (2014) (quoting the Demorazza memorandum, on the Definition of the Jew); Green, *supra* note 82 (noting that “a government-appointed committee of academics released a study meant to prove that the country’s 70,000 Jews were racially different from Italians and other Aryans”).

October 1, 1938; or (5) otherwise clear evidence of activity in the Jewish community.⁸⁸

Although the Nuremberg Laws provided for some cultural and religious factors in a balancing test to determine race, the biological racial factors received greater emphases.⁸⁹ By contrast, there are clear indicators of influence by the Catholic Church in the criteria provided to determine Jewishness.⁹⁰ For example, the requirement for acknowledgment of Judaism or for one's children to profess their Jewishness demonstrated a clear link to religious antisemitism by focusing on the religious identity of the individual and her family.⁹¹ Interestingly, the Church was even involved in the construction of the race laws.⁹² The Church sent numerous letters to Mussolini's administration discussing the plight of the "innocent" Catholic spouses of unconverted or converted Jews who were allegedly victimized by the Italian race laws despite their religion.⁹³ The Church claimed that when a spouse was deprived of the ability to support his or her family financially, then the entire family, even the innocent

88. LIVINGSTON, *supra* note 68, at 40 n.27 (describing the criteria designating someone as Jewish based on his or her conduct and not just biology); *Italian Racial Laws*, ITALY AND THE HOLOCAUST FOUNDATION, <http://www.italyandtheholocaust.org/italian-racial-laws.aspx> (last visited Mar. 4, 2017) (describing the laws enacted between September and November of 1938, including those related to intermarriage).

89. First Regulation, *supra* note 57, §5(1) (providing factors beyond biology to determine racial class with a presumption towards Jewishness); LIVINGSTON, *supra* note 68, at 40 n.27 (providing distinctions for racial class with a presumption towards being Aryan).

90. LIVINGSTON, *supra* note 68, at 41 (discussing the influence of the Church of the racial laws); Stefano Luconi, *Recent Trends in the Study of Italian Antisemitism Under the Fascist Regime*, 38 PATTERNS OF PREJUDICE 1, 4 (2004) (noting that "the new race laws of 1938 stunned public opinion and were immediately unpopular, both with the established elites and with ordinary Italians, as well as in the Catholic Church.").

91. LIVINGSTON, *supra* note 68, at 41 (describing criteria that allude to Church influence in racial construction); Symposium on Pope Pius XII and the Holocaust in Italy, 7:2 J. MODERN ITALIAN STUDIES 215, 240 (2002) (discussing the Church's response to Jewish converts to the Catholic faith).

92. LIVINGSTON, *supra* note 68, at 41 (noting that "[w]hile many or even most of the suggestions in the letters were ultimately rejected, they provide important insights into the mindset of the draftsmen and the issues that they considered important during and after the drafting process."); Symposium on Pope Pius XII, *supra* note 91, at 242 (discussing the Church's objection to the implementation of race laws because of its effects on converted Jews).

93. LIVINGSTON, *supra* note 68, at 41 (discussing the problem with "innocent Catholic spouses"); Symposium on Pope Pius XII, *supra* note 91, at 240 (noting that "[r]ather, like most Catholics, he welcomed Jewish converts into the Church and treated them equally with co-religionists of all races.").

spouse and children, were punished.⁹⁴ The Church even requested an exception to the law for fathers deemed Jewish but married to Catholic women so they could provide for their families.⁹⁵ An internal memorandum from October 4, 1939, called “Family Unity and Mixed Marriages,” argued that those who had converted to Catholicism, but were identified as racially Jewish and whose spouses and children were entirely Catholic, “might be” considered non-Jews for purposes of the law and to provide family harmony.⁹⁶ Although the suggestion was rejected, the influence of the Church and religion remained paramount in the Italian context because of the presumption of Aryanism and the criteria relating to conversion and profession of religion for borderline cases.⁹⁷

Identity performance extended beyond religious conduct into other avenues of daily life.⁹⁸ For example, in Germany, Jews were required to add the names “Sarah” for women and “Israel” for men as middle names on all passport and identification documents.⁹⁹ The addition of the middle name allowed not only for identification of race, thereby inhibiting an individual’s ability to pass as Aryan, but also created an easy method for segregation.¹⁰⁰ In Nazi Germany,

94. LIVINGSTON, *supra* note 68, at 41 (discussing the Church’s communications with the government with regards to those who would be affected inadvertently by the race laws); Symposium on Pope Pius XII, *supra* note 91, at 242 (noting that the Church was “unhappy with the law defining as Jewish anyone with two Jewish parents, regardless of his or her religion, for it did not acknowledge conversions.”).

95. LIVINGSTON, *supra* note 68, at 41 (discussing exemptions for Catholic families with a single Jewish parent); Symposium on Pope Pius XII, *supra* note 91, at 241-42 (arguing that “[t]hese concepts were anathema to the Catholic Church, which readily condemned race-based (but Pope Pius XII and the Holocaust in Italy not religion-based) discrimination.”).

96. LIVINGSTON, *supra* note 68, at 42 (discussing the Family Unity and Mixed Marriages memorandum); Symposium on Pope Pius XII, *supra* note 91, at 241-42 (discussing the racist Manifesto of Racial Scientists and the Catholic Church’s response to it).

97. LIVINGSTON, *supra* note 68, at 41 (describing Church involvement regardless of Church influence); Symposium on Pope Pius XII, *supra* note 91, at 242 (discussing Pius XI’s speeches and responses to rising racism in Italy).

98. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279 (2000) (discussing identity performance and working identity in general); *see generally* Pegelow, *supra* note 23 (discussing Jewish perceptions of themselves from the 1920s until the 1940s).

99. *See* Telephone Interview with Charles Moerdler, Partner, Stroock, Stroock & Levan (May 16, 2014) (discussing the inclusion of Israel on his grandfather’s passport and birth certificate); Eddy Portnoy, *All German Jews Forced to Change Names to Israel and Sarah*, FORWARD (Aug. 17, 2013) (describing the requirement to add Sarah or Israel to all Jewish documentation).

100. *See* Telephone Interview with Charles Moerdler, *supra* note 99; Portnoy, *supra* note 99.

Aryanism was glorified and anything “other” was shunned.¹⁰¹ Between 1933 and 1939, Jews were restricted from entering politics.¹⁰² Professionals such as tax consultants, lawyers, and doctors were restricted in their ability to practice, and businesses were Aryanized.¹⁰³ Although Jews were still able to pass as Aryan, particularly women with blonde hair and blue eyes, new documents were needed.¹⁰⁴ The separation also allowed for dehumanization over time, a concept that eventually led to genocide.¹⁰⁵

101. See Nico Voigtlander & Hans-Joachim Voth, *Persecution Perpetuated: The Medieval Origins of Anti-Semitic Violence in Nazi Germany*, Q. J. ECON. 1339 (2012) (arguing that the roots of Nazi antisemitism can be traced to the interwar period and demonstrate deep-seeded ethnic tension and hatred); Christopher Mark Hutton, *Nazi Race Theory and Belief in an “Aryan Race”: A Profound Failure of Interdisciplinary Communication*, 1 INT’L J. SCI. SOC’Y 149 (2010) (noting that “Nazi ideologues associated the Enlightenment with a “Jewish” universalism and an urbanized modernity which was rapidly erasing racial and cultural difference. Nazi science is constituted as a pseudo-scientific “other”, against which normative science and scholarship can be measured.”).

102. See Law for the Restoration of the Professional Civil Service (Apr. 7, 1933) § 3(1), http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1520 (providing that all non-Aryan civil servants are to be retired); *Antisemitic Legislation 1933-39*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007901> (describing the “Law for the Restoration of the Professional Civil Service of April 7, 1933, which excluded Jews and the ‘politically unreliable’ from civil service”).

103. See *Antisemitic Legislation 1933-39*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007901> (discussing legislation that restricted Jewish property ownership, movement and citizenship); *Aryanization*, SHOAH RESOURCE CENTER, http://www.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205775.pdf (last visited, Mar. 5, 2017) (defining Aryanization of businesses as firing Jewish workers and managers and moving businesses owned by Jews into the hands of Aryans).

104. See e.g., Rose Greenbaum-Dinerman, *Survived as an “Aryan”*, <http://www.zchor.org/greenba1.htm> (last updated May 4, 2006) (providing the story of a woman who passed as Aryan and survived the war); Justin Huggler, *Nazi ‘Perfect Aryan’ Poster Child was Jewish*, TELEGRAPH (Jul. 1, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/germany/10938062/Nazi-perfect-Aryan-poster-child-was-Jewish.html> (discussing a child who’s photo became Nazi propaganda and his Jewish heritage); see generally Lenore J. Weitzman, *Living on the Aryan Side in Poland: Gender, Passing and the Nature of Resistance*, in WOMEN IN THE HOLOCAUST 187-222 (Dalia Ofer & Lenore J. Weitzman, eds., 1998).

105. *Nuremberg Laws*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007902> (last visited, Mar. 5, 2017) (describing the Law for the Protection of German Blood and German Honor as a pretext for disappearing Jews into concentration camps); Bradsher, *supra* note 49 (noting that “The so-called “Nuremberg Laws” [were] a crucial step in Nazi racial laws that led to the marginalization of German Jews and ultimately to their segregation, confinement, and extermination.”). According to Cheryl Harris, in the American race context, “the racialization of identity and the racial subordination of Blacks and Native Americans provided the ideological basis for slavery and conquest.” She

By creating a racial distinction across biological lines and racial considerations, Nazi Germany created an environment similar to that of racism in the United States.¹⁰⁶ These parallels demonstrate the importance of placing antisemitism in the race context, and provides a new lens through which to understand how racism has been used, the many different places it has been manipulated, and what the potential implications can be.¹⁰⁷ Unfortunately, the racist conceptions used by Nazi Germany have persisted until today, so much so that legal mechanisms created after the Second World War have understood antisemitism within the race context.¹⁰⁸ Furthermore, these distinctions manifest throughout the world and demonstrate the need for understanding and combatting antisemitism within the race context.¹⁰⁹

II. CURRENT MANIFESTATIONS OF ANTISEMITISM

Part II will analyze current examples of racist antisemitism, ranging from violent attacks on Jewish communities in Europe to legal regulations that effect Jewish family life.¹¹⁰ Part II will focus entirely on manifestations of antisemitism in Europe as an example of modern antisemitic trends, however, it should still be noted that antisemitism persists around the world.¹¹¹ The examples provided in

argues that through a creation of property and property rights, hegemony and domination over Blacks and Native American peoples was possible. “The valorization of whiteness as treasured property in a society structured on racial caste” created an environment for racial differentiation and for whiteness to become a commodity. See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1710, 1713-16 (1993) (discussing the racialization of identity in the United States); Cheryl I. Harris, *Whiteness as Property: A Twenty Year Appraisal*, 31 HARV. J. RACIAL & ETHNIC JUST. 148, 159 (2015) (arguing “Through this doctrinal apparatus, American law regulated, facilitated and managed chattel slavery and the seizure of indigenous land and the subordination of native nations.”).

106. See *supra* note 29 (discussing racial policy of differentiation under Nazi Germany); *supra* note 31 (discussing racial policies in the United States).

107. See *infra* Part II (discussing the current manifestations of antisemitism and the need for contextualizing antisemitism as racism).

108. See *infra* Part III (discussing the international legal tools available to combat antisemitism and how they identify antisemitism within a race context).

109. See *infra* Part II (discussing antisemitism in the world today and providing a few examples of their manifestation as racist antisemitism).

110. See *infra* notes 107-12 (discussing violent attacks on Jewish communities in Europe); *infra* notes 125-35 (discussing antisemitic legislation on ritual slaughter and against circumcision in Europe).

111. See, e.g., Ira Forman, *How Our Jewish Organizations Combat Anti-Semitism*, N.Y. JEWISH WEEK (Mar. 21, 2017), <http://jewishweek.timesofisrael.com/how-our-jewish-organizations-combat-anti-semitism> (describing the views of former special envoy to monitor

this section represent merely a sampling of the implications of racist antisemitism.¹¹² Yet, they illustrate the continuing impact of racist antisemitism and the importance of analyzing antisemitism within the race context.¹¹³ Scholars today generally discuss antisemitism in terms of religious intolerance, hate crimes, or historical antisemitism.¹¹⁴ By not addressing or placing antisemitism within a racial context, the impact, scope, and potential strategies for combatting antisemitism are lost.¹¹⁵

Following the Holocaust, the international legal approach to combatting antisemitism shifted in order to compensate for the mass atrocities and genocide perpetrated under National Socialism through its demonization of Jews.¹¹⁶ Many believed that after the creation of

and combat antisemitism Ira Forman and his work with Jewish Agencies to end antisemitism around the world); Peter Beinart, *The Dangers of Blaming Trump for Anti-Semitism*, THE ATLANTIC (Mar. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/03/the-dangers-of-blaming-trump-for-anti-semitism/520692> (describing the recent JCC bomb threats and the dangers of constructing a narrative blaming Trump supporters for the attacks); *Jewish Groups Urge Congress to Preserve Anti-Semitism Monitor*, JEWISH TELEGRAPHIC AGENCY (Mar. 22, 2017), <http://www.jta.org/2017/03/22/news-opinion/politics/jewish-groups-urge-congress-to-preserve-anti-semitism-monitor> (discussing the efforts by Jewish groups to maintain the State Department's antisemitism monitor).

112. There are examples of such forms of discrimination in the US context as well. See, e.g., Mikaela Conley, *Proposed Circumcision Ban Struck From San Francisco Ballot*, ABC NEWS, (July 28, 2011) <http://abcnews.go.com/Health/san-francisco-circumcision-ban-stricken/story?id=14179024> (discussing the emergence and then striking of the circumcision ban from the San Francisco ballot); Peter Jacobs, *Harvard is Being Accused of Treating Asians the Same Way it Used to Treat Jews*, BUSINESS INSIDER (Dec. 4, 2014) <http://www.businessinsider.com/the-ivy-leagues-history-of-discriminating-against-jews-2014-12> (describing how Harvard “is using racial classifications to engage in the same brand of invidious discrimination against Asian Americans that it formerly used to limit the number of Jewish students in its student body.”).

113. See *infra* Part IV (discussing the continuing impact of antisemitism and the forms it takes).

114. See generally Vivian Grosswald Curran, *Deconstruction, Structuralism, Antisemitism and the Law*, 36 B.C. L. REV. 1 (1994) (discussing antisemitism under Vichy France); Stephen Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833 (1996) (discussing religious clauses and antisemitism); Jocelyn Hellig, *Antisemitism in Sub-Saharan Africa with a Focus on South Africa*, 14 EMORY INT'L L. REV. 1197 (2000) (describing antisemitism in South Africa with particular attention to toxic forms of antizionism as antisemitism); Alamea Deede Bitran, “*Anti-Israel, A Camouflage Platform for Antisemitism*,” 29 ST. THOMAS L. REV. 1 (2016) (discussing anti-Israel sentiment on college campuses as a disguise for antisemitism).

115. See *infra* Part III (discussing the legal mechanisms available to combat antisemitism in a racial context).

116. *A World Made New: Human Rights After the Holocaust*, FACING HISTORY AND OURSELVES, <https://www.facinghistory.org/universal-declaration-human-rights/world-made-new-human-rights-after-holocaust> (last visited Mar. 5, 2017) (discussing the human rights

the State of Israel, antisemitism fell away because the State's creation provided Jews with a Jewish homeland that would protect them or provide haven no matter the international context.¹¹⁷ Additionally, Europe seemed to take a hard look at its racist antisemitic policies following the Second World War.¹¹⁸ Yet, modern manifestations of antisemitism in Europe demonstrate the ways in which antisemitism functioning as racism has persisted and developed in a post-WWII Europe.¹¹⁹

In the past ten years, antisemitic violence has increased throughout Europe.¹²⁰ In France, for example, the increased violence

regime after the Holocaust); Irwin Cotler, Opinion, *Auschwitz, the Holocaust and Human Rights: Lessons for our Time*, JERUSALEM POST (Jan. 28, 2016), <http://www.jpost.com/Opinion/Auschwitz-the-Holocaust-and-human-rights-Universal-lessons-for-our-time-443173> (discussing lessons after the Holocaust including impunity for mass atrocities).

117. Cotler, *supra* note 116 (arguing that “If there had been a State of Israel, there might well not have been a Holocaust or the horrors of Jewish history”); Cnaan Liphshiz, *Obama: Israel Prevents Another Holocaust*, JEWISH TELEGRAPHIC AGENCY (Mar. 22, 2013), <http://www.jta.org/2013/03/22/news-opinion/israel-middle-east/obama-israel-prevents-another-holocaust> (quoting former President Barack Obama as saying “The State of Israel does not exist because of the Holocaust. But with the survival of a strong Jewish State of Israel, such a Holocaust will never happen again.”).

118. See e.g., ORG. FOR SEC. AND CO-OPERATION IN EUR., MINISTERIAL COUNCIL, DECLARATION ON ENHANCING EFFORTS TO COMBAT ANTISEMITISM, MC.DOC/8/14 (Dec. 5, 2014), <http://www.osce.org/mc/130556> (providing for the OSCE again to call on States to promote educational programs to combat antisemitism, encourage intercommunity coalition building and called on the ODIHR, to take conclusive steps to encourage these national activities); European Monitoring Center on Racism and Xenophobia, *EUMC Working Definition of Anti-Semitism*, EUROPEAN PARLIAMENT WORKING GROUP ON ANTISEMITISM, <http://www.antisem.eu/projects/eumc-working-definition-of-antisemitism> (providing a working definition for “antisemitism”); ORG. FOR SEC. AND CO-OPERATION IN EUR., BERLIN DECLARATION (2004), <http://www.osce.org/cio/31432> (recognizing that “anti-Semitism, following its most devastating manifestation during the Holocaust, has assumed new forms and expressions, which, along with other forms of intolerance, pose a threat to democracy, the values of civilization and, therefore, to overall security in the OSCE region and beyond.”).

119. See *supra* notes 105-115 (providing discussion about modern forms of racist antisemitism in Europe).

120. See, e.g., Griff Witte & Anthony Faiola, *France Sends 10,000 Troops Across Country, Protecting Hundreds of Jewish Sites*, WASH. POST (Jan. 12, 2015), https://www.washingtonpost.com/world/hollande-calls-crisis-meeting-10000-extra-forces-sent-to-protect-people-of-france/2015/01/12/63610982-9a34-11e4-a7ee-526210d665b4_story.html (discussing France's protection of Jewish sites and communities); *Jewish Synagogue Guard Killed in Copenhagen Attack Identified*, TIMES OF ISR., (Feb. 15, 2015), <http://www.timesofisrael.com/jewish-synagogue-guard-killed-in-copenhagen-attacks-identified> (describing an attack on a synagogue in Copenhagen); Jeffrey Goldberg, *Is it Time for Jews to Leave Europe*, THE ATLANTIC (Apr. 2015), <https://www.theatlantic.com/magazine/archive/2015/04/is-it-time-for-the-jews-to-leave-europe/386279/> (discussing rise of antisemitism in Europe).

against Jewish communities has caused large numbers to leave the country, despite governmental assurances of safety and deployment of 10,000 troops to guard and protect Jewish communities.¹²¹ In 2015 alone, 8,000 French Jews moved to Israel as violence increased and right-wing politicians, including French presidential candidate Marine Le Pen, publicly called for them to perform acts contrary to their faith, such as eating pork and no longer wearing the yarmulke.¹²² There has also been a rise in violence in Denmark, Belgium, and Germany.¹²³ Some emblematic examples include the attack on a kosher supermarket in Paris, just days after the Charlie Hebdo attacks.¹²⁴ One month later, a volunteer Jewish security guard standing outside a synagogue was shot and killed by a terrorist in Denmark.¹²⁵

While the use of boycotts and sanctions are a legitimate form of protest with regards to any state, some argue that the boycott of Israeli

121. See Witte, *supra* note 120 (discussing France's protection of Jewish sites and communities); Melissa Bell, *France: Authorities Probe Alleged Anti-Semitic Attack in Paris*, CNN (Feb. 24, 2017), <http://www.cnn.com/2017/02/24/europe/france-paris-assault> (discussing continued police responses to possible anti-Semitic attacks in France).

122. See Oren Liebermann, *Au Revoir and Shalom: Jews Leave France in Record Numbers*, CNN (Jan. 25, 2016), <http://www.cnn.com/2016/01/22/middleeast/france-israel-jews-immigration/> (discussing the rate of emigration from France); cf. Judy Maltz, *Je Ne T'aime Pas Israel: Drop in French Jews' Immigration to Israel*, HAARETZ (Sept. 26, 2016), <http://www.haaretz.com/israel-news/1.744457> (discussing a tapering off of French immigration to Israel).

123. See *Charlie Hebdo Attack: Three Days of Terror*, BBC NEWS (Jan. 14, 2015), <http://www.bbc.com/news/world-europe-30708237> (discussing the violence against Jews following the Charlie Hebdo attack); *Copenhagen Shootings: Police Kill 'Gunman' After Two Attacks*, BBC NEWS (Feb. 15, 2015), <http://www.bbc.com/news/world-europe-31475803> (discussing the attack and subsequent police action to stop the shooter); *Suspect in Brussels Jewish Museum Shooting Faces Extradition to France*, FRANCE24 (Nov. 3, 2016), <http://www.france24.com/en/20161103-belgium-extradition-france-brussels-jewish-museum-shooting-nemmouche> (describing the potential extradition from France of the chief suspect in the Jewish Museum of Belgium shooting in 2014).

124. See *Charlie Hebdo Attack: Three Days of Terror*, BBC NEWS (Jan. 14, 2015), <http://www.bbc.com/news/world-europe-30708237> (discussing the violence against Jews following the Charlie Hebdo attack); *France Remembers Victims of Kosher Supermarket Attack*, FRANCE24 (Jan. 10, 2016), <http://www.france24.com/en/20160109-france-homage-victims-hyper-cacher-kosher-supermarket-attack-paris> (remembering the attack on the Kosher supermarket one year later).

125. See *Jewish Synagogue Guard Killed in Copenhagen Attack Identified*, TIMES OF ISR. (Feb. 15, 2015), <http://www.timesofisrael.com/jewish-synagogue-guard-killed-in-copenhagen-attacks-identified> (describing the attack on the synagogue in Copenhagen); *Copenhagen Shootings: Police Kill 'Gunman' After Two Attacks*, BBC NEWS (Feb. 15, 2015), <http://www.bbc.com/news/world-europe-31475803> (discussing the attack and subsequent police action to stop the shooter).

products can lead to disproportionate manifestations of antisemitism.¹²⁶ For example, in November 2015, the European Commission, the executive arm of the European Union, issued a decision that products sold in the European Union originating from territories disputed under international law may not be labelled as “Made in Israel.”¹²⁷ The Israeli government objected, claiming that “there are hundreds of territorial conflicts around the world [but the European Union] chose to single out Israel and Israel alone” and noting that that the European Union’s labelling of Jewish products “brings back dark memories.”¹²⁸ These acts reference policies of discrimination by labelling Jews and Jewish-owned businesses in a way reminiscent of Nazi policies during the Holocaust.¹²⁹ Additionally, the choice to label products as “Made in Israel” is reminiscent of the race context in the United States because of the ways in which a particular group has been singled out as “performing” a racial identity.¹³⁰ By buying products made in Israel, individuals, whether or not they are Jewish, are identifying themselves with the State of Israel and thus becoming exemplars of “Jewish” behavior or identity.¹³¹

The Boycott, Divestment, and Sanctions movement (“BDS”), an international movement that promotes a campaign of boycotts, divestment, and sanctions against Israel, similarly targets and labels

126. See Bernard Avishai, *The E.U. v. B.D.S.: The Politics of Israel Sanctions*, THE NEW YORKER (Jan. 22, 2016), <http://www.newyorker.com/news/news-desk/the-e-u-vs-b-d-s-the-politics-of-israel-sanctions> (discussing perspective on the boycott divestment sanctions movement); Benjamin Weinthal, *European Affairs: BDS Spreading like Wildfire in Europe?*, JPOST (Mar. 5, 2016), <http://www.jpost.com/International/EUROPEAN-AFFAIRS-Spreading-like-wildfire-446866> (discussing the BDS wave in Europe as a worrisome trend).

127. See Don Melvin & Oren Liebermann, *EU: Products from West Bank and Golan Cannot Be Labeled ‘From Israel,’* CNN (Nov. 11, 2015), <http://www.cnn.com/2015/11/11/europe/eu-labeling-israel-territories>; Weinthal, *supra* note 126 (discussing the BDS in Europe and difference in labeling products from Israel and from West bank).

128. See Don Melvin & Oren Liebermann, *EU: Products from West Bank and Golan Cannot Be Labeled ‘From Israel,’* CNN (Nov. 11, 2015), <http://www.cnn.com/2015/11/11/europe/eu-labeling-israel-territories>; Weinthal, *supra* note 126 (discussing the BDS in Europe and difference in labeling products from Israel and from West bank).

129. See *supra* Part I (discussing Nazi policies, including Aryanization of property).

130. See *supra* note 61 (discussing race performance by Jews in Nazi Germany); *supra* note 70 (discussing race performance in the Rhineland case and *In re Monks’ Estate*).

131. See *infra* Part III (discussing the Wupertal case where a synagogue was targeted for being Zionist); *supra* note 99 (discussing labeling in Nazi Germany of identity through passports).

Israeli products and businesses.¹³² BDS places pressure on businesses and academic institutions to sever working relationships and ties with Israeli businesses and institutions.¹³³ In August 2015, the Valencia, Spain arm of BDS pressured the organizers of the Rototom Sunsplash human music festival to cancel a performance by Matisyahu, a Jewish American reggae singer, unless he signed a declaration in support of a Palestinian state.¹³⁴ Matisyahu was singled out from amongst 250 artists as the only one pressured to sign the document.¹³⁵ Matisyahu was first identified as Jewish, because of his name, appearance, and background as a religious Jew, and then placed within the context of conduct relating to the State of Israel—reversing the trend of identifying the person with the State but nonetheless perpetuating identification of race through conduct.¹³⁶ Furthermore, Matisyahu is an American, not an Israeli, and the policies of the Israeli government were projected onto him, demonstrating clearly an instance when the line between valid protest and antisemitism was crossed.¹³⁷

Other recent limitations of Jewish practice and identification have extended into the realm of family.¹³⁸ For example, in the

132. See Michelle Malka Grossman, *BDS to Jpost: Matisyahu Justified “Israeli Crimes”*, JPOST (Aug. 18, 2015), <http://www.jpost.com/Arab-Israeli-Conflict/Rototom-Sunsplash-spokesperson-The-decision-was-made-between-Matisyahu-and-BDS-not-us-412383> (discussing Matisyahu being asked to condemn Israel in order to perform); *Spanish Government Condemns Exclusion of Jewish Artist from Festival*, GUARDIAN (Aug. 19, 2015), <https://www.theguardian.com/music/2015/aug/19/matisyahu-exclusion-rototom-sunsplash-festival-spanish-government-condemns> (discussing Matisyahu cancelling his performance because he refused to state his position on the Israel-Palestine conflict).

133. See also *What is BDS?*, BOYCOTT, DIVESTMENT, SANCTIONS, <https://bdsmovement.net/what-is-bds> [hereinafter BDS MOVEMENT] (describing the BDS movement as a “Palestinian-led movement for freedom, justice and equality” that encourages boycott and divestment from Israeli products and institutions in order to isolate them and “it more difficult to oppress Palestinians”); STAND WITH US, EXPLAINING THE BDS MOVEMENT: BDS THE NEW ANTISEMITISM, <https://www.standwithus.com/booklets/ExplainingBDS/files/ExplainingBDS.pdf> (last visited May 2, 2017) (providing an alternative viewpoint on the BDS movements and its connection to modern forms of antisemitism and anti-Israel sentiment).

134. See BDS MOVEMENT, *supra* note 133; STAND WITH US, *supra* note 133.

135. See Grossman, *supra* note 132.

136. See Grossman, *supra* note 132; *Spanish Government Condemns Exclusion of Jewish Artist from Festival*, *supra* note 132.

137. See Grossman, *supra* note 132; *Spanish Government Condemns Exclusion of Jewish Artist from Festival*, *supra* note 132.

138. See, e.g., European Convention for the Protection of Animals for Slaughter art. 17, May 10, 1979, E.T.S. 102 (discussing slaughter prohibitions and restrictions in Europe); Tanya Gold, *A Ban on Male Circumcision Would be Antisemitic. How Could it Not Be?*, THE GUARDIAN (Oct. 11, 2013), <https://www.theguardian.com/commentisfree/2013/oct/11/ban-male-circumcision-antisemitic> (discussing the restrictions on circumcision in Europe).

European Union, the directive “European Convention for the Protection of Animals for Slaughter” requires stunning before slaughter but allows states to create religious slaughter exemptions.¹³⁹ This directive, although perhaps morally sound, would restrict Jewish butchers and limit availability of Kosher and Halal meats.¹⁴⁰ It does so because under Jewish and Muslim law, an animal cannot be stunned before it is killed for the meat to be considered Kosher or Halal.¹⁴¹ Some European states have enacted exemptions for religious slaughter while others have banned religious slaughter or continue to debate the exemption.¹⁴² Denmark issued a regulation in 2014 that banned ritual slaughter without stunning and Poland similarly banned ritual slaughter in 2013.¹⁴³ Additionally, various countries, including Sweden and Germany, have proposed laws criminalizing circumcision, which would interfere directly in religious choice and practice in Europe.¹⁴⁴ These bans target religious Muslim and Jewish

139. See European Convention for the Protection of Animals for Slaughter art. 17, May 10, 1979, E.T.S. 102 (discussing slaughter prohibitions and restrictions in Europe) (providing specifications on slaughter in Europe, however, exempting religious communities); C.M. & B.C., *Religion and Ritual Slaughter: Much Ado About Not Much*, *THE ECONOMIST* (Feb. 18, 2014), <https://www.economist.com/blogs/erasmus/2014/02/religion-and-ritual-slaughter> (discussing the initiative to ban slaughter without first rendering the animal insensitive to pain).

140. See *id.*

141. See *Ritual Animal Slaughter Becoming a More Contested Issue in Europe*, *PUB. RADIO INT’L* (May 16, 2014) [hereinafter *Ritual Animal Slaughter*], <https://www.pri.org/stories/2014-05-16/ritual-animal-slaughter-becoming-more-contested-issue-europe> (describing ritual slaughter requirements); Christopher Needham, *Library Briefing: Religious Slaughter of Animals in the EU*, *LIBRARY OF THE EUR. PARLIAMENT* (Nov. 15, 2012), [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120375/LDM_BRI\(2012\)120375_REV2_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120375/LDM_BRI(2012)120375_REV2_EN.pdf) (discussing the EU’s analysis of the perspectives on ritual slaughter).

142. See *Ritual Animal Slaughter*, *supra* note 141 (discussing bans on ritual slaughter in Sweden and Poland and debates about the ban in France and the Netherlands), <https://www.pri.org/stories/2014-05-16/ritual-animal-slaughter-becoming-more-contested-issue-europe>; Needham, *supra* note 141 (describing how “these exceptions are subject to ongoing concern, particularly voiced by animal welfare organisations, that cattle, sheep, goats and poultry die with greater pain and suffering under these methods.”).

143. See Adam Withnall, *Denmark Bans Kosher and Halal Slaughter as Minister Says ‘Animal Rights Come Before Religion’*, *INDEPENDENT* (Feb. 18, 2014), <http://www.independent.co.uk/news/world/Norway/Norway1304-bans-halal-and-kosher-slaughter-as-minister-says-animal-rights-come-before-religion-9135580.html> (describing Parliamentary discussions on banning ritual slaughter); see also *Polish Ban on Kosher Slaughter of Animals is Overturned*, *BBC NEWS* (Dec. 10, 2014) (overturning the ban on ritual slaughter in Poland), <http://www.bbc.com/news/world-europe-30412551>.

144. Circumcisions are done for all Jewish boys at 8-days-old and is a religious decree. It is also a way of identifying as a Jew. Furthermore, Jewish men during the Holocaust were easily identified because they, unlike their Aryan neighbors, were circumcised. Circumcision

minorities who ritually require circumcision for all baby boys, thus placing religious families in a precarious situation.¹⁴⁵ Interestingly, such a ban would allow for greater “passing” amongst Jewish and non-Jewish men because all would be uncircumcised.¹⁴⁶ However, the ban would also make it difficult for Jews to live in Europe, since almost all Jews circumcise their sons, regardless of religious practice or observance.¹⁴⁷

has a complex and complicated history and there are those who argue it is an act of violence against the child—but limiting or criminalizing circumcision would radically affect and implicate religion in Europe. See Tanya Gold, *A Ban on Male Circumcision Would be Antisemitic. How Could it Not Be?*, THE GUARDIAN (Oct. 11, 2013), <https://www.theguardian.com/commentisfree/2013/oct/11/ban-male-circumcision-antisemitic> (discussing the laws criminalizing circumcision in Sweden and Germany as well as the Council of Europe proposed regulation banning circumcision). Interestingly, Norway enacted legislation protecting the rights of parents to circumcise their sons for religious reasons at the same time that many other countries were criminalizing such conduct. See Yair Rosenberg, *Norway Passes Law Protecting Circumcision*, TABLET (June 27, 2014), <http://www.tabletmag.com/scroll/177526/Norway-passes-law-protecting-circumcision> (discussing protections put forth in Norway for circumcision).

145. Tony Paterson, *Germany’s Jews and Muslims ‘outraged’ as circumcision is ruled to cause bodily harm and infringe child’s rights*, INDEPENDENT (June 27, 2012), <http://www.independent.co.uk/news/world/europe/germany-s-jews-and-muslims-outraged-as-circumcision-is-ruled-to-cause-bodily-harm-and-infringe-7893302.html> (describing Jewish and Muslim outrage at an order banning male circumcision); *Norwegian Official: Jews, Muslims Circumcise out of Ignorance*, JTA (Nov. 25, 2013), <http://www.haaretz.com/jewish/news/1.560094> (discussing an official’s comments about the Jewish and Muslim practice of circumcision).

146. See *supra* note 1 (discussing passing in society in different ways); Smadar Shir, *‘I Pretended to be German to Survive the Holocaust’*, YNET (Apr. 12, 2015), <http://www.ynetnews.com/articles/0,7340,L-4646212,00.html> (describing one man’s story of passing as German to survive the Holocaust).

147. Tony Paterson, *Germany’s Jews and Muslims ‘outraged’ as circumcision is ruled to cause bodily harm and infringe child’s rights*, INDEPENDENT (June 27, 2012), <http://www.independent.co.uk/news/world/europe/germany-s-jews-and-muslims-outraged-as-circumcision-is-ruled-to-cause-bodily-harm-and-infringe-7893302.html> (noting that “Circumcision is almost universally practised as both a custom and standard religious observance by Germany’s four million Muslims and 200,000 Jews.”). Cf. Netta Ahituv, *Even in Israel, More and More Parents Choose Not to Circumcise Their Sons*, HAARETZ (Jan. 14, 2012) <http://www.haaretz.com/israel-news/even-in-israel-more-and-more-parents-choose-not-to-circumcise-their-sons-1.436421> (describing “An informal online survey conducted in 2006 by the Israeli parenting portal Mamy [finding] that of 1,418 parents of boys, 4.8 percent did not have them circumcised. The reasons given: 1.6 percent were not Jews; 2 percent objected to disfiguring the body; and 1.2 percent refrained because the act is painful.”).

*III. LEGAL FRAMEWORK: INTERNATIONAL PROTECTIONS
AGAINST RACIST ANTISEMITISM*

After the Second World War, legal institutions and mechanisms were created in the hopes of preventing or responding to future atrocities.¹⁴⁸ Part III will discuss the mechanisms created to address racism, including CERD and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance. These mechanisms discuss antisemitism in a racial context because of the way such language was perpetuated and used during the Holocaust.¹⁴⁹ The CERD cases and doctrine represent the international community's work to provide tools to combat all forms of racism, including racist antisemitism.¹⁵⁰ These cases and legal principles discuss antisemitism as a form of racism rather than distinctly as a form of religious intolerance.¹⁵¹

Under international law, antisemitism is understood within both religious and racial terms, demonstrating a clear objective for dealing with both historical and modern forms of antisemitism.¹⁵² ICERD

148. See *Human Rights Bodies*, OHCHR, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last visited Mar. 23, 2017) (discussing the Human Rights Bodies, including the Committee on the Elimination of Racial Discrimination and the Special Procedures mandate); *Human Rights Enforcement Mechanisms of the United Nations*, ESCR-NET, <https://www.escr-net.org/resources/human-rights-enforcement-mechanisms-united-nations> (last visited Mar. 23, 2017) (discussing the ratification of the UN treaties and the creation of treaty bodies).

149. See *supra* Part I (discussing Nazi and Italian fascist rhetoric and laws regulating Jews as a race).

150. See G.A. Res 2106 (XX), Convention for the Eradication of All Forms of Racial Discrimination (Dec. 21, 1965) (providing legal tools to combat racism); Committee on the Elimination of Racial Discrimination CERD/C/GC/35, General Recommendation No. 35, Combating Racist Hate Speech (Sept. 26, 2013) (providing an interpretation of the Convention to combat hate speech).

151. See, e.g., *Zundel v. Canada*, Communication No. 953/2000, U.N. Doc. CCPR/C/78/D/953/2000, ¶ 5.5 (2003); see also *Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/70/D/736/1997, ¶ 11.5 (2000) (describing a case dealing with Holocaust denial and school bias); *The Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, CERD/C/67/D/30/2003, ¶¶ 10.4-10.5 (Aug. 22, 2005) (finding that antisemitic speech constitutes hate speech of racial superiority); *P.S.N. v. Denmark*, Communication No. 036/2006, CERD/c/71/D/36/2006 (2007) (describing antisemitism as an instance of double discrimination, religious and racial).

152. See G.A. Res 2106 (XX), Convention for the Eradication of All Forms of Racial Discrimination (Dec. 21, 1965) (creating an international document protecting against racial discrimination); International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification, December 16, 1966, entry into force Mar. 23, 1976, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. (providing protections against religious discrimination).

obligates States to combat racial discrimination and report to the CERD committee.¹⁵³ Racial discrimination is defined by the Convention to mean:

any distinction, exclusion, restriction or preference based on race, color, descent, or national origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedom in the political, economic, social, cultural or any other field of public life.¹⁵⁴

The Convention obliges governments to condemn and eliminate racial discrimination by public institutions, government officials, and private individuals.¹⁵⁵ Furthermore, the Convention requires that “States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority . . . or which attempt to justify or promote racial hatred and discrimination in any form.”¹⁵⁶ As

153. See G.A. Res 2106 (XX), Convention for the Eradication of All Forms of Racial Discrimination (Dec. 21, 1965) (providing international protections against racial discrimination), adopted and open for signature December 21, 1965, entry into force January 4, 1969. 177 countries have ratified the Convention. Brunei, the Cook Islands, the Democratic People’s Republic of Korea, Dominica, Kiribati, Malaysia, Marshall Islands, Micronesia, Myanmar, Niue, Samoa, South Sudan, Tuvalu and Vanuatu have taken no action regarding the Convention. Angola, Bhutan, Nauru, Palau, Sao Tome and Principe, and Singapore are merely signatories of the Convention. See *International Convention on the Elimination of All Forms of Racial Discrimination, Status of Ratification: Interactive Dashboard*, OHCHR, (last updated Nov. 14, 2016) <http://indicators.ohchr.org/> (noting countries that have signed and ratified CERD).

154. G.A. Res 2106 (XX), Convention for the Eradication of All Forms of Racial Discrimination (Dec. 21, 1965), art. 1 (providing that no country should discriminate based on race), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>; see *International Convention on the Elimination of All Forms of Racial Discrimination, Status of Ratification: Interactive Dashboard*, OHCHR, (last updated Nov. 14, 2016) <http://indicators.ohchr.org/> (providing countries who have ratified CERD, including all EU countries).

155. G.A. Res 2106 (XX), Convention for the Eradication of All Forms of Racial Discrimination (Dec. 21, 1965), art. 1, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (providing protections against discrimination in the public sphere); Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, 4 DEPAUL J. FOR SOC. JUST. 263, 297 (2011) (discussing a committee recommendation to the U.S. to meet its obligations to eliminate racial discrimination).

156. Convention for the Eradication of All Forms of Racial Discrimination, CERD, art. 4 (continuing that State Parties “(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by

seen in the case of twentieth century antisemitism, German and Italian Race Laws provided for discrimination of Jews based upon their racial identity, religious identity, and ethnicity.¹⁵⁷ Article 5 takes this obligation a step further by specifying certain protected rights, obligating State Parties to eliminate racial discrimination, and requiring the protection of the right to freedom of thought, conscience, and religion.¹⁵⁸

The Committee's understanding of racism draws three important parallels to the forms of racist antisemitism mentioned in Part I.¹⁵⁹ First, the Committee expands racism to encapsulate discrimination based on race, color, descent, or national origin.¹⁶⁰ These elements expand the Convention beyond classic understandings of racism.¹⁶¹ Second, the Committee condemns propaganda based on theories of superiority.¹⁶² During the 1930s and 40s, Julius Streicher's newspaper *Der Sturmer* was a conduit of Nazi propaganda and illustrated vividly

law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."); Daniel, *supra* note 155, at 269 (noting that "Articles 1 through 7 define racial discrimination and affirmatively impose an obligation on states to take steps towards the elimination of all forms of such discrimination within their jurisdiction.").

157. See *supra* Part I (discussing the racialization of antisemitism under Nazi Germany and fascist Italy); see generally LIVINGSTON, *supra* note 68 (discussing race laws in Italy); First Regulation to the Reich Citizenship Law of November 14, 1935 (providing regulations and restrictions based on the Jewish race).

158. Convention for the Elimination of All Forms of Racial Discrimination, CERD, art. 5(d)(vii) (extending the protections against racial discrimination into religious discrimination as well); Daniel, *supra* note 155, at 269 (noting that "Articles 1 through 7 define racial discrimination and affirmatively impose an obligation on states to take steps towards the elimination of all forms of such discrimination within their jurisdiction.").

159. See *supra* Part I (discussing racist antisemitism under Nazi Germany and fascist Italy and in the United States); Convention for the Elimination of All Forms of Racial Discrimination, CERD, art. 1 (providing for the elimination of "[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.").

160. Convention for the Eradication of All Forms of Racial Discrimination, CERD, art. 1 (providing protections against racial discrimination); Daniel, *supra* note 155, at 269-70 (discussing the obligations illustrated in article 1).

161. See *supra* note 20 (discussing ancient forms of antisemitism); *supra* note 23 (discussing the changes in antisemitism in the 20th century).

162. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195, 220 (entered into force Jan. 4, 1969) (providing protections against discrimination based on racial superiority); Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 672 (2010) (discussing the provisions against discrimination based on racial superiority).

the effectiveness of racist antisemitic propaganda through the letters to the editor section of the paper.¹⁶³ Finally, the Committee specifically extends the prohibition on racism to its effect on the enjoyment of freedom of religion, thereby sharply focusing and seemingly signifying acceptance of the intersection between religion and race.¹⁶⁴

According to CERD Committee General Recommendation No. 35, racist hate speech includes both remarks that explicitly target racial groups and indirect language that disguises its objectives and targets.¹⁶⁵ The Committee notes that the interpretations laid out in the Comment relate to hate speech emanating from individuals or groups, regardless of its form, whether oral or print, or method of dissemination.¹⁶⁶ The Committee continues that hate speech can be spread “through electronic media, including the Internet and social networking sites, as well as non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings, including sporting events.”¹⁶⁷

In 2001, the international community issued a strong call for antisemitism to be actively opposed and countered by states as a human rights issue.¹⁶⁸ UN Member States attended the UN-sponsored

163. See Nico Voigtlander & Hans-Joachim Voth, *supra* note 101, at 1356 (discussing the antisemitism perpetuated in Streicher’s newspaper); Arthur Gold & William Coulson, *Nuremberg War Crimes Trials: 60 Years Later*, CBA Rec. 38, 41 (Feb./Mar. 2006) (discussing the defendants tried at Nuremberg including Julius Streicher, publisher of the anti-Semitic *Der Sturmer*).

164. Tsisis, *supra* note 162, at 645-46 (discussing the extension of state provisions to protect against religious discrimination); *supra* note 36 (discussing CERD protections against racial discrimination in the context of religion).

165. See General Recommendation No. 35, Combating Racist Hate Speech, Committee on the Elimination of Racial Discrimination, CERD/C/GC/35 (Sept. 26, 2013), ¶ 6 (discussing hate speech targeting groups based on racial distinction); see also Tsisis, *supra* note 162, at 645 (discussing hate speech in international law).

166. General Recommendation No. 35, Combating Racist Hate Speech, Committee on the Elimination of Racial Discrimination, CERD/C/GC/35 (Sept. 26, 2013), ¶ 6 (discussing who hate speech extends towards); see also Tsisis, *supra* note 162, at 645 (discussing hate speech in international law).

167. General Recommendation No. 35, Combating Racist Hate Speech, Committee on the Elimination of Racial Discrimination, CERD/C/GC/35 (Sept. 26, 2013), ¶ 6 (describing the ways hate speech can be spread); see also Tsisis, *supra* note 162, at 645 (discussing hate speech in international law).

168. See generally World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, *Durban Declaration and Programme of Action*, U.N. Doc. A/CONF.189/12 (Sep. 8, 2001) (discussing the international community’s response to rising antisemitism and affirming that where there is racial discrimination and intolerance constitute serious violations of human rights) [hereinafter DDPA].

Durban Anti-Racism Conference (“Durban I” or “2001 World Conference against Racism”), where an outcome document, the Durban Declaration and Programme of Action (“DDPA”), highlighted antisemitism as a human rights violation.¹⁶⁹ The DDPA noted with concern an increase in antisemitism along with the emergence of violent and racist movements.¹⁷⁰

In 2009, this commitment was reaffirmed at the Durban Review Conference (“Durban II”).¹⁷¹ Specifically, the Durban II outcome document condemned the increase in incidents of racial or religious intolerance and violence, including antisemitism.¹⁷² It also noted that “the Holocaust must never be forgotten” and urged member states to adopt General Assembly resolutions 60/7 (regarding Holocaust Remembrance) and 61/255 (condemning any denial of the Holocaust).¹⁷³

Former Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Doudou Diene, conducted extensive research into the definition of antisemitism and manifestations of antisemitism.¹⁷⁴ He found that any

169. DDPA, *supra* note 168, ¶ 61 (highlighting antisemitism as a human rights violation); World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (Aug. 8, 2001) (affirming that where there is racial discrimination and intolerance constitute serious violations of human rights).

170. *See* DDPA, *supra* note 168, ¶ 61 (discussing the ways that antisemitism has increased in the past few decades); World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, ¶ 61 (Aug. 8, 2001) (recognizing “the increase in antisemitism and Islamophobia in various parts of the world”); *see also* Raphael Walden, *The Drafting of the Articles on the Middle East and Antisemitism at the Durban Conference Against Racism*, in *RACISM AND HUMAN RIGHTS* (Raphael Walden ed., 2004) (discussing attempts to “minimise or exclude references to anti-Semitism” at the Durban Conference).

171. 2009 Outcome Document of the Durban Review Conference (reaffirming the declarations made during Durban I); World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (Aug. 8, 2001) (affirming that where there is racial discrimination and intolerance constitute serious violations of human rights).

172. *See* 2009 Outcome Document of the Durban Review Conference, ¶ 12 (condemning the increase of religious discrimination, including antisemitism); World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, ¶ 59 (Aug. 8, 2001) (recognizing that certain religious communities face violence because of their beliefs or racial or ethnic origin).

173. 2009 Outcome Document of the Durban Review Conference at 66 (discussing Holocaust remembrance); World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, ¶ 58 (Aug. 8, 2001) (recalling “that the Holocaust must never be forgotten”).

174. Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, report submitted by Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 36 (E/CN.4/2005/18/Add.4) (Dec.

definition of antisemitism should include the rejection of Jewishness—more than just as a religion but as a people and a culture.¹⁷⁵ His proposed definition of antisemitism also includes scrutinizing anti-Zionist speech for when it extends into antisemitism.¹⁷⁶ He notes that much of antisemitic language and acts are drawn from classical forms of antisemitism.¹⁷⁷ His recommendation in 2004 was to collect data on the scope and manifestations of antisemitism, and to create a unit within the Office of the High Commissioner (“OHCHR”) to investigate racism and discrimination, including antisemitism.¹⁷⁸ He also recommended that the Commission on Human Rights recognize the State of Israel as a Jewish state publicly so as to directly attack the boundary between anti-Zionism and antisemitism.¹⁷⁹ Finally, he recommended that minority communities begin dialogue on the issues they face.¹⁸⁰

13, 2004) (describing the rise in antisemitism and defining antisemitism); Human Rights First, *Antisemitism: 2007 Hate Crime Survey* at 12 (noting that “hostility towards Jews arises in a new context in which new forms of anti-Semitism, linked to the Middle East conflict, are overlaid on top of traditional anti-Semitism.”).

175. Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, report submitted by Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 36 (E/CN.4/2005/18/Add.4) (Dec. 13, 2004) (describing the incorporation of “Jewishness” in any definition of antisemitism as integral); Human Rights First, *Antisemitism: 2007 Hate Crime Survey* at 12 (noting that “hostility towards Jews arises in a new context in which new forms of anti-Semitism, linked to the Middle East conflict, are overlaid on top of traditional anti-Semitism.”).

176. *See infra* Part IV (discussing emerging trends in antisemitism).

177. Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, report submitted by Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 45 (E/CN.4/2005/18/Add.4) (Dec. 13, 2004) (discussing the origins of antisemitism and its effects on antisemitism today); *see generally* Human Rights First, *Antisemitism: 2007 Hate Crime Survey* (discussing the rise in antisemitism and hate crimes in 2007).

178. Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, report submitted by Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 45 (E/CN.4/2005/18/Add.4) (Dec. 13, 2004) (recommending a commission to investigate and combat antisemitism); *see generally* Human Rights First, *Antisemitism: 2007 Hate Crime Survey* (discussing the rise in antisemitism and hate crimes in 2007).

179. Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, report submitted by Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 45 (E/CN.4/2005/18/Add.4) (Dec. 13, 2004) (urging the acknowledgement of the State of Israel’s right to exist); *see generally* Human Rights First, *Antisemitism: 2007 Hate Crime Survey* (discussing the rise in antisemitism and hate crimes in 2007).

180. Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, report submitted by Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶¶ 48-51 (E/CN.4/2005/18/Add.4)

The link between antisemitism and racism suggests that one must attend to racist antisemitism in the modern era and use mechanisms like CERD to address it.¹⁸¹ Additionally, the way that CERD has understood antisemitism as a form of racism suggests an affirmation of an oft-overlooked facet of antisemitism that this Note hopes to address, namely, its connection to racism.¹⁸²

IV. LOOKING FORWARD: EMERGING LEGAL TRENDS AND ANTISEMITISM

Antisemitism has been analyzed by international mechanisms like CERD in a way that divides the analysis of antisemitism into three emerging trends: (1) hate speech; (2) Holocaust denial; and (3) the toxic forms of antizionism that cross the line into antisemitism.¹⁸³ These trends represent both current legal jurisprudence on antisemitism in international law as well as the ways in which racism permeates into antisemitism even today.¹⁸⁴ Part IV will discuss the ways that international mechanisms deal with these trends. As discussed in Part II, antisemitism persists today in specific racialized

(Dec. 13, 2004) (discussing fostering dialogue between minority communities). Diene issued the report to the UN as a recommendation for future conduct regarding antisemitism. *See generally* Human Rights First, *Antisemitism: 2007 Hate Crime Survey* at 4 (discussing the rise in extremism and its targeting of minority communities).

181. *See supra* notes 131-59 (discussing the international framework placing antisemitism in a racial context); *supra* Part I (discussing racist antisemitism that led to the Holocaust).

182. *See supra* notes 131-59 (discussing the international framework placing antisemitism in a racial context); *supra* Part I (discussing racist antisemitism that led to the Holocaust).

183. *See* Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 406-07 (discussing the three pillars that constitute “a new form of anti-Jewish discourse,” namely anti-Semitism denial, Holocaust-denial and the toxic form of anti-Zionism); Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, *supra* note 11, at 837 (discussing antisemitism on US college campuses).

184. The Human Rights Committee has also heard Complaints about antisemitism through its Complaint Mechanism, but those cases predominantly pertain to issues related to freedom of religion and speech. *See, e.g.*, *Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/550/1993 (1996) (Evatt, Elizabeth, Kretzmer, David & Klein, Eckart, concurring), <http://juris.ohchr.org/Search/Details/654> (providing a case where the Complaints Procedure analyzed antisemitism); *see also* *Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/70/D/736/1997, ¶ 11.5 (2000) <http://juris.ohchr.org/Search/Details/902> (finding “as to the nature and effect of the author’s public statements, the Committee concludes that the restrictions imposed on him were for the purpose of protecting the “rights or reputations” of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance”).

ways. Additionally, there is no framework available yet to deal with political antisemitism. As such, placing antisemitism in the race context provides a framework through which to understand, combat, and address antisemitism.

The first emerging trend in international law concerning antisemitism is the need to combat and address hate speech.¹⁸⁵ The Committee on the Elimination of All Forms of Racial Discrimination has held that antisemitic hate speech constitutes a violation of the Committee's General Recommendation No. 15, paragraph 3.¹⁸⁶ The Recommendation instructs States to "penalize four categories of

185. See *The Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, CERD/C/67/D/30/2003, ¶¶ 10.4-10.5 (Aug. 22, 2005) <http://juris.ohchr.org/Search/Details/1740> (finding that antisemitic speech constitutes hate speech of racial superiority); see also *Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/70/D/736/1997, ¶ 11.5 (2000) <http://juris.ohchr.org/Search/Details/902>. (providing for freedom from bias and prejudice based on faith and race). For more on the European response to hate speech see ECRI General Policy Recommendation No. 6, http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N6/Recommendation_6_en.asp#TopOfPage_calling_on_governments_to_include_antisemitism_xenophobia_and_racism_in_their_work_at_the_international_level_to_suppress_illegal_content_on_the_internet); ECRI General Policy Recommendation No. 15, http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf (expanding on the ideas laid out in General Policy Recommendation No. 6). Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, Council of Europe <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008160f> (defining racist and xenophobic material as "any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors"); see also *Ivanov v. Russia* (no. 35222/04) (2007) ("The Court has no doubt as to the markedly anti-Semitic tenor of the applicant's views and it agrees with the assessment made by the domestic courts that he sought through his publications to incite hatred towards the Jewish people. Such a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination. Consequently, the Court finds that, by reason of Article 17 of the Convention, the applicant may not benefit from the protection afforded by Article 10 of the Convention.").

186. *Zundel v. Canada*, Communication No. 953/2000, U.N. Doc. CCPR/C/78/D/953/2000, ¶ 5.5 (2003), <http://juris.ohchr.org/Search/Details/955> (finding that because the author had been "active for almost thirty years in the worldwide distribution of materials that deny the Holocaust and other Nazi atrocities against the Jews" the House of Commons' concern regarding his using Parliament as a platform to "disseminate Anti-Semitic views, thereby exposing the Jewish community to hatred and discrimination" was legitimate. The author's restriction from parliament also protected the public order and morals, a legitimate goal within the meaning of article 19, paragraph 3.); see also *Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/70/D/736/1997, ¶ 11.5 (2000) (finding a legitimate right to restrict based on the right to protect against bias in schools), <http://juris.ohchr.org/Search/Details/902>.

misconduct: dissemination of ideas based on racial superiority or hatred; incitement to racial hatred; acts of violence against any race, and incitement to such acts.”¹⁸⁷ The Committee found in *Jewish Community of Oslo v. Norway* that antisemitic hate speech constitutes speech of racial superiority and is not protected by the “due regard” clause in Article 4, whereby hate speech is prohibited with “due regard” to the principles in the Universal Declaration of Human Rights and the rights set out in Article 5 CERD.¹⁸⁸ The Committee also found that freedom of speech is enshrined in the Universal Declaration of Human Rights, and other international conventions, and that it is afforded lower protection when used for racist and hate speech.¹⁸⁹

In *P.S.N. v. Denmark*, the Committee recognized “the importance of the interface between race and religion and considers that it would be competent to consider a claim of ‘double’ discrimination on the basis of religion and another ground specifically provided for in Article 1 of the Convention, including national or ethnic origin.”¹⁹⁰ Although no complaints have been brought before

187. See *The Jewish Community of Oslo et al. v. Norway*, Communication no. 30/2003, U.N. Docs. CERD/C/67/D/30/2003, ¶¶ 10.4-10.5 (Aug. 22, 2005), <http://juris.ohchr.org/Search/Details/1740> (finding that antisemitic speech constitutes hate speech of racial superiority); Robin Edger, *Are Hate Speech Provisions Anti-Democratic?: An International Perspective*, 26 AM. U. INT’L L. REV. 119, 139 (2010) (noting that the message contained racial superiority or hatred, characterizing it as incitement to racial discrimination).

188. See Convention on the Elimination of All Forms of Racial Discrimination, art. 4, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (providing the “due regard clause” used to overturn the acquittal in *Jewish Community of Oslo*); Edger, *supra* note 187 (discussing the *Jewish Community of Oslo* case and the Committee decision that acquittal was a violation of ICERD).

189. See *Jewish Community of Oslo v. Norway*, ¶ 10.4 (discussing the comparison of freedom of speech and freedom from discrimination); Edger, *supra* note 187, at 137 (noting that “A second interpretation, historically promulgated by Canada, Austria, Italy and France, takes the view that states parties must reconcile the fundamental rights and freedoms memorialized in the UDHR and Article 5 of the CERD with the duties enshrined in Article 4 of the CERD, creating equilibrium between the two.”); see also *M’Bala M’Bala v. France*, application no. 25239/13 (2015), <http://hudoc.echr.coe.int/eng?i=001-158752>; *W.P. and Others v. Poland*, application no. 42264/98 (2004) (“The Court again notes that by making the above complaint, whose wording is anti-Semitic and offensive, the applicants essentially seek to use Article 14 taken together with Article 11 to provide a basis under the Convention for a right to engage in activities which are contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms set forth in the Convention.”). Nagationism refers to denial of the Holocaust in the context of ECHR jurisprudence on hate speech.

190. See *P.S.N. v. Denmark*, Communication No. 036/2006, CERD/C/71/D/36/2006, ¶ 6.3 (2007) <http://juris.ohchr.org/Search/Details/1733> (discussing the instance of double

the Committee defining antisemitism as a form of “double” discrimination, the Committee’s holding in P.S.N. demonstrates a willingness to develop this line of inquiry.¹⁹¹ A holding of “double” discrimination in a case of antisemitism would further develop the nuance and complexity of defining antisemitism.¹⁹²

The second trend concerning antisemitism is the widespread Holocaust denial found around the world, particularly as survivors and perpetrators pass away.¹⁹³ The International Holocaust Remembrance Alliance (“IHRA”) defines Holocaust denial as an expression of antisemitism and an “attempt to deny the genocide of the Jews in an effort to exonerate National Socialism and antisemitism from guilt and responsibility” in that genocide.¹⁹⁴ Holocaust denial often manifests as blaming Jews for exaggerating or creating the Holocaust for financial or political reasons.¹⁹⁵ The IHRA finds that distortion of the Holocaust manifests itself in five different

discrimination); *see also* Leonard Leo, Felice Gaer, & Elizabeth Cassidy, *Protecting Religions from “Defamation”: A Threat to Universal Human Rights Standards*, 34 HARV. J.L. & PUB. POL’Y 769, 782 (2011) (noting that CERD specifically rejected a proposal to include religious intolerance and racial discrimination in a single document).

191. *See supra* note 190 (discussing the possibility of applying double discrimination to antisemitism).

192. *See supra* note 190 (describing the Committee’s dicta on double discrimination).

193. *See* European Commission against Racism and Intolerance (ECRI) Policy Recommendation No. 9, The Fight Against Antisemitism (June 25, 2004) http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N9/Recommendation_9_en.asp#TopOfPage (noting that Holocaust denial is “one of the most severe forms of racial defamation and of incitement to hatred of Jews and that the denial of such crimes against humanity . . . [can] not be allowed to enjoy the protection afforded by Article 10 of the European Convention on Human Rights”); ECRI Policy Recommendation No. 9, The Fight Against Antisemitism (urging governments to ensure that criminal laws penalize antisemitic acts when committed intentionally including, “the public denial, trivialization, justification or condoning of the Shoah [Holocaust]; the public denial, trivialization, justification or condoning, with an anti-Semitic aim, of crimes of genocide, crimes against humanity or war crimes committed against persons on the ground of their Jewish identity or origin.”).

194. *See* International Holocaust Remembrance Alliance, Working Definition of Holocaust Denial and Distortion (Oct. 10, 2013) <https://www.holocaustremembrance.com/working-definition-holocaust-denial-and-distortion> (defining Holocaust denial); ECRI Policy Recommendation No. 9, The Fight Against Antisemitism (noting that Holocaust denial includes the trivialization or justification of the Holocaust).

195. *See* International Holocaust Remembrance Alliance, Working Definition of Holocaust Denial and Distortion (Oct. 10, 2013) <https://www.holocaustremembrance.com/working-definition-holocaust-denial-and-distortion> (defining Holocaust denial); ECRI Policy Recommendation No. 9, The Fight Against Antisemitism (noting that Holocaust denial includes the trivialization or justification of the Holocaust).

ways: first, intentional attempts to minimize or excuse the impact of the Holocaust (including allies and collaborators of Nazi Germany); second, gross minimization of the number of victims of the Holocaust, contradicting reliable sources; third, attempts to blame Jews for causing their own genocide; fourth, statements that cast the Holocaust as a positive event, like saying that the Holocaust did not go far enough; and fifth, attempts to blur responsibility for the creation of concentration and death camps by putting the blame on other nations or ethnic groups.¹⁹⁶

Mutuma Ruteere, the current Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance, issued a report in 2015 stating that Holocaust denial and distortion are motivated by antisemitism and built on the idea that the Holocaust was “invented or exaggerated as part of a plot to advance Jewish interests.”¹⁹⁷ He continued by debunking such claims and asserting that the Holocaust is one of the most documented tragedies of the twentieth century.¹⁹⁸ The Special Rapporteur found that revisions of the Holocaust and attempts to falsify history “contribute to the rehabilitation and dissemination of Nazism and other extreme ideologies and create fertile ground for nationalist and neo-Nazi demonstrations.”¹⁹⁹ He found that such speech could

196. *See supra* note 194 (discussing the definition of antisemitism and the reasons for instituting a definition).

197. *See* Human Rights Council Res. 69/160, U.N. Doc. A/HRC/32/49, at Ch. V, ¶ 29 (Apr. 13, 2015) (describing how Holocaust distortion stems from antisemitism); *see also* Garaudy v. France (no. 65831/01), Press Release issued by the Registrar 2 (July 7, 2003) (finding that the defendant’s remarks amounted to antisemitism because “[d]isputing crimes against humanity [was] one of the most serious forms of racial defamation of and incitement to hatred of Jews.”).

198. *See* Human Rights Council Res. 69/160, U.N. Doc. A/HRC/32/49, *supra* note 197 (discussing the Holocaust and antisemitism); Garaudy v. France *supra* note 197 (discussing speech that constituted antisemitic hate speech).

199. Human Rights Council Res. 69/160, U.N. Doc. A/HRC/32/49, at Ch. V, ¶ 30 (Apr. 13, 2015) (noting that denying the Holocaust promotes neo-Nazi rehabilitation). The past three Special Rapporteurs on contemporary forms of racism have each condemned attempts to falsify history and deny the Holocaust. Each has linked such revisionism to antisemitism and condemned the right wing groups who do so. *See, e.g.*, Human Rights Council Res. 67/154, U.N. Doc. A/HRC/23/24, ¶ 29 (Apr. 13, 2015) (Mar. 26, 2013) (recommending that State prosecute perpetrators of antisemitic acts, collect data about antisemitism and other forms of racism, and strengthen the Judiciary and policy force to prosecute antisemitic acts); Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-Up and Implementation of the Durban Declaration and Programme of Action, Report submitted by Mr. Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination,

promote racist rhetoric constituting hate speech under CERD Article 4(a).²⁰⁰

Former Special Rapporteur Doudou Diene noted that Holocaust denial is the latest manifestation of “deep-seated anti-Semitism.”²⁰¹ The current Special Rapporteur, Mutuma Ruteere, found similar trends in his visits and investigations in April 2016.²⁰² He found that stigma and violence continue in Jewish communities, such as the painting of swastikas on monuments dedicated to the victims of the Holocaust or in Jewish schools, and the desecration of Jewish cemeteries.²⁰³ He reiterated that attempts to deny the Holocaust constitute speech that could promote racist rhetoric and hate speech in violation of ICERD Article 4(a).²⁰⁴ He clearly ties such conduct to antisemitism and calls for prosecution of such acts.²⁰⁵

xenophobia and related intolerance (A/HRC/7/19) (Feb. 20, 2008) (condemning Holocaust denial).

200. *See supra* note 199 (discussing specific instances of antisemitic speech that amount to hate speech violating CERD article 4).

201. Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance: Follow-Up and Implementation of the Durban Declaration and Programme of Action, Report submitted by Mr. Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 58 (A/HRC/7/19) (Feb. 20, 2008) (discussing elements of antisemitism including Holocaust denial); Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 407 (In its strong form, this deflection takes the shape of outright denial, accusing Jews of using extraordinary craft and malevolent genius to con the world into “the biggest fraud in the history of mankind.”).

202. *See infra* notes 203-05 (discussing Mutuma Ruteere’s findings in April 2016 as pertaining to hate crimes and hate speech against Jewish communities).

203. Secretariat of the Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 9, U.N. Doc. A/HRC/32/49 (Apr. 7, 2016) (describing acts of antisemitism and violence); Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 414 (noting that “[t]he swastika, in whatever form, location, or medium, is culturally significant as an emblem of the destruction of European Jewry.”).

204. Secretariat of the Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 9, U.N. Doc. A/HRC/32/49 (Apr. 7, 2016) (discussing the provision in ICERD that protects against such hate speech); Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 416 (describing how “anti-Semitic speech-acts increase the likelihood of anti-Semitic hate and bias incidents.”).

205. Secretariat of the Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, at para. 9, U.N. Doc. A/HRC/32/49 (Apr. 7, 2016) (discussing the need to respond to hate speech); *see* ECRI General Policy Recommendation No. 15, http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N15/REC-15-2016-015-ENG.pdf. (discussing the realm and interplay between free speech and hate speech). The ECRI notes that there is a tension between freedom from discrimination as it pertains to hate speech and freedom of expression. The ECRI opines that there is a “need to ensure that

Finally, the third trend relates to the ways in which antizionism has crossed the line between political expression and antisemitic speech and conduct.²⁰⁶ According to former Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Doudou Diene, antisemitism is still a major issue in Europe.²⁰⁷ He also found that “there is a crucial need to identify when anti-Zionism is tainted by anti-Semitism.”²⁰⁸ He found that such superimposition occurs in the following cases:

When language, images and character traits attributed to Israel are imbued with recognizable anti-Semitic stereotypes;

When Israelis and Jews are represented as cosmic devils, blamed for global disasters and compared with Nazis;

When Israelis and Jews who support the State of Israel are singled out, attacked, and treated in a manner that is out of proportion to the issue at hand and in comparison with the action of other countries;

any control exercised over freedom of expression is as limited as possible.” Recommendation No. 15 also defines media and internet as pertaining to print media, audiovisual and electronic media and other forms of communication that may yet be developed. In doing so, the ECRI hones in on the different platforms where hate speech can be disseminated and specifies that all such platforms are covered by the recommendation. Interestingly, the ECRI also discusses how there is a need for a complaint mechanism that applies to each particular platform to have a wider impact and cover more ground.

206. *See* Organization for Security and Co-operation in Europe, Ministerial Council, Declaration on Enhancing Efforts to Combat Antisemitism, at 1 (MC.DOC/8/14) (Dec. 5, 2014) (acknowledging that “international developments, including with regard to the situation in the Middle East, never justify antisemitism”); Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene, on the manifestations of defamation of religions and in particular on the serious implications of Islamophobia on the enjoyment of rights, A/HRC/6/6, (Aug. 21, 2007) (discussing when anti-Zionism as a manifestation of antisemitism in certain cases).

207. *See supra* Part II (discussing continuing trends of antisemitism in Europe).

208. Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene, on the manifestations of defamation of religions and in particular on the serious implications of Islamophobia on the enjoyment of rights, ¶ 41, A/HRC/6/6, (Aug. 21, 2007) (discussing when anti-Zionism crosses the line into antisemitism); *see also* Report submitted by Mr. Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, addendum, Defamation of Religions and Global Efforts to Combat Racism: Anti-Semitism, Christianophobia and Islamophobia, E/CN.4/2005/18/Add.4, at 13 (Dec. 13, 2004) (discussing a fifth element “[w]hen the Holocaust is misrepresented and used as a weapon, as allegedly improperly used by Jews to extort financial support and build political capital.”).

When the legitimate right of Israel as a Jewish State to exist is questioned.²⁰⁹

Mr. Diene notes that criticism, when it is disproportionate and ongoing, equates to defamation, demonization, and the questioning of the State's legitimacy, which denies its right to exist.²¹⁰ He further alludes to the "efforts made to isolate the Israeli academic community [and] [c]ampaigns for the boycotting of Israel" as a direct result of the demonization of Israel.²¹¹

According to the Inter-Parliamentary Coalition for Combatting Antisemitism ("ICCA"), while criticism of Israel is not antisemitic, singling Israel out for "selective condemnation or opprobrium," denying Israel's right to exist, and seeking its destruction is discriminatory.²¹² The ICCA also provides examples of when antisemitism is manifested in the context of the State of Israel, including: denying the Jewish people the right to self-determination, using symbols and images associated with classic antisemitism and applying them to the State of Israel or Israelis, applying double

209. Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diene, on the manifestations of defamation of religions and in particular on the serious implications of Islamophobia on the enjoyment of rights, ¶ 41, A/HRC/6/6, (Aug. 21, 2007) (discussing instances where anti-Zionism can amount to antisemitism).

210. Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, report submitted by Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 40, (E/CN.4/2005/18/Add.4) (Dec. 13, 2004) (discussing the importance of acknowledging the right of the State of Israel to exist and the denial thereof as antisemitic); The Ottawa Protocol on Combating Antisemitism, Inter-parliamentary Coalition for Combatting Antisemitism (2010), <http://www.antisem.org/wp-content/uploads/2012/10/Ottawa-Protocol-on-Combating-Antisemitism-English-1.pdf>, (noting that "[c]riticism of Israel is not antisemitic, and saying so is wrong. But singling Israel out for selective condemnation and opprobrium – let alone denying its right to exist or seeking its destruction – is discriminatory and hateful, and not saying so is dishonest.").

211. Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, report submitted by Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ¶ 40, (E/CN.4/2005/18/Add.4) (Dec. 13, 2004) (providing a standard by which to determine when anti-Zionism amounts to antisemitism).

212. The Ottawa Protocol on Combating Antisemitism, Inter-parliamentary Coalition for Combatting Antisemitism (2010), <http://www.antisem.org/wp-content/uploads/2012/10/Ottawa-Protocol-on-Combating-Antisemitism-English-1.pdf> (discussing the particular instances when anti-Zionism crosses the line into antisemitism); *see also* IHRA Working Definition of Antisemitism (2015), https://www.holocaustremembrance.com/sites/default/files/press_release_document_antisemitism.pdf, (discussing specific examples of antisemitism, including holding Jews collectively accountable for actions taken by the State of Israel).

standards not expected of other democratic nations, comparing Israeli policy to that of the Nazis, or holding Jews collectively accountable for actions taken by the State of Israel.²¹³

The ICCA has also declared that “[w]e are alarmed at the resurrection of the old language of prejudice and its modern manifestations—in rhetoric and political action—against Jews, Jewish belief and practice and the State of Israel.”²¹⁴ The Declaration calls on parliamentarians to “expose, challenge and isolate political actors who engage in hate against Jews and target the State of Israel as a Jewish collectivity.”²¹⁵ The Declaration also calls on governments and the United Nations to never allow the institutions of the international community to “establish any legitimacy for antisemitism, including singling out . . . Israel for discriminatory treatment in the international arena.”²¹⁶

One thing that is troubling about this modern manifestation of antisemitism, associating the acts of the State of Israel with all Jews, is that it provides for a new facet of antisemitism: national or ethnic racist antisemitism.²¹⁷ On February 5, 2015, a local court in Wuppertal, Germany sentenced three Palestinian men who, in 2014,

213. The Ottawa Protocol on Combating Antisemitism, Inter-parliamentary Coalition for Combatting Antisemitism (2010), <http://www.antisem.org/wp-content/uploads/2012/10/Ottawa-Protocol-on-Combating-Antisemitism-English-1.pdf> (discussing the particular instances when anti-Zionism crosses the line into antisemitism); see also IHRA Working Definition of Antisemitism (2015), https://www.holocaustremembrance.com/sites/default/files/press_release_document_antisemitism.pdf, (discussing specific examples of antisemitism, including holding Jews collectively accountable for actions taken by the State of Israel).

214. The London Declaration on Combating Antisemitism, Inter-parliamentary Coalition for Combatting Antisemitism (2009), <http://www.antisem.org/wp-content/uploads/2012/10/London-Declaration-on-Combating-Antisemitism.pdf> (framing anti-Zionism as antisemitism and placing it in a historical context); Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 400 (noting that “the involvement of some Russian Jews in radical politics gave conservative anti-Semites a pretext to divert popular political discontent ‘away from the regime and against Jewry by means of pogroms’”).

215. The London Declaration on Combating Antisemitism, Inter-parliamentary Coalition for Combatting Antisemitism (2009), <http://www.antisem.org/wp-content/uploads/2012/10/London-Declaration-on-Combating-Antisemitism.pdf> (providing the ICCA’s statements on speech against the State of Israel and its connection to historical forms of antisemitism).

216. *Id.*

217. Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 406-07 (discussing anti-Zionism as antisemitism); see, e.g., Germany 2015 International Religious Freedom Report, <http://www.state.gov/documents/organization/256405.pdf>, at 9 (discussing the incident at Wuppertal).

had thrown Molotov cocktails at a synagogue in Wuppertal.²¹⁸ The Court decided that because the building was empty at the time, two of the men would receive 18-month suspended sentences for aggravated arson, and the third, an 18-year-old, would be placed on juvenile probation.²¹⁹ The Court agreed with the defendants' argument that their action was not antisemitic, but rather a protest about the 2014 violence in Gaza.²²⁰ Had the Court found their action to be influenced by discrimination or antisemitism, the sentencing would have been heavier.²²¹ The Court did not see this conduct as a hate crime perhaps because it did not view antisemitism through a racial lens. This case highlights a number of issues with antisemitism today.²²² First, the decision highlights the ways in which protest against actions undertaken by the State of Israel are imposed upon Jews living outside the state.²²³ The synagogue in Wuppertal is not a representative of Israel, and was not involved in the conflict in Gaza in 2014.²²⁴ Yet, the defendants in the case argued they were protesting

218. See Germany 2015 International Religious Freedom Report, <http://www.state.gov/documents/organization/256405.pdf>, at 9 (discussing the February 2015 court ruling that firebombing a synagogue was not antisemitism); Douglas Ernst, *German Court Rules Synagogue Torching Not Anti-Semitism, but Act to 'Criticize Israel'*, WASH. TIMES (Jan. 13, 2017), <http://www.washingtontimes.com/news/2017/jan/13/german-court-rules-synagogue-torching-not-anti-sem/> (discussing the Wuppertal ruling).

219. See Germany 2015 International Religious Freedom Report, *supra* note 217. But see Sven Pohle, *'Pure Anti-Semitism' Behind Synagogue Attack, says Wuppertal Jewish Leader*, DW (Jan. 27, 2015), <http://www.dw.com/en/pure-anti-semitism-behind-synagogue-attack-says-wuppertal-jewish-leader/a-18216819> (discussing the Wuppertal Jewish community's perception of the attack).

220. See Germany 2015 International Religious Freedom Report, *supra* note 217 (describing the court's ruling); Pohle, *supra* note 219 (noting that "[t]here were more than enough signals last July. All demonstrations were against Israel - and not just against Israel, against Jews.").

221. See Germany 2015 International Religious Freedom Report, *supra* note 217 (describing the court's ruling); Pohle, *supra* note 219 (noting that "[t]here were more than enough signals last July. All demonstrations were against Israel - and not just against Israel, against Jews.").

222. See generally Germany 2015 International Religious Freedom Report, *supra* note 217 (outlining the facts and ruling related to the case); Ernst, *supra* note 218 (describing the situation in Wuppertal); Pohle, *supra* note 219 (describing the Jewish community's perception of antisemitism in the attack).

223. See Germany 2015 International Religious Freedom Report, *supra* note 217 (discussing the defendants' defense that they were acting in protest); Pohle, *supra* note 219 (discussing the riots and protests following the offense in Gaza in Spring 2014); see *supra* notes 118-121 (discussing the singling out of Matisyahu for his failure to openly support the BDS movement).

224. See Pohle, *supra* note 219 (discussing the riots and protests following the offense in Gaza in Spring 2014),

the State's conduct by attacking a synagogue.²²⁵ Second, the Court agreed that the defendants were exercising their right to protest rather than acting based on antisemitism and prejudice.²²⁶ In doing so, the Court legitimated the idea that a synagogue could stand in for an organ of a foreign state, and by extension that antizionism, to that extent, is not antisemitism.²²⁷ Finally, the Court's ruling pulls into sharp relief the connection between protesting the conduct of Israel and antisemitism.²²⁸ The Court's inability to view the defendants' acts as racist antisemitism prevented it from using valuable legal tools as well as losing an important element of the crime—namely, the racial character of associating the synagogue, a Jewish community center, as an ambassador for all Jews and even for the State of Israel.

CONCLUSION

Antisemitism provides a unique case study through which to explore the dynamics between racial and religious discrimination.²²⁹ As history has demonstrated, discrimination can manifest itself in different ways at different times.²³⁰ Within the context of antisemitism, historical antisemitism was focused on religious difference.²³¹ Twentieth century antisemitism traversed the plane of racial discrimination, while simultaneously drawing on traditional religious themes.²³² Current trends around antisemitism provide a

225. See Germany 2015 International Religious Freedom Report, *supra* note 217 (describing the defendant's defenses); Ernst, *supra* note 218 (discussing the situation and ruling in general).

226. See Germany 2015 International Religious Freedom Report, *supra* note 217 (describing the court's ruling in the case); Ernst, *supra* note 218 (describing the judge's finding that the arson was a form of protest against Israel).

227. See Germany 2015 International Religious Freedom Report, *supra* note 217 (discussing the February 2015 court ruling that firebombing a synagogue was not antisemitism); Pohle, *supra* note 219 (describing the feeling of insecurity in the Jewish community following the attack).

228. See Germany 2015 International Religious Freedom Report, *supra* note 217 (describing the court's ruling in the case); Ernst, *supra* note 218 (describing the judge's finding that the arson was a form of protest against Israel).

229. See *supra* Part II (discussing the international framework for combatting antisemitism as both religious and racial); *supra* note 61 (discussing association with the Jewish community, like attending synagogue, as indicative of race in specific contexts).

230. See *supra* note 20 (discussing ancient forms of antisemitism); *supra* note 23 (discussing the shift in modern antisemitism).

231. See *supra* note 20 (discussing Greek and Roman antisemitism); *supra* note 21 (discussing 19th Century antisemitism).

232. See Regulation to the Reich Citizenship Law of November 14, 1935 § 5(2)(a) (discussing Jews with mixed blood performing identity through belonging to a "Jewish

blend of religious, racial, ethnic, and national antisemitism.²³³ Understanding how antisemitism has developed and its racial components, particularly through the lens of the Holocaust race laws, can help develop and analyze present and future trends.²³⁴

One of the key loci for antisemitism, like other forms of discrimination, is the family unit.²³⁵ During the 1930s, Jewish bloodlines were interrogated to determine the individual's biological identifiers: Aryan or not.²³⁶ In Nazi Germany, borderline cases operated under the presumption of Jewishness, and Mischlings had to adhere to certain practices to be considered Aryan.²³⁷ Similarly, in fascist Italy, borderline cases required conduct to determine the individual's race, however the presumption tended toward Aryan rather than Jewish, particularly in cases of conversion.²³⁸ These two methods of discrimination demonstrate the rise of racist antisemitism and blending of religious and racial antisemitism.²³⁹ Similarly, racism in the US context implemented eugenics, biology, and performance within and outside of the family unit in order to determine racial identity.²⁴⁰

Antisemitism persists today and has resulted in intense violence around the world, particularly in Europe, along with laws limiting

religious community"); *see generally* LIVINGSTON, *supra* note 68 (discussing Italian Jewish performance similar to Nazi construction of identity where association with the Jewish community was a factor for identifying race).

233. *See supra* Part III (discussing modern international legal frameworks that place antisemitism as a form of both racial and religious discrimination); *supra* Part IV (discussing emerging trends and the issues that arise from antisemitism that blends with anti-Zionism).

234. *See* Regulation to the Reich Citizenship Law of November 14, 1935 (providing for limitations on citizenship based on race); *see* LIVINGSTON, *supra* note 68 (discussing Italian race laws and their effect on the Jewish community).

235. *See supra* note 86 (discussing the Church's memorandum about family unity); *supra* note 122 (discussing extensions of antisemitism into the realm of family life).

236. *See supra* Part I (discussing Italian and German race laws during the 1930s).

237. *See Race Law Chart, supra* note 58 (discussing Mischling laws); *see also* First Regulation to the Reich Citizenship Law of November 14, 1935, §2(2), <http://germanhistorydocs.ghi-dc.org/pdf/eng/English32.pdf> (providing the race citizenship laws and effects on Mischling).

238. *See* LIVINGSTON, *supra* note 68 (discussing the situation of Jewish families in fascist Italy); Green, *supra* note 82 (discussing the passing of Italy's anti-Jewish racial laws on September 1, 1938).

239. *See supra* Part I (discussing the origins of racist antisemitism); *supra* Part III (providing an analysis of the international protections against antisemitism).

240. *See In Re Monks Estate, supra* note 71 (discussing performance of identity in the United States based on appearance, conduct and biology); Onwuachi-Willig, *A Beautiful Lie, supra* note 75 (providing a background on the Rhinelander case, which looked at biology and conduct to determine race).

access to integral parts of Jewish religious identity—circumcision and kosher meat.²⁴¹ These actions, as well as the rise of anti-Zionism as antisemitism, reflect a modern trend for antisemitism, one with increasingly violent tendencies.²⁴² Although the international community has provided frameworks for prosecuting and understanding racial antisemitism, newer forms of ethnic and national antisemitism have not yet been developed in international law.²⁴³ The legal and social challenges for combatting antisemitism are not over.²⁴⁴ Assimilation and passing, particularly for Jews from Europe, is possible, however, attacks upon those who are perceived as Jewish (because of how they look), Jewish institutions (predominantly religious centers), and anyone perceived as supporting the State of Israel remain prevalent.²⁴⁵ Because there is no framework for addressing political antisemitism, analyzing and combatting antisemitism through the race context can help prevent and respond to the continuing and developing trends of antisemitism.²⁴⁶ Placing antisemitism within a racism framework provides a different

241. See *supra* note 105 (discussing rising violence in Europe); *supra* note 123 (discussing laws banning kosher meat); *supra* note 127 (discussing European countries who have banned circumcision).

242. See *supra* note 106 (discussing rising violence in France); *supra* note 162 (discussing the pillars of antisemitism today, including antisemitism disguised as anti-Zionism).

243. See *supra* Part III (discussing legal trends and tools to combat antisemitism); *supra* Part IV (discussing emerging trends in antisemitism).

244. See Michael Oren, *Anti-Semitism Thriving in Europe*, CNN (Feb. 17, 2016) <http://www.cnn.com/2016/02/17/opinions/europe-anti-semitism-thriving-oren/> (discussing trends in Europe today including labeling products from Israel and inviting the President of Iran during International Holocaust Remembrance Day in France and Italy); *Anti-Semitism in Europe: Fear of New Darkness*, *ECONOMIST* (Feb. 19, 2015) <http://www.economist.com/news/europe/21644242-copenhagen-shootings-paris-terror-attacks-are-raising-new-worries-about-jew-hatred>. (discussing the sense that antisemitism is on the rise in Europe today).

245. See Melissa Bell, *France: Authorities Probe Alleged Anti-Semitic Attack in Paris*, CNN (Feb. 24, 2017) <http://www.cnn.com/2017/02/24/europe/france-paris-assault/> (discussing the recent attack on a group of Jews in Paris, where it was said “You Jews, a*****, you’re going to die!”); Alan Blinder, Serbe Kovaleski & Adam Goldman, *Threats and Vandalism Leave American Jews on Edge in Trump Era*, *N.Y. TIMES* (Feb. 28, 2017) (discussing threats on Jewish institutions in the US).

246. See Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 371 (discussing new forms of antisemitism where anti-Zionism crosses the line into antisemitism); Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, *supra* note 11 (discussing antisemitism on US college campuses); see *supra* note 206 (discussing the Wuppertal case and the need for identifying and defining antisemitism within the race context).

perspective that may shed some light on strategies for which to combat the growing antisemitism around the world.²⁴⁷

247. See Marcus, *Jurisprudence of the New Anti-Semitism*, *supra* note 11, at 371 (discussing new forms of antisemitism where anti-Zionism crosses the line into antisemitism); Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, *supra* note 11 (discussing antisemitism on US college campuses).

