

HUMAN RIGHTS IN JEWISH LAW: CONTEMPORARY JURISTIC AND RABBINIC CONCEPTIONS

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1. INTRODUCTION: HUMAN RIGHTS AND ISRAEL

Many have critiqued and condemned the State of Israel for alleged human rights violations.¹ The upsurge of violence over the past few years between Israel and terrorist organizations in Gaza and Lebanon have evoked vitriolic condemnation of Israel's actions in defense of its security and its citizens.² The human rights allegations lodged against Israel have led some to question whether the Jewish character of the state affects this alleged neglect of human rights to the Arab population in and surrounding Israel.³

Jewish law—as part of the Jewish character embodied by the State of Israel—plays a crucial role in understanding the concept of human rights as developed by Jewish communities throughout

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¹ *E.g.*, Human Rights Council Res. S-12/1, U.N. Doc. A/RES/HRC/S-12/1 (Oct. 21, 2009) (condemning Israel's actions to limit Palestinians' access to their properties and holy sites, particularly in Occupied East Jerusalem).

² *See, e.g.*, *Middle East Human Rights Groups Call on the General Assembly to Adopt the Goldstone Report*, HUMAN RIGHTS WATCH (Nov. 3, 2009), <http://www.hrw.org/en/news/2009/11/03/middle-east-human-rights-groups-call-general-assembly-adopt-goldstone-report> (praising the Goldstone report for calling on Israeli and Palestinian armed forces to investigate human rights and war violations); *see* Fred Abrahams, *On Israel, Congress Tolerates Abuse*, HUMAN RIGHTS WATCH (Nov. 4, 2009), <http://www.hrw.org/en/news/2009/11/04/israel-congress-tolerates-abuse> (criticizing the House of Representatives' vote condemning the Goldstone report). *See also* Justice Richard Goldstone, Statement on behalf of the Members of the United Nations Fact Finding Mission on the Gaza Conflict, Address before the U.N. Human Rights Council 12th Session (Sept. 29, 2009) (discussing the investigation of human rights violations in the Gaza Conflict and condemning some of Israel's conduct in this conflict); Human Rights Council Res. S-9/L. 1, U.N. Doc. A/RES/HRC/S-9/L.1 (Jan. 12, 2009) (condemning Israel's military operation in occupied Palestinian territory).

³ *See generally* Ruth Gavison, *The Jews' Right To Statehood: A Defense*, 15 *AZURE* 70 (2003) (arguing that Israel's long-term viability relies on a clear rationale for a Jewish state).

Jewish history, and as understood by some Jews in Israel today. Most of Jewish law developed while Jews were a minority, dispersed among mainly intolerant and belligerent Gentile majorities. The jurisprudence of human rights laws and values during these periods reflects this situation. However, for the first time in over eighteen centuries, the modern State of Israel creates a striking contrast to the past epochs of Jewish history, by establishing Jewish sovereignty and a Gentile minority under Jewish authority. This drastic change in Jewish existence forced Jewish law scholars to confront the gaps in Jewish human rights laws as they pertain to Gentiles. Rabbis, Jewish law scholars internal to the Jewish law tradition, and members of the Israeli Judiciary offer different jurisprudential methods for reconciling modern human rights laws and values with the corpora of Jewish law. The divergences and convergences of human rights jurisprudence between (1) how the concept of human rights developed in Jewish law before statehood, and (2) how several modern Jewish law thinkers approach human rights in Jewish law, along with (3) how those compare to the methods used by the Israeli Supreme Court when it incorporates Jewish law into its discussions on human rights, demonstrate how Jewish law—as part of the Jewish nature of the State of Israel—does not *per se* contribute to the human rights problems facing Israel today.

2. THE INFLUENCE OF JEWISH LAW IN ISRAEL TODAY

Jewish law assumes an uncertain place in the Israeli legal system. Scholars disagree as to Jewish law's legal weight in the Israeli judicial system. Some claim that Jewish law in the Israeli court system functions merely as "a decoration and not as serious source of substantive law."⁴ Others have argued that Jewish law plays a substantive and crucial role in the interpretation of value-laden terms, such as equity, public policy, and good faith, and at times serves as the sole basis for a particular Supreme Court decision.⁵ Regardless, the Israeli Supreme Court has stated that it will employ Jewish law only insofar as it does not conflict with

⁴ M. Bass & D. Cheshin, *Jewish Law in the Judgments of the Supreme Court of the State of Israel*, 1 JEWISH L. ANN. 200, 212 (1978).

⁵ See 4 MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 1730 (Bernard Auerbach & Melvin J. Sykes trans., 1994) ("[I]n not a few cases [Jewish law] has served as the principal source for the Supreme Court's decision.").

secular law.⁶ Due to the fact that only a few Supreme Court justices received training in Jewish law, decisions incorporating Jewish law account for a relatively minor proportion of Israeli Supreme Court decisions.

However, while Jewish law may not carry much weight in the Israeli legal system, it has great importance for the religious Jewish community in Israel. For religious Jews, Jewish law discusses and designates the proper course of action for Jews in all areas of life. Those who believe in Jewish law's divine approbation follow its mandates out of religious obligation, even though no formal authoritative religious court charged with enforcing its rulings exists. Many religious Jews believe that once the Messiah comes and brings redemption to the world, Jewish law will once again serve as the law for the Jewish State of Israel.

In Israel today, most religious Zionists relate to the state of Israel on religious terms. The influential and at times extreme messianic religious Zionists, greatly affected by the teachings of Rabbi Zvi Yehuda HaCohen Kook, believe that the Jewish return to Israel marks the beginning of the Redemption and the coming of the Messiah.⁷ Realizing the Redemption will bring about the *telos* for which Jews have waited since the destruction of the Second Temple in 70 C.E. Nevertheless, the fact that they believe they are living in the beginning of the redemptive period affects the way they relate to Jewish law as it pertains to the land of Israel. For Messianists, these religious laws trump secular laws whenever the observance of secular laws might hinder the realization of the Redemption. The Israeli population experienced this when Israel dismantled and relocated the population of several Israeli towns located in the Gaza Strip in 2005. At the time, many rabbis claimed that removing Jews from Israel violated Jewish law, and many religious soldiers refused orders to remove Israelis from their

⁶ Cf. HCJ 390/79 Dwaikat v. State of Israel 34(1) IsrSC 1, 17 [1980], translated in ITZHAK ZAMIR & ALLEN ZYSBLAT, PUBLIC LAW IN ISRAEL 383 (1996) (stating that Israel is "a state where the *Halakha* (religious law) is applied only in so far as secular law allows it").

⁷ See generally AVIEZER RAVITZKY, MESSIANISM, ZIONISM, AND JEWISH RELIGIOUS RADICALISM 79-144 (Michael Swirsky & Jonathan Chipman trans., 1996) (offering a detailed theological overview of the teachings and beliefs of messianic religious Zionism).

homes in Gaza.⁸ The pullout from Gaza caused extreme social unrest and widened the gap between the messianic religious community and the rest of Israel's population.⁹ While Jewish law may not have significant influence in the secular Israeli court system, it may still have profound legal reach. The conclusions that modern rabbis reach when relying on Jewish law as their authority have the power to convince faithful messianic religious Zionists to go so far as to break secular law if the alternative somehow stands in the way of realizing the destiny of the Jewish people in Israel.

3. HUMAN RIGHTS IN JEWISH LAW OF EARLIER PERIODS

3.1. Biblical Law

Biblical law provides both universal and national guidelines. In many instances, the Bible explicitly states to whom certain laws apply. In Deuteronomy chapter 15, the Bible details a social welfare program that dissolves debts every seven years for citizens

⁸ For an interesting discussion of rabbi-led protests to prevent soldiers from removing Jews from their homes in Gaza, see Dan Izenberg, *Yesha Rabbis Preach Mitzva of Stopping Pullout*, JERUSALEM POST, Aug. 17, 2005, at 3, available at <http://pqasb.pqarchiver.com/jpost/access/888719051.html?dids=888719051:888719051&FMT=ABS&FMTS=ABS:FT&date=Aug+17,+2005&author=DAN+IZENBERG&pub=Jerusalem+Post&edition=&startpage=03&desc=Yesha+rabbis+preach+mitzva+of+stopping+pullout>. Perhaps as a result of the protests, an unknown number of soldiers during this time refused to follow these orders requiring disengagement. See also Yaakov Katz, *Rabbis Say No to Violence, Yes to Breaking the Law*, JERUSALEM POST, Apr. 8, 2005, at 1, available at <http://pqasb.pqarchiver.com/jpost/access/820193791.html?dids=820193791:820182019&FMT=ABS&FMTS=ABS:FT&type=current&date=Apr+8,+2005&author=YAAKO+KATZ,+Gil+Hoffman+contributed+to+this+report.&pub=Jerusalem+PoPo&edition=&startpage=01&desc=Rabbis+say+no+to+violence,+yes+to+breaking+the+law> (quoting rabbis as saying that contributing to the evacuation of settlements for non-Jews violates the Torah and is immoral); Margot Dudkevitch, *IDF: Few Will Refuse Pullout Orders*, JERUSALEM POST, May 17, 2005, at 2, available at <http://pqasb.pqarchiver.com/jpost/access/841180831.html?dids=841180831:841184118&FMT=ABS&FMTS=ABS:FT&type=current&date=May+17,+2005&author=MARGOT+DUDKEVITCH&pub=Jerusalem+Post&edition=&startpage=02&desc=IDF:+Few+will+refuse+pullout+orders> (stating that the army did not expect many soldiers to refuse orders to participate in the disengagement).

⁹ See Dina Kraft, *Defiant Young People Vow to Resist the Gaza Pullout*, N.Y. TIMES, Aug. 15, 2005, at A8 (contrasting the calls for peaceful protests issued by prominent members of the Israeli religious community with violent, civilian-led protests and riots following the decision by Israel's government to withdraw from the Gaza Strip).

but not for foreigners.¹⁰ In chapter 23 of the same book, the Bible explicitly prohibits collecting interest from citizens, while expressly permitting usury vis-à-vis foreigners.¹¹ Likewise, in Genesis chapter 9, the Bible records that the murder of any human being shall be punishable by death, for God has created humanity in God's own image.¹² In Leviticus chapter 24, the Bible offers one manner of law pertaining to all human beings regarding compensatory damages when one person maims another person.¹³

However, the bulk of Biblical law does not carry with it an explicit audience. When silent, whom does the law intend to protect? For example:

Thou shalt not murder. Thou shalt not commit adultery.
Thou shalt not steal. Thou shalt not bear false witness
against thy neighbor. Thou shalt not covet thy neighbor's
house; thou shalt not covet thy neighbor's wife, nor his
man-servant, nor his maid-servant, nor his ox, nor his ass,
nor any thing that is thy neighbor's.¹⁴

Who shall one not murder? With whose spouse shall one not lie? From whom shall one not steal? These latent ambiguities might seem easily answerable to the modern reader—they obviously apply universally. When understood universally, these laws from the Decalogue—the inviolability of life, family, and property—make up the bedrock of human rights in the ancient world.

Yet, most ancient Jewish legal scholars did not interpret the law in this way. For them, such passages only refer to Jewish victims. This dialectic—the allegiance to legal precedent and the imperative of modern mores—poses a great challenge for contemporary Jewish legal scholars. The modern Jewish legal scholar's interpretation of the scope of such laws will depend in part on the

¹⁰ See *Deuteronomy* 15:2-3 (Jewish Publication Society of America) ("[E]very creditor shall remit the due that he claims from his neighbor; he shall not dun his neighbor or kinsman You may dun the foreigner; but you must remit whatever is due you from your kinsmen.").

¹¹ See *Deuteronomy* 23:20-21 (Jewish Publication Society of America) ("You shall not deduct interest from loans to your countryman You may deduct interest from loans to foreigners.").

¹² See *Genesis* 9:6 (Jewish Publication Society of America) (decrying the murder of human beings, "[f]or in the image of God/Was man created").

¹³ *Leviticus* 24:17-22 (Jewish Publication Society of America).

¹⁴ *Exodus* 20:13-14 (Jewish Publication Society of America).

balance he strikes between strict loyalty to prior interpretations and modern moral sensibilities.

3.2. Rabbinic Law

The Rabbinic period in Judaism began immediately following the destruction of the second temple in Jerusalem in 70 C.E.¹⁵ In this period, the oral legal traditions of Judaism were found in written form in the Mishnah and several other works by Jewish legal scholars called Tannaim.¹⁶ Study of these works—especially of the Mishnah—by the Amoraim led to the codification of the Babylonian and Palestinian Talmuds, the authoritative commentaries on the Mishnah.¹⁷ These legal texts from the Tannaitic and Amoraic eras in the Rabbinic period comprise the ancient corpus of Jewish law.

Rabbinic exegesis of Biblical law preferred parochial and self-interested interpretations. In Exodus 21:14 the Bible elaborates on the prohibition of murder: “[a]nd if a man come presumptuously upon his neighbor, to slay him with guile; thou shalt take him from Mine altar, that he may die.”¹⁸ The Mekhilta, a Tannaitic work, interprets this verse as follows: by referring to the murderer as the generic “man,” the Bible intends to make the scope of the command universal.¹⁹ Thus, any murderer shall be punished with death. However, by referring to the victim with the closer relation, “neighbor,” the Bible intends that murder only be punishable by

¹⁵ See Jacob Neusner, “Pharisaic-Rabbinic” Judaism: A Clarification, 12 HIST. RELIGIONS 250, 250 (1973) (“[T]he rabbinic *Heilsgeschichte* . . . regards the rabbis known after the destruction of the Second Temple in A.D. 70 as the heirs and continuators of the Pharisees of the period before that time.”).

¹⁶ See LAWRENCE H. SCHIFFMAN, FROM TEXT TO TRADITION: A HISTORY OF SECOND TEMPLE & RABBINIC JUDAISM 177 (1991) (stating that in the Rabbinic period, Mishnah was compiled and the oral Torah evolved into a fixed corpus which replaced the written Torah as “the main object of Jewish study”).

¹⁷ See *id.* (arguing that the collection and editing of the Mishnah allowed Rabbinic Judaism to expand to virtually all of the world’s Jews). Cf. Neusner, *supra* note 15, at 250 (“The oral Torah was seen to constitute a single, continuous tradition, and its history would produce ‘Pharisaic-rabbinic’ as readily as ‘Biblical-talmudic’ Judaism.”).

¹⁸ Exodus 21:14 (Jewish Publication Society), available at <http://www.israel-bar-mitzvah.com/torah/exo021.htm#014>.

¹⁹ See MEKHILTA D’RABBI YISHMA’EL, TRACTATE NEZIKIN, SECTION 4 (limiting the scope of murder to the Jewish victims).

death if the murderer kills a Jew.²⁰ The passage ends with a very cryptic line by the Tanna,²¹ Isi Ben Akiva, who posits:

Before the giving of the Bible, we were warned concerning the spilling of blood. After the giving of the Bible, by [the laws] being made stricter, they were also made more lenient. In truth [the rabbis] said that [regarding one who kills a Gentile] although exempt from temporal courts, his judgment is handed over to heaven.²²

The full extent of the prohibition against murder and its legal repercussions—the axiomatic prohibition in human rights—does not pertain to Gentiles, according to the Rabbinic legal tradition.

Although Jewish law formalistically denied Gentiles this basic human rights protection, it provided two other legal mechanisms to protect the rights of Gentiles. The first approach—which still leaves much to be desired by modern standards—minimally protects the rights of Gentiles for the sake of avoiding hostility and reciprocal animosity. Thus, while a Jew must assist the burdened animal of another Jew because of a Biblical command,²³ he should help the burdened animal of a Gentile only in order to avoid inviting hostility from the Gentile population.²⁴ Similarly, a female Jew may act as a nursemaid for a Gentile baby for a wage only to avoid engendering animosity.²⁵ She may also deliver a Gentile baby for a wage to avoid hostility.²⁶ Lastly, a Jew who sees a Gentile in a life-threatening situation should not save him unless

²⁰ *Id.*

²¹ Tanna is the singular form of Tannaim.

²² MEKHILTA D'RABBI YISHMA'EL, TRACTATE NEZIKIN, SECTION 4.

²³ See *Exodus* 23:5 (requiring Jews to assist the overburdened pack animals of others).

²⁴ See BABYLONIAN TALMUD, TRACTATE BAVA METZIA 32b (commanding Jews to “tend to the animal of an idolater because of the need to prevent enmity”).

²⁵ See BABYLONIAN TALMUD, TRACTATE AVODAH ZARAH 26a (stating that it must be for a wage because the supposed hostility grows from the disparity that Jewish women will nurse Jewish babies for money, but not those of Gentiles). Conversely, the Talmud here records another legal scholar's opinion that prohibits nursing for a wage, rejecting the hostility argument. *Id.*

²⁶ *Id.* Another opinion in the Talmud prohibits Jewish midwives from assisting in the birth of a Gentile child on the Sabbath—even though she may deliver a Jewish baby on that day—again rejecting the hostility argument.

inaction would engender hostility.²⁷ This legal principle moves practice, albeit slightly, towards universal treatment in certain human rights areas, such as childbirth, childcare, and burdened animals, but does not otherwise afford much protection to Gentiles.

The second principle, “for the ways of peace,” enjoys greater development in ancient Jewish law and garners more sympathy from the modern reader. In part, this principle provides the rationale for rabbinic legislation otherwise not included by formal exegetical methods.²⁸ Thus, while the law requires competence to effectuate possession, the equitable principle, for the ways of peace, protects the possessions of the insane.²⁹ While the fruit of trees growing in a private yard belongs to the owner of the land, any fruit that falls from that tree into the public domain has no owner. Nevertheless, for the ways of peace, a person may not shake that tree to cause the fruit to fall into the public domain.³⁰ Using this equitable principle, the Tannaim expanded the scope of laws that facilitate an orderly society.

In this context, the principle for the ways of peace extends certain legal protections to Gentiles. Economically, the Tannaim included Gentiles within the scope of Jewish charity law; Jewish farmers should allow poor Gentiles to benefit from the biblically mandated social welfare programs afforded to the Jewish poor.³¹ In cities inhabited by Jews and Gentiles, the community charity coffer should collect from and distribute to both groups.³² During the sabbatical year—during which Jews may not engage in

²⁷ *Id.* Even though this law demonstrates apathy towards the lives of Gentiles, in practice, it will cause Jews to save Gentile lives.

²⁸ In broad strokes, this distinction parallels the law and equity distinction from medieval Europe.

²⁹ See MISHNA NASHIM, TRACTATE GITTIN 5:8 (asserting that the taking of the found possession of an insane individual is in fact a form of theft).

³⁰ See *id.* (stating that, equitably, the act of causing private fruit to fall into the public domain and then taking it is considered theft).

³¹ See *id.* (restricting Jews from preventing “the poor among the non-Jews from gathering gleanings” and other benefits from social welfare programs extended to poor Jews).

³² See TOSEFTA NASHIM, TRACTATE GITTIN 3:13 (requiring charity for Jew and Gentile alike).

agricultural activity—a Jew may assist a Gentile’s agricultural production (barring physical work on the land).³³

Socially, the Tannaim included laws pertaining to universal features of humanity, sickness, and death. Just as a Jew has a positive commandment to visit ailing Jews, he must also visit sick Gentiles.³⁴ And in the event of a death, a Jew must impartially ensure burial of the deceased (within the same cemetery if need be), eulogize the departed, and console the mourners of the deceased irrespective of the deceased’s religious or national affiliation.³⁵ Finally, as a basic staple of human decency and respect, a Jew must give salutations to Gentiles.³⁶ To ensure the observance of these basic needs—the need for food, the need for dignity while ill and approaching death, and the need for basic human respect and recognition—Jewish law created the equitable principle for the ways of peace.

Following Biblical times, the Rabbinic period saw a narrowing of human equality in Jewish law. Although the rabbis constrained the default scope of Biblical law to members of the Jewish religion, they were not devoid of sympathy for Gentiles; the rabbis generated two legal mechanisms for affording equal protection for certain basic human rights. Yet, these allowances for equality did not trump religious obligations, as evidenced by the fact that one legal opinion in the Talmud prohibited Jews from violating the Sabbath to assist in the birth of a Gentile child.³⁷ Furthermore, the Talmud remained silent or vague as to the place of Gentiles in many areas of law. Commentators throughout the Medieval and Modern Eras have since attempted to fill in these gaps.

³³ See MISHNA NASHIM, TRACTATE GITTIN 5:9 (stating that Jews can loan neighbors suspected of “transgressing the Sabbatical Year” sieves and other farming tools during the sabbatical year, but may not “winnow, or grind, or sift” with them; they can encourage Gentiles, but may not directly assist them in working the land).

³⁴ See BABYLONIAN TALMUD, TRACTATE GITTIN 61a (commanding Jews to “visit the Gentile sick along with the Jewish sick”).

³⁵ *Id.* See also TOSEFTA NASHIM, TRACTATE GITTIN 3:14 (requiring burial of Jew and Gentile alike).

³⁶ See MISHNA NASHIM, TRACTATE GITTIN 5:9 (encouraging Jews to offer greetings to Gentiles “for the sake of peace”).

³⁷ See BABYLONIAN TALMUD, TRACTATE AVODAH ZARAH 26a (prohibiting Jewish midwives from delivering the children of “idolaters” on the Sabbath).

3.3. Medieval Jewish Law

Since the destruction of the Temple in 70 CE, Jewish history has been saturated with persecution, death, and destruction. With a population dispersed throughout Europe, Africa, and the Middle East, Jewish existence meant life as a discriminated minority. The Middle Ages heightened this aspect of Jewish identity.

The Crusades greatly affected Jewish identity and Jewish relations with Gentiles.³⁸ The *Mainz Anonymous*, a particularly horrific document claiming to recount the eradication of the Jewish community in Mainz, Germany in 1096, reflects the intense xenophobia and venomous hatred of the Christian majority who murdered Jewish men and children, and raped and killed Jewish women.³⁹ The intensity of this xenophobia led many Jews to commit suicide and to kill their own children rather than allow them to be kidnapped and converted to Christianity.⁴⁰ Such acts—which had, until then, been unequivocally condemned by Jewish law—found justification, or at a minimum, quiet acceptance, in Jewish law and in contemporary religious leaders.⁴¹ Medieval Jewish legalists chose to internalize these acts out of their communal need to honor the actions of the thousands who died at the hands of the crusaders and other persecutors. The Middle Ages also witnessed countless burnings of sacred Jewish texts, expulsions from almost all of the countries in Western Europe, and

³⁸ See generally ROBERT CHAZAN, *EUROPEAN JEWRY AND THE FIRST CRUSADE* (1987) (outlining the effects of the First Crusade upon the Jewish population in Europe, with a particular emphasis on Jewish-Gentile relations during this period).

³⁹ See generally *THE JEWS AND THE CRUSADERS: THE HEBREW CHRONICLES OF THE FIRST AND SECOND CRUSADES 95-116* (Shlomo Eidelberg ed., trans., KTAV Pub. House 1996) (offering a translation and detailed historical background of the *Mainz Anonymous*).

⁴⁰ Haym Soloveitchik, *Religious Law and Change: The Medieval Ashkenazic Example*, 12 ASS'N FOR JEWISH STUD REV. 205, 208-09 (1987) ("Parents slaughtered their own children to prevent them from falling into Christian hands and being raised as Christians, and even recited a blessing on the murder of themselves and of their own children . . .").

⁴¹ *Id.* at 209-10. One man in the Middle Ages sent a letter to Rabbi Maier of Rothenburg asking what penance he should perform after slaughtering his children in order to prevent them from "falling into Christian hands." *Id.* Reportedly, the Rabbi was hard put to find a reply. *Id.*

the destruction of thriving Jewish communities across Europe.⁴² As a minority thrust into this perilous situation for over 1000 years, Jewish society, and Jewish legal interpretation, consequently reflected an intensely xenophobic attitude.

Medieval Jewish legal scholarship reached its height with the codification of Jewish law in the *Shulhan Arukh*. While many interpretations of the ancient Jewish legal texts abounded during the Middle Ages—with legal scholars in each community and region prescribing proper Jewish practice—the *Shulhan Arukh* enjoyed widespread acceptance in the Jewish world after its printing in the 16th century.⁴³ After its publication, a Jewish law scholar could not begin to study the contemporary practice of Jewish law without conferring with the near-authoritative *Shulhan Arukh*. It stores the medieval consensus on Jewish law.⁴⁴

The *Shulhan Arukh* contains several subunits on laws relating to Gentiles.⁴⁵ Consistent with one's expectations, given the place of Jews during the Middle Ages, the codified law limits the extension of human rights to Gentiles. Thus, a Jewish woman may not nurse a Gentile child even for a wage.⁴⁶ She may assist in the delivery of a Gentile child under extremely limited circumstances, and may do so only if the birth occurs during a weekday (not on the Sabbath or any of the festivals), she receives a wage, and she has a reputation

⁴² See generally YITZHAK BAER, A HISTORY OF JEWS IN CHRISTIAN SPAIN (Jewish Publication Society 1978) (describing the Diaspora, development, and persecution of Jews in Spain from the eleventh century to the fifteenth century); JACOB RADER MARCUS, THE JEW IN THE MEDIEVAL WORLD (Hebrew Union College Press 1999) (chronicling Jewish persecution during the Middle Ages).

⁴³ See Joseph Davis, *The Reception of the Shulhan 'Arukh and the Formation of Ashkenazic Jewish Identity*, 26 ASS'N FOR JEWISH STUD. REV. 251, 252-53 (2002) (detailing the reaction to the groundbreaking legal codification in the *Shulhan Arukh* and its impact on Jewish identity).

⁴⁴ Many legal opinions from the Medieval period still carry weight in contemporary legal analysis. Because they differ by region, common history, and surrounding majority population, it would take an entire paper to properly cover these opinions. Instead I have opted to use the *Shulhan Arukh* as the legal consensus, and to incorporate specific medieval legalists and their opinions as they pertain to modern rabbinic legal arguments.

⁴⁵ Even though the *Shulhan Arukh* contains many laws directly and indirectly distrustful of Gentiles—and requiring strict separation from anything of religious significance to Gentiles—I will limit my overview to laws directly pertaining to human rights issues.

⁴⁶ See SHULHAN ARUKH, YOREH DEAH 154:2 (prohibiting a Jewish woman from nursing a Gentile child).

in the community as a midwife; she would most likely engender hostility if she refused to assist in the child's birth (apparently if she did not have a reputation as a midwife, she could claim ineptitude at midwifery and not engender animosity).⁴⁷ Furthermore, the codified law prohibits a doctor from healing Gentiles, except to avoid hostility, thus extending the prohibition against saving the life of a Gentile except to avoid hostility.⁴⁸ Similarly, the use of the principle for the ways of peace remained narrow; the *Shulhan Arukh* lists the examples stated in the ancient texts tersely and does not expand their scope.⁴⁹ It also omits the command for Jews to give salutations to Gentiles.

By the end of the Middle Ages, in light of the perennial societal hardships and catastrophes suffered at the hands of the popular majority, the Jewish law reflected a negative outlook on the rights that a Jew must afford universally.

4. MODERN ISRAELI APPROACHES TO HUMAN RIGHTS IN JEWISH LAW

In 1948, Jewish history experienced an event with which it was wholly unfamiliar during the prior eighteen hundred years—the establishment of the State of Israel created a Jewish majority and Jewish sovereignty for the Jewish people. Just as this event had many ramifications for Jews worldwide and Jewish identity, it also had great effects on Jewish law. Jewish law's development throughout the previous centuries paid little attention, if any, to the laws and principles connected with sovereignty. Statehood demanded that scholars breathe new life into these areas of Jewish law.

The intersection between modern universal human rights values and the Jewish state is one of the areas that required reinterpretation. Scholars within the Jewish legal system had to determine what Jewish law says about human rights for all human beings. The Jewish people had suffered continual discrimination and destruction as a weak minority at the hands of a majority from whom they differed. The hatred engendered by this history found its way into Jewish law over the ages. However, majority status

⁴⁷ *Id.*

⁴⁸ *Id.* at 158:1.

⁴⁹ *Id.* at 151:12, 235:9, 267:1.

and statehood placed Jewish law scholars at a crossroads; would they continue the theme of distrust and xenophobia towards the Gentile minority within their land, or, after centuries of experiencing minority status and persecution, would they decide to remedy those ills for the minority over whom the Israeli majority now had authority? As evidenced by the following five legal opinions, rabbis contemporary with the State of Israel differ.

4.1. Shelomoh Goren

Rabbi Shelomoh Goren discusses a Gentile's right to life in Jewish law. According to Goren, the printed text of the Mishnah contains a substantive error. As published currently, the Mishnah in Tractate Sanhedrin states, "anyone who eradicates the life of a person from Israel, it is as if he has eradicated an entire world."⁵⁰ Given, however, that the early manuscripts omit the words "from Israel," Goren infers that this admonition applies to the taking of both Jewish and Gentile lives.⁵¹ He then quotes a Tanna, Ben Azai, whom Goren interprets to assert that Jewish law has the value of securing the lives of all human beings as one of its axiomatic pillars.⁵² In sum, all human beings have a right to a dignified life, because all human beings are created in the image of God.⁵³

Goren also discusses the property rights of Gentiles under Jewish law. Whether or not Gentiles may possess property rights in a Jewish-controlled Israel turns mainly on the interpretation of Exodus 23:33. The verse states, "They shall not dwell in thy land – lest they make thee sin against Me, for thou wilt serve their gods – for they will be a snare unto thee."⁵⁴ Maimonides, a medieval Jewish legal scholar, greatly expands the scope of this prohibition to include all Gentiles who have not received the status of resident alien, a status currently impossible to bestow.⁵⁵ Thus, in essence,

⁵⁰ BABYLONIAN TALMUD, TRACTATE SANHEDRIN 37a.

⁵¹ See 1 SHELOMOH GOREN, MESHIV MILHAMAH 3 (1983) (Isr.) (discussing the erroneous addition to the text of the Mishnah).

⁵² See *id.* at 6 (finding the human rights value to life to be universal).

⁵³ See *id.* (alluding to the verse from *Genesis* 9:6).

⁵⁴ Exodus 23:33 (Jewish Publication Society), available at <http://www.israel-bar-mitzvah.com/torah/exo023.htm#001>.

⁵⁵ See MOSHE BEN MAIMON, MISHNEH TORAH, HILCHOT AVODAT KOCHAVIM 10:6 (declaring that no gentile is allowed onto Jewish lands unless "he has accepted upon himself the Seven Commandments of the Sons of Noah," in which case he is classed as a "settling stranger," who will only be accepted onto Jewish lands "at a

Maimonides bans all Gentile settlement in a Jewish-controlled Israel. However, Goren compiles the legal analysis of several other medieval legalists – primarily that of the Ra'avad – which together produce a result more consistent with modern values. The Ra'avad asserts that the ban on Gentile settlement in Israel, but for bestowing resident alien status, only applies when a requisite legal body with the capacity to bestow such a status exists. However, when that legal body does not exist, the ban on Gentile settlement only applies to a smaller segment of the Gentile population, i.e., outright idolaters.⁵⁶ Goren concludes that because Gentiles today do not worship idols, they may not only possess property rights in Israel, but they may also enjoy other rights granted to Gentiles who 'lead orderly lives.'⁵⁷

In his legal analysis of the internment of Gentiles, Goren is more circumspect. Although he unmistakably asserts that the principle for the ways of peace demands that a Jew bury Gentile corpses, Goren equivocates about cemeteries containing both Jewish and Gentile corpses.⁵⁸ The medieval consensus, Goren states, prohibited mixed cemeteries as an extension of the prohibition of burying a righteous person next to a villainous one.⁵⁹ Despite this, Goren manages to locate the lone legal opinion that permits mixed cemeteries, provided that the Gentile 'led an orderly life.'⁶⁰ In the end, Goren rejects this lone opinion on formal legal grounds, but argues that it could be followed if a failure to do so would engender hostility.⁶¹

Goren's liberal jurisprudence reflects the attempts of someone within the Jewish legal system to harmonize traditional Jewish

time when the Jubilee is observed"). Conversely, converts to the Jewish faith were allowed complete access to Jewish lands under the Code of Maimonides. *Id.*

⁵⁶ See SHELOMOH GOREN, *MISHNAT HAMEDINAH* 58 (1999) (Isr.) (limiting the limitation on the right to land to idolaters).

⁵⁷ *Id.* at 60–61. The phrase "lead orderly lives" refers to people who abide by the seven Noahide laws—a topic beyond the scope of this paper. In brief, these laws encapsulate the bare minimum of an orderly society; the presence of a legal system that prohibits murder, theft, adultery, etc.

⁵⁸ See SHELOMOH GOREN, *SEFER TORAT HAMEDINAH* 289 (1996) (Isr.) (vacillating on whether Jews and Gentiles may be buried in the same cemetery).

⁵⁹ See *id.* at 290 (discussing the burial of Jews and Gentiles in the same cemetery).

⁶⁰ *Id.* at 294.

⁶¹ See *id.* at 295 (incorporating the principle of engendering hostility into the discussion).

legal mandates with modern universal values. According to Goren, the debate within formal Jewish law is not whether the basic human right to life applies universally or parochially; Jewish law does not allow the murder of any innocent human being. Instead, the law debates the gravity of murder as applied to different victims, Jews and Gentiles. Goren argues for equal gravity in murdering a Gentile or a Jew by interpreting an authoritative source on the universal prohibition of murder. Few legal scholars within the Jewish legal system accept source criticism of the Talmud as a valid form of legal analysis. Goren's use of it here demonstrates his innovative jurisprudence not only in the harmonizing of Jewish law texts with modern universal values, but also in the utilization of modern academic historical analysis in positively ascertaining the original version of Jewish legal texts. Additionally, his allusion to the Biblical verse that states that God created humanity in God's own image—a principle that few past Jewish legal scholars have employed—further demonstrates Goren's innovative jurisprudence. By finding rationales in Jewish law to support a Gentile's right to life, property, and dignity after death, Goren generates the practical outcome of universal rights for Gentiles in Jewish law.

4.2. *Shaul Yisraeli*

Rabbi Shaul Yisraeli acknowledges the past deliberate separation made by Jewish law between Jews and Gentiles. However, he marks an important divergence from this segregation in the modern world. In previous eras, Jewish law attempted to distance Jews from idolatry and anything reminiscent of it.⁶² In modern society—where idolatry has ceased to threaten the integrity of the Jewish religion—Jewish law now mandates a separation from Gentiles who reflect idolatry's detrimental characteristics.⁶³ He underscores the importance, in his introduction to laws pertaining to Gentiles in Israel, that any suspicion of Gentiles is only legitimate insofar as the Gentile in question embodies those detrimental characteristics. Any person,

⁶² See SHAUL YISRAELI, SEFER 'AMUD HAYEMINI 114-15 (1966) (Isr.) (detailing past Jewish law jurisprudence regarding Jews and Gentiles).

⁶³ *Id.* at 115.

Yisraeli insists, who 'leads an orderly life' deserves dignity and respect.⁶⁴

Yisraeli also argues for property rights for Gentiles according to Jewish law. In the ancient period when the land of Israel maintained a certain level of holiness, Gentiles could not own real property in Israel; but today, claims Yisraeli, because Israel lacks that same holiness, the prohibition against Gentile property rights has consequently dissipated.⁶⁵ Elaborating further, Yisraeli quotes the same argument between Maimonides and the Ra'avad as did Goren.⁶⁶ While agreeing with Goren's result, he offers a different legal analysis. According to Yisraeli, Maimonides's prohibition on allowing property rights in a Jewish-controlled Israel requires an extremely high threshold for what constitutes a "Jewish-controlled Israel." In order to consider Israel Jewish-controlled, Jewish sovereignty in Israel must encompass national security in the face of war, a majority of the worldwide Jewry settling in Israel, and control of all of the land within the borders of ancient Israel or the ability to exert control over all of ancient Israel.⁶⁷ As these requirements have not been met, all people may enjoy property rights in the land of Israel.

Yisraeli does, however, share Goren's liberal jurisprudence. By shifting Jewish law's seeming contempt for Gentiles—all of whom presumably committed acts of idolatry—to a contempt for "idolatrous" actions, Yisraeli tries to expunge the animosity towards Gentiles from those within the Jewish legal system. The laws remain the same, but the reality has changed. Given this, Jews should not regard minorities in Israel with the same disdain as they have in the past—when the Jews themselves lived as the minority among an oppressive Gentile majority—because modern people have different characteristics. According to Yisraeli, only those individuals who engage in idolatrous actions deserve contempt.

Yisraeli uses this same method to argue in favor of Gentile property rights in Israel. By requiring an extremely improbable factual test in order to trigger the law that would prohibit Gentile

⁶⁴ *Id.*

⁶⁵ See SHAUL YISRAELI, SEFER ERETS HEMDAH 208 (1958) (Isr.) (arguing that the prohibition remains intact for the produce that must be tithed, a nominal issue).

⁶⁶ YISRAELI, *supra* note 62, at 115.

⁶⁷ *Id.* at 122.

property rights, Yisraeli ensures Gentile property rights for the foreseeable future. Yisraeli, like Goren, employs an innovative jurisprudence to provide legal conclusions that echo modern universal human rights.

4.3. Aharon Lichtenstein

Rabbi Dr. Aharon Lichtenstein begins his analysis of universal values in Jewish law by presenting the following thesis: "Whatever is demanded of [Jews] as part of [the assembly of Israel] does not negate what is demanded of [Jews] simply as human beings on a universal level, but rather comes in addition."⁶⁸ As proof of this assertion, he cites the statement made by Issi ben Akiva in the Mekhilta, and interprets it as a challenge to the moral integrity of the Jewish legal tradition.⁶⁹ Could it be, questions Isi, according to Lichtenstein, that a supposed superior moral code allows less moral behavior, i.e., the murdering of Gentiles? The rabbi's response implicitly accepts Issi's challenge by agreeing with him. Of course, Jewish law does not condone the murder of Gentiles or the violation of any other universal moral tenet. Nevertheless, Jewish courts do not have jurisdiction over such moral violations. Lichtenstein, through his interpretation of the Mekhilta's recorded exchange, thereby asserts that Jews must abide by both sets of precepts, regardless of whether the imperative originates in universal human morality or in Jewish law.⁷⁰

⁶⁸ AHARON LICHTENSTEIN, *BY HIS LIGHT: CHARACTER AND VALUES IN THE SERVICE OF GOD* 21 (2d ed. 2003).

⁶⁹ *See id.* at 23 (stating that Akiva challenges the moral integrity of the Jewish law tradition by questioning a verse in *Mishpatim* (*Shemot* 21:14)). The verse seems to indicate that a Jew is punished for murder only if he kills a fellow Jew but not if the victim is a Gentile. To Akiva, such verses are inconceivable, since they seem to indicate that crimes such as murder, "which previously had been forbidden to general humanity would now be permitted to Jews by the Torah." *Id.*

⁷⁰ *See id.*

[W]hatever is demanded of a person on a universal level is *a priori* demanded of a Jew as well; Torah morality is at least as exacting as general morality. . . . Thus, part of what is demanded of a [Jew] is simply. . . what is demanded of every person as a human being.

Id.

On the topic of the murder of Gentiles, Lichtenstein vigorously opposes any laxity. The jurisdictional element does not affect practice because the imperative to follow moral and legal mandates does not depend on deterrence, but rather on the weight of the divine command.⁷¹ Thus, when he asserts that the prohibition against murder from the Decalogue applies to Gentiles who lead orderly lives, he concludes that no difference exists between the prohibitions against murdering a Jew and murdering a Gentile.⁷² He further states that someone who murders Gentiles in cold blood not only commits the serious crime of murder, but also desecrates the name of God—a critical prohibition in Jewish law.⁷³

Lichtenstein, in broad strokes, provides the most liberal jurisprudence in the area of human rights. Jews must secure human rights for all people under Jewish authority. The corpora of Jewish law remains silent on issues of universal human rights, because universal morality comprises a separate set of laws governing every human being, while Jewish law relates only to the laws governing Jews. Therefore, Jews, by virtue of being human, must behave in accordance with universal human rights values as God commanded. Although he does not provide an analysis of issues where universal human rights and Jewish law contradict one another, Lichtenstein's method presents the most inclusive jurisprudence on the intersection between Jewish law and universal human rights.

4.4. *Shlomo Aviner*

Conversely, Rabbi Shlomo Aviner does not present a clear picture of his view of Gentiles in Jewish law. Aviner asserts a Biblical imperative to respect all human beings, yet he immediately thereafter differentiates between the respect due to all humans and

⁷¹ See *id.* at 51 (“Chazal said, ‘*Gadol ha-metzuveh ve-oseh*,’ thus placing at the center or even at the apex of our spiritual lives the sense of being called and commanded.”).

⁷² David Bar-Hayim, *Goyim Behalachah [Gentiles in the Halakhah]*, 5, http://www.daatemet.org.il/articles/pdf/he_GentilesinHalacha.pdf.

⁷³ See 2 AHARON LICHTENSTEIN, *LEAVES OF FAITH: THE WORLD OF JEWISH LIVING* 255 (2004) (incorporating the principle of *Hillul Hashem* into the discussion).

the extreme love required of all Jews towards all other Jews.⁷⁴ Aviner states that throughout the centuries of exile, Jews lacked the physical capabilities to avenge their fallen brethren. But now, with a strong army, they should take revenge on the Gentiles who sought their destruction, striking fear in those who wish ill upon the Jews by taking the battle to their gates.⁷⁵

On the other hand, in the civilian context, he prohibits the murder of Gentiles on the basis of both Jewish law and universal principles of morality.⁷⁶ The humanistic moral imperative to respect another's bodily integrity binds a Jew, just as it binds all others.⁷⁷ He even quotes the Mekhilta, which interpreted the prohibition to murder given at Mount Sinai as proof that Jewish law creates an imperative that builds upon the humanistic moral imperative, not one that supplants humanistic obligations.⁷⁸ Aviner concludes from the discussion in the Mekhilta that a Biblical prohibition to murder Gentiles exists, over which the court of heaven has exclusive jurisdiction.⁷⁹ He further states that anyone who murders a Gentile not only transgresses the Biblical prohibition of murder, but further damns himself by disgracing the name of God, a crime which can only be absolved by capital punishment.⁸⁰

In the abstract, Aviner acknowledges a universal imperative from within Jewish law to relate to all human beings as humans without distinction by religion, race, sex, or status.⁸¹ However, in practice, Aviner does not explain which human rights this universal imperative demands, but does discriminate between the human value of Gentiles and the human value of Jews.⁸² In Jewish law, humans have rights because God created them in God's image.⁸³ God created some humans more in his image than

⁷⁴ See SHLOMO AVINER, MASHIV HA-RUAH 32 (Gilad Helinger ed., 2006) (Isr.) (discussing the love and respect for human beings).

⁷⁵ *Id.* at 686.

⁷⁶ *Id.* at 687-88.

⁷⁷ *Id.* at 688.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See 4 SHLOMO AVINER, SHU'T SHE'EILAT SHLOMO 286 (2001) (acknowledging a universal human right to human dignity).

⁸² *Id.*

⁸³ *Id.*

others—these are Jews, according to Aviner.⁸⁴ Thus, Jews receive additional human rights beyond those afforded to Gentiles.⁸⁵ Moreover, Gentiles as individuals unequivocally deserve property rights in Israel from legal and moral standpoints.⁸⁶ However, Gentiles with whom a territorial conflict rages do not necessarily have these rights, according to Jewish law.⁸⁷ Because of this, the Arab Gentile minority in Israel may stay in Israel only if they can be trusted to abide by Israeli law and remain loyal to the state.⁸⁸ Aviner determined that the current territorial conflict destroys the trustworthiness of the Arab Gentile minority *at least* in this manner.⁸⁹ While in theory, the individual Arab Gentile deserves a peaceful coexistence with the Israeli majority, as long as the conflict continues, the protection of human rights for the Arab Gentile minority remains tenuous.⁹⁰

Aviner espouses quite hawkish ideas regarding the rights of dissidents and the Arab Gentile population in Israel. He proclaims that according to Jewish law, the Israeli army has an obligation to engage in retaliatory actions and deterrence campaigns, as they see fit, to quash terrorist activity.⁹¹ In reference to minority dissidents who throw stones at Israeli citizens, Aviner assumes that they aim to inflict mortal wounds on their victims, unless the size of the rock or the distance between the attacker and victim precludes that possibility.⁹² Aviner believes that Jewish law courts may inflict excessive corporal punishments on people in order to deter others from acting in the same way.⁹³ Thus, the rabbinic court should put those who throw stones at Israeli citizens to death on attempted murder charges.⁹⁴

⁸⁴ *Id.*

⁸⁵ *See id.* at 286–87 (asserting that additional human rights exist for Jews). Aviner does not list these rights or allude to their scope.

⁸⁶ *Id.* at 288.

⁸⁷ *Id.*

⁸⁸ *Id.* at 288–89.

⁸⁹ *Id.* at 289.

⁹⁰ *Id.*

⁹¹ *See* SHLOMO AVINER, AL HA'ARETZ LEVETAH: SHU'T INTIFADA 17 (1993/1994) (discussing the permissibility of retaliatory military campaigns).

⁹² *Id.* at 21.

⁹³ *Id.* at 22.

⁹⁴ *Id.*

Aviner continues to erode human rights protections of the lives of dissident minorities using the Jewish law doctrine of “Pursuer,” or self-defense of a third party. This doctrine requires any Jew who witnesses someone pursuing another person with murderous intentions to save the intended victim, even at the cost of the pursuer’s life.⁹⁵ Under this doctrine, Aviner asserts that any Jew who sees an aggressor lift a rock to throw at a Jewish victim, must protect the would-be victim, even if that would require killing the aggressor.⁹⁶ This extreme portrayal of Jewish law doctrines does not turn on the severity of the law, but rather on the extreme finding of fact that all who throw stones do so with the intent to murder. Once Aviner assumes this extreme fact—which undoubtedly reflects his political leanings—the application of normal legal principles, such as the self-defense of a third party, results in extreme conclusions.

Aviner further assumes that ongoing terrorist activity against Israel puts Israel in a state of war with its aggressors.⁹⁷ While he prohibits collective punishment as contrary to Jewish law, he limits that prohibition to times of peace.⁹⁸ In war, Aviner asserts, Jewish law does not require differentiation between actual aggressors and civilians caught in the crossfire.⁹⁹ Thus, citizens who harbor terrorists—a category that includes stone throwers—may suffer collective punishment, though such punishment should not match the severity of the punishments doled out to actual terrorists.¹⁰⁰ Aviner states that families and communities who do not hand over their terrorist relatives and friends to the Israeli authorities deserve to be punished as accomplices of terror.¹⁰¹ Furthermore, any Gentile aligned with any terror organization against the State of

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 24.

⁹⁸ *Id.* at 23–24.

⁹⁹ *Id.* at 24. This assertion concerning Jewish law has no support in any authoritative legal text. Aviner instead backs up this claim with his own exegetical interpretation of one of the wars waged by King Saul recorded in the Bible. This interpretation does not properly explain the text and, even if it did, would still require a logically invalid inference in order for this war to serve as proof of such an assertion.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Israel appears to lose all rights afforded by the state, under Aviner's view of Jewish law.¹⁰²

Although Aviner appears to espouse some progressive human rights values, his extreme viewpoint on the Israel-Palestinian conflict hinders the practical implementation of human rights, according to his conception of Jewish law. He fabricates his own hawkish Jewish law rules of war and applies them to the current conflict in Israel. While he acknowledges a civilian value in incorporating universal human rights into Jewish law, he abrogates any concern for such rights during times of war or unrest.

4.5. David Bar-Hayim

Rabbi David Bar-Hayim espouses extreme views on Jewish law concerning human rights. According to Bar-Hayim, a prohibition on murdering Gentiles (not punishable in a Jewish temporal court) exists in Jewish law without a clearly defined scope.¹⁰³ While one medieval legalist, the Ra'avan, posits that this prohibition emerges from the prohibition against murder in the Decalogue, the other medieval legalists quoted, Maimonides included, do not agree.¹⁰⁴ After alleging a non-existent consensus among medieval legalists concerning the prohibition of murder committed against Gentiles, Bar-Hayim concludes that a qualitative difference exists between the prohibited acts of murdering a Jew and a Gentile.¹⁰⁵ The claim that the murder of either a Gentile or Jew carries the same weight—with the exception that Jewish courts are only granted jurisdiction over the murder of a Jew¹⁰⁶—does not characterize Jewish law correctly, according to Bar-Hayim. Under Bar-Hayim's view of Jewish law, the murder of a Jew qualitatively carries greater contempt than does the murder of a Gentile.

Bar-Hayim also claims that Jewish law permits the kidnapping of Gentiles. He quotes two Tannaitic sources, one that bans kidnapping without an express scope as to whom this ban applies and a second source that limits the ban on kidnapping to Jewish

¹⁰² *Id.* at 75.

¹⁰³ See Bar-Hayim, *supra* note 72, at 8 (discussing the variety of opinions on the prohibition of murdering a Gentile).

¹⁰⁴ *Id.* at 9.

¹⁰⁵ *Id.*

¹⁰⁶ See *supra* at 117-18 (explaining Rabbi Lichtenstein's opinion that murdering a Gentile is as severe as murdering a Jew).

victims only.¹⁰⁷ Bar-Hayim harmonizes the two texts by limiting the ban on kidnapping to Jewish victims, leaving no room for the possibility that the prohibition covers all human victims.¹⁰⁸ To support this position, he uses Maimonides, whom he reads to allow the kidnapping of Gentiles.¹⁰⁹ He offers a similar argument of silence to allow the injury of Gentiles.¹¹⁰

Bar-Hayim underscores this grave distinction in the human rights of Jews and Gentiles with the outlandish exegetical claim that Jewish law equates Gentiles to animals rather than humans.¹¹¹ Except for the two cases where the legal sources force Bar-Hayim to recognize a Gentile's right to life and property, he rationalizes the disparity between Jews and Gentiles by likening Gentiles to animals. Thus, humans typically feel hardly any compunction for kidnapping or injuring an animal, especially relative to the kidnapping and injuring of human beings. Because they are considered animals under Bar-Hayim's extremist interpretation of Jewish law, Gentiles are not afforded the same legal protection as Jews. Under this theory, they are not legally protected from kidnapping or intentional injury. To bolster this claim, Bar-Hayim quotes several medieval and modern philosophical scholars who appear to agree with him.¹¹²

His extremely antagonistic approach to human rights in Jewish law harnesses the animosity built up over the long period of Jewish persecution and unleashes it as fundamentalism for the modern era. His jurisprudence solves any ambiguity in this context by limiting its scope to Jews only. He then records the biased opinions of medieval and modern thinkers—themselves persecuted as members of a Jewish minority—and uses them as a

¹⁰⁷ See Bar-Hayim, *supra* note 72, at 16 (discussing the kidnapping of Gentiles).

¹⁰⁸ *Id.* (discussing Bar-Hayim's failure to account for the possibility that these two sources reflect divergent legal opinions).

¹⁰⁹ *Id.* His reading of Maimonides is inconclusive and, at worst, specious. Bar-Hayim argues from silence, claiming that because Maimonides did not mention Gentiles when he codified the laws of kidnapping, the kidnapping of Gentiles is therefore allowed. Such an argument ignores the likely possibility that Maimonides's code of Jewish law contains gaps. To fill one such gap in this manner reveals Bar-Hayim's *a priori* feelings towards "the other."

¹¹⁰ *Id.* at 16-17.

¹¹¹ *Id.* at 23.

¹¹² *Id.* at 24-27.

backdrop for his intense hatred and apathy towards the humanity and the human rights of Gentiles.

4.6. Interim Summary

Following the establishment of the State of Israel, legalists internal to the Jewish law system have a choice to make in the context of human rights. Jewish law had developed in the fifteen hundred years prior as a legal system for a dispersed minority among an oft-antagonistic Gentile majority. The xenophobic hatred emerging as a result of Jewish persecution and countless massacres offers two divergent options for the modern legalist enjoying majority status under Israeli statehood. Will Jewish law shed its xenophobia, learn from its people's horrible persecution, and ensure that any minority living under its authority enjoys the respect and safety that Jews so desperately wanted and never attained while a minority? Or will Jewish law continue to foster the xenophobic attitude developed over centuries and unleash it on the minorities under its rule? Some rabbis, such as Goren, Yisraeli, and Lichtenstein, have chosen the former path and highlight the tolerant themes in Jewish law while pragmatically interpreting other legal issues to accord with modern human rights values. Others, like Bar-Hayim, unequivocally choose the latter path and, garnering support from the bloodstained pages of Jewish history and its thinkers, fashion an extremely severe outlook on the human value afforded to Gentiles under Jewish law. Yet, some, like Aviner, straddle the fence. Although he occasionally reflects a tolerance aligned with the former attitude, this open-mindedness is often obscured by his hawkish nature. At other times, he seems to subscribe to the latter approach while speaking of universal values to avoid being labeled an extremist. These three approaches stated by these rabbis represent values in the Jewish population in Israel today. Regardless of the demographics and whom the masses of religious Jews in Israel choose to follow, influential voices in Jewish law offer a progressive jurisprudence that supports human rights protections for Gentiles.

5. THE APPROACH OF THE ISRAELI SUPREME COURT

The Modern Era has witnessed the expansion of both the acceptance and the scope of human rights throughout the Western world. Today, legal discussions about whether certain people in society have a right to life or property seem rhetorical. Western

secular courts punish all cold-blooded murderers regardless of whose life they take. The legal discussions of human rights in contemporary Western court systems explore issues such as freedom of speech, religion, association, and the like. The same is true of the Israeli legal system. In a society fraught with political, religious, and military tensions, discussion of these freedoms requires the court's attention.

A problem arises when trying to incorporate Jewish law as a source for Modern Israeli law. The human rights values, *sui generis* to the Modern Era, do not have explicit sources in the corpora of Jewish law. In fact, depending on whose interpretation one accepts, Jewish law can at times stand antithetical to modern human rights values. This conundrum offers Israeli jurists the opportunity to reject the use of Jewish law in these areas or to find creative ways to base these modern freedoms on Jewish law principles otherwise not discussed or developed in previous centuries. When choosing the latter option, the Israeli secular court jurists can interpret the law in ways barred to rabbinic Jewish law scholars save for a few mavericks. Rabbinic Jewish law scholars maintain a strict doctrine of *stare decisis*, which bars subsequent legalists from overruling the decisions of past scholars. The secular jurist does not have to abide by such a strict doctrine and is thus able to favor modern methods of legal interpretation.

Justice Menachem Elon used this method of interpreting Jewish law in the human rights context in *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*.¹¹³ On the topic of freedom of thought and speech, Justice Elon offers several sources from Jewish law. He writes:

I believe there is no more penetrating and encompassing description of the freedom of expression and the importance of every individual opinion—even that of a single individual—than the Talmudic statement regarding the disputes between Bet Hillel and Bet Shammai: “both are the words of the living God” (B.T. *Eruvin* 13b; J.T. *Berakhot* 1:4; J.T. *Yevamot* 1:6). . . . [T]he *halakha* is according

¹¹³ See generally EA 2/84 *Neiman v. Chairman of the Cent. Elections Comm. for the Eleventh Knesset* 39(2) PD 225 (1985) (Isr.), translated in http://elyon1.court.gov.il/files_eng/84/020/000/Z01/84000020.z01.pdf (discussing human rights and cautioning against strict adherence to a common law doctrine, which might permit the spread of racism or hate).

to Bet Hillel . . . but the views of Bet Shammai remained legitimate and material in the world of the *halakha*. This approach became characteristic of the *halakha*.¹¹⁴

In the context of legal discussions, although one version became the law, the dissenting opinion remained an enduring voice in the Jewish legal system. This plurality of voices that has survived in Jewish law throughout the ages “has the power to create harmony and unity out of difference.”¹¹⁵ The Jewish legal principle that “both are the words of the living God,” provides a basis for freedom of speech and thought. Justice Elon concludes that the Jewish value in a plurality of voices,

. . . is the lesson of leadership and government in the heritage of Israel—tolerance for every individual and every group, according to their opinions and outlooks. And this is the great secret of tolerance and listening to the other, and the great potency of the right of every individual and every group to express their opinions, that they are not only essential to an orderly and enlightened regime but also vital to its creative power.¹¹⁶

The Israeli Supreme Court (hereinafter “the Court”) explained the universal right to human dignity and bodily integrity in Jewish law in *Katlan v. Prisons Service*.¹¹⁷ In his opinion, Deputy President Cohn locates the source for human dignity and bodily integrity in the statements of the Mishnah in Tractate Sanhedrin:

The creation of humankind started with the creation of a single individual to teach that whoever removes one single soul from this world is regarded as if he had caused the whole world to perish; and whoever keeps one single soul alive in this world is regarded as having preserved the whole world. And to preserve peace—that one person should not say to another: “my father is greater than your

¹¹⁴ *Neiman*, 39(2) PD at 294, translated in *id.* at 76. Halakha can be loosely translated as “Jewish law.”

¹¹⁵ *Neiman*, 39(2) PD at 295, translated in *id.* at 77.

¹¹⁶ *Neiman*, 39(2) PD at 296, translated in *id.* at 78.

¹¹⁷ See generally HCJ 355/79 *Katlan v. Prisons Service* 34(3) PD 294 [1985] (Isr.), translated in MENACHEM ELON ET AL., *JEWISH LAW (MISHPAT IVRI): CASES AND MATERIALS* 441–47 (1999) (discussing the right to human dignity and bodily integrity).

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father." . . . Therefore, every person must say: "The world was created for me."¹¹⁸

Just as the world exists for the individual, it exists no less for any other individual, states DP. Cohn.¹¹⁹ This principle, asserts DP. Cohn, led Hillel the Elder to exclaim that all of Jewish law rests on the following principle: do unto *your friends* as you would have done unto you.¹²⁰ Therefore, states DP. Cohn, Jewish law prohibits the state from infringing on the bodily integrity and human dignity of anyone because such infringement constitutes humiliation and degradation to that person.

Deputy President Cohn interprets Jewish law similarly to those internal to the Jewish law system. However, while he reflects the interpretation of Rabbi Goren on the universality intended by the statements in the Mishnah from Tractate Sanhedrin, he surpasses scholars internal to Jewish law in his universal reading of Hillel's statements. As demonstrated earlier, rabbinic and traditional exegeses of Jewish law interpret references to "friends" locally as referring only to Jews. DP. Cohn, however, extends the reference to "your friends" in Hillel's statement to all human beings.

Furthermore, DP. Cohn develops a rule for human dignity, ensuring that no action "causes a person to be disgraced or embarrassed" from studying the case law found in the Talmud.¹²¹ In the religious Jewish law tradition, scholars have never developed a rule for human dignity, which they could apply to other areas of law beyond the specific examples in the Talmud. Traditionally, this principle remained confined to Talmudic applications. The Court breaches this traditional approach by applying the principle of human dignity beyond its traditional confines.

¹¹⁸ MISHNAH, NEZIKIN, TRACTATE SANHEDRIN 4:5.

¹¹⁹ *Katlan*, 34(3) PD at 11, translated in MENACHEM ELON ET AL., *supra* note 117, at 444.

¹²⁰ *Id.*; see also BABYLONIAN TALMUD, TRACTATE SHABBAT 31a (citing the original statement of Hillel the Elder).

¹²¹ *Katlan*, 34(3) PD at 12, translated in MENACHEM ELON ET AL., *supra* note 117, at 445.

In *State of Israel v. Guetta*,¹²² Deputy President Elon continues the discussion of human dignity in Jewish law. The value assigned to human dignity in Jewish law protects against “the humiliation or demeaning of the *image of God* in man.”¹²³ Jewish law places a premium on the value of human dignity, explains DP. Elon, to the extent that human dignity considerations trump rabbinic legislation¹²⁴ and, according to one source, even supersede Biblical law.¹²⁵ The Talmud offers the following example to elucidate this legal hierarchy. The Biblical ban on wearing wool and linen interwoven in the same garment is expanded in terms of both potency and applicability in rabbinic legislation.¹²⁶ If, however, the rabbinic expansion of this ban conflicts with human dignity, human dignity preempts the ban.¹²⁷ This conflict might occur when someone realizes that he is in fact wearing such prohibited clothing while in public. In such a case, he need not remove his clothing immediately. Instead he may wait until he returns home to remove the banned clothing. Thus, states DP. Elon, this principle prevents the state from conducting humiliating public searches of any person, especially those requiring the person to undress.¹²⁸

DP. Elon greatly expands the scope of this legal discussion. While rabbinic legal analysis limits the pertinence of this law to Jews alone, the Court applies this law to all scenarios where human dignity conflicts with law, especially to required public

¹²² See generally CrimA 2145/92 State of Israel v. Guetta 46(5) PD 704 [1992] (Isr.), translated in MENACHEM ELON ET AL., *supra* note 117, at 449–53 (discussing the permissibility of body searches in public).

¹²³ *Guetta*, 46(5) PD at 724, translated in MENACHEM ELON ET AL., *supra* note 117, at 452.

¹²⁴ *Guetta*, 46(5) PD at 724, translated in MENACHEM ELON ET AL., *supra* note 117, at 451; see also BABYLONIAN TALMUD, TRACTATE BERAKHOT 19b (citing the original discussion of human dignity).

¹²⁵ *Guetta*, 46(5) PD at 724, translated in MENACHEM ELON ET AL., *supra* note 117, at 451. See PALESTINIAN TALMUD, TRACTATE KILAYIM 40b (allowing human dignity concerns to override Biblical law).

¹²⁶ *Guetta*, 46(5) PD at 717–18, translated in MENACHEM ELON ET AL., *supra* note 117, at 451; see BABYLONIAN TALMUD, TRACTATE BERAKHOT 19b (citing the original discussion of human dignity in the context of wearing clothing made of wool and linen).

¹²⁷ See BABYLONIAN TALMUD, *supra* note 124 (overruling the ban on interwoven garments because of human dignity concerns).

¹²⁸ *Id.*

undress. The Court also reads the value of human dignity universally, finding it to apply to all human beings, not just Jews.

The Court's tendency to interpret Jewish law universally extended to the bioethical considerations on euthanasia in *Shefer v. State of Israel*.¹²⁹ In the context of passive euthanasia— withholding life-sustaining treatment—the Court discusses the Jewish law prohibition on withholding life-sustaining action as interpreted from Leviticus 19:16, “[y]ou shall not stand by the blood of your fellow.”¹³⁰ From this and several other Jewish law sources, the Court bans certain acts of euthanasia for all people.¹³¹

By extending this ban, this analysis not only neglects the traditional interpretation of “your fellow” in Jewish law, but it bypasses the traditional approach to saving the life of Gentiles as recorded in the Talmud.¹³² Jewish law states that this verse does not apply to Gentiles.¹³³ Furthermore, a Jew may only save the life of a dying Gentile if to do otherwise would engender hostility from the rest of the Gentile population.¹³⁴ The analysis of the Court expands the understanding of this verse in Jewish law to include all human beings, while ignoring an explicitly contradictory passage from the Talmud.¹³⁵

In *Dwaikat et al. v. State of Israel et al.*, the Court adjudicated a dispute over land privately owned by Arab Gentile residents on which a group of Israelis intended to establish a civilian settlement.¹³⁶ In this context, the Court unequivocally rejects the

¹²⁹ See CA 506/88 *Shefer v. State of Israel* 48(1) PD 87, 132 [1993] (Isr.), translated in http://elyon1.court.gov.il/files_eng/88/060/005/z01/88005060.z01.pdf (discussing the permissibility of euthanasia).

¹³⁰ *Shefer*, 48(1) PD at 108, translated in *id.* at 23. The opinion mistakenly states that the source for the quoted verse is *Leviticus* 19:9. It is in fact *Leviticus* 19:16 as recorded above.

¹³¹ *Shefer*, 48(1) PD at 194, translated in *id.* at 140.

¹³² BABYLONIAN TALMUD, TRACTATE AVODAH ZARAH 26a.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ This does not mean that the court has chosen to ignore this passage from the Talmud. There is room for the court to interpret the passage from Tractate Sanhedrin differently, for instance, as applying only to idolatrous Gentiles. Such an interpretation would maintain the integrity of Jewish law texts and allow the Court to validly explain the Biblical verse, *Leviticus* 19:16, as it did.

¹³⁶ See generally HCJ 390/79 *Dwaikat v. State of Israel* 34(1) PD 1 [1980], translated in ZAMIR & ZYSBLAT, *supra* note 6, at 379 (adjudicating a dispute over Arab-owned land).

notion that Jewish law allows Jews to deprive Gentiles of their property in the State of Israel.¹³⁷ As proof, the Court cites Leviticus 19:34, which demands equal treatment for the other who dwells in the land of Israel.¹³⁸ Unlike those internal to Jewish law who offer apologetic rationales for affording property rights to Gentiles, the Court finds positive affirmation from Jewish law, by overlooking the legal formalities required for resident alien status, to support universal human rights.

The Court discusses Jewish law's attitude towards minorities under a Jewish government in *Neiman*.¹³⁹ The Court, citing Deuteronomy 23:8 ("you shall not abhor an Egyptian, for you were a stranger in his land")¹⁴⁰ asserts that Jewish law rejects racism.¹⁴¹ Despite Jewish enslavement by Egyptians for hundreds of years, Jews may not hate the entire Egyptian nation for its past injustices. Furthermore, any foreigner who chooses to live under Jewish sovereignty must enjoy equal protection of laws, as the Bible states in Numbers 9:14: "[t]here shall be one law for you, whether stranger or citizen of the country."¹⁴² After citing Biblical protections for minorities, the Court discusses the many protections afforded to resident aliens by Jewish law.¹⁴³ The Court lists several of these protections and applies this entire legal analysis to any minority living in Israel today without mentioning the discussion among Jewish law scholars of the modern inability to bestow resident alien status according to Jewish law.

In *Berger v. Haifa District Planning and Building Committee*, the Court elaborates on the Jewish law requirement of equal protection

¹³⁷ *Dwaikat*, 34(1) PD at 11, translated in ZAMIR & ZYSBLAT, *supra* note 6, at 383.

¹³⁸ *Id.* See Leviticus 19:34 (Jewish Publication Society of America) ("The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt: I the Lord am your God.").

¹³⁹ See EA 2/84 *Neiman v. of the Cen. Elections Comm. for the Eleventh Knesset* 39(2) IsrSC 225, 300 [1985], translated in http://elyon1.court.gov.il/files_eng/84/020/000/Z01/84000020.z01.pdf (discussing human rights).

¹⁴⁰ *Deuteronomy* 23:8 (Jewish Publication Society of America).

¹⁴¹ *Neiman*, 39(2) IsrSC at 300, translated in http://elyon1.court.gov.il/files_eng/84/020/000/Z01/84000020.z01.pdf at 85.

¹⁴² *Numbers* 9:14 (Jewish Publication Society of America).

¹⁴³ *Neiman*, 39(2) IsrSC at 301, translated in http://elyon1.court.gov.il/files_eng/84/020/000/Z01/84000020.z01.pdf at 86.

to minorities under Jewish rule.¹⁴⁴ After quoting several verses establishing the requirement of due process and equal protection for minorities,¹⁴⁵ the Court offers a thematic survey of Jewish history. When Jews lived as nearly helpless, dispersed minorities among Gentile majorities, they suffered ceaseless, bitter persecution and perennial massacres simply because their religious faith differed from that of the surrounding majority.¹⁴⁶ Thus, after the Jews established their own sovereignty and consequent majority, it behooves them to ensure the safety and equality of minorities under their authority even more vigilantly than a new State whose people have no experience with persecution as a minority. In addition, the Jewish law precept to treat all people equally because God created all humans in the image of God bolsters such an attitude.¹⁴⁷ Here, the Court explicitly embraces the lesson from Jewish history it has chosen. Like many legalists internal to the Jewish law system, the Court aims to protect the rights of minorities living under Jewish sovereignty precisely because the Court understands the devastation inherent in the persecution of minorities. To ensure that Jewish law and Jewish heritage reflect this lesson, the Court extended Jewish law to areas barred to those scholars internal to the Jewish legal system.

6. CONCLUSION

The modern jurisprudence of many Israeli rabbis and the Supreme Court of Israel demonstrate that Jewish law can be interpreted consistently with modern human rights values. After Israel gained statehood, Jewish thinkers began fashioning a jurisprudence that interpreted Jewish law in ways affording Gentiles more protections and rights while under Jewish authority in Israel. As they functioned within the Jewish law tradition, previous generations had cemented authoritative interpretations

¹⁴⁴ See generally HCJ 392/72 *Berger v. Haifa District Planning and Building Committee* 27(2) IsrSC 764 [1973] (discussing the requirement of equal protection to minorities).

¹⁴⁵ See *id.* at 771; *Exodus* 12:49, *Leviticus* 24:22, *Deuteronomy* 1:16 (stating the demand for equal protection and due process for minorities).

¹⁴⁶ *Berger*, 27(2) IsrSC at 771.

¹⁴⁷ *Id.* See generally Menachem Elon, *The 'Other' in Jewish Law and in the Decisions of the Supreme Court*, 42 MADA'EI HAYAHADUT 31 (2004) (Isr.) (elaborating on the discussion of Gentiles in Jewish law and the differences in approach between Supreme Court justices).

that barred a full integration of the rights of Jews and Gentiles. Nevertheless, they found creative ways to apply certain laws and explain away other laws to ensure that Gentiles received certain protections in Israel. However, while the rabbis have certain limits on interpretation, the Court does not. It reads Jewish law through a universal lens, deviating from traditional bars on interpretation and rigorous adherence to legal formalities. By doing so, it extends the traditional protections afforded to Jews and resident aliens to all people within the authority of the Israeli government. The Court and many Israeli rabbis manifest the belief that because of past Jewish persecution, Jews and Israel should specifically protect and ensure the rights of any minority within its authority.

Some Israeli rabbis espouse more radical ideas reminiscent of the xenophobia engendered throughout the Diaspora.¹⁴⁸ While those rabbis have followers in the Israeli population,¹⁴⁹ so too do the many other rabbis who preach tolerance and respect.¹⁵⁰ Jewish law in the hands of modern Israeli rabbis and jurists has moved and continues to move towards the modern, tolerant, and universal approach to human rights. The issue of whether the Jewish nature of Israel conflicts with the goals of a democratic state can be debated. But human rights values in Jewish law as interpreted by the Israel Supreme Court and many rabbis do not pose any threat to democratic values in Israel.

¹⁴⁸ See generally Yitzchak Blau, *Ploughshares Into Swords: Contemporary Religious Zionists and Moral Constraints*, 34:4 TRADITION 39 (2000) (presenting an overview of belligerent attitudes espoused by several modern Israeli rabbis).

¹⁴⁹ See Ethan Bronner, *Israelis Arrest West Bank Settler in Attacks*, N.Y. TIMES, Nov. 2, 2009, at A9 (providing an example of Israeli followers of radical rabbis).

¹⁵⁰ See Rebecca Huberman, *Bein Dam Le'Dam*, 33 AMUDIM 352 (1985) (Isr.) (arguing for a Biblical ban on murder that applies universally).