Antisemitism: A view from within the Rabbinic Legal Tradition

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I. Introduction

I presented a draft of this article one year ago, when the revival of that most ancient and persistent hatred – antisemitism – was becoming increasingly visible. A mere one year later, antisemitism has exploded on campuses, on the streets, on social media, and in our daily politics and interactions. This book could not be more timely. I only regret that my contribution to this book is all too narrow and specialized. I am neither an expert in the academic field of Antisemitism Studies, nor am I a member of the nascent field of Antisemitism and the Law. I accepted an invitation to participate in this important book because I sensed a gap in the study of antisemitism. That gap is the internal viewpoint of those who were and are the objects of antisemitism. How did Jews, writing from within the Jewish traditional framework, understand the hatred directed at them? Did Jewish traditional thinkers in all periods and times believe there was a pervasive hatred of Jews different in kind from ordinary antagonism between groups or political and social conflict? To what did they attribute anti-Jewish sentiment? And what were their proposed solutions?

To be sure, there is a vast literature within the academic field of Jewish Studies that addresses Roman-Jewish relations in late antiquity and Christian-Jewish and Islamic-Jewish relations in the medieval period and modern periods. The large majority of these studies are concerned with the question: What was the Jewish attitude to non-Jews? While some studies do address the internal viewpoint – that is, how did Jews understand and react to hatred of Jews – these studies, emanating from within the relatively closed field of Jewish Studies, do not, by and large, make their way into the contemporary study of antisemitism. To offer but one example: The recent textbook »Key Concepts

in the Study of Antisemitism« offers twenty-one learned and truly excellent chapters devoted to such subjects as AntiSemitism, AntiJudaism, Anti-Zionism, Racism, and more.[1] Each chapter surveys progress in the field and the methodological and conceptual questions yet to be resolved. But only one of these chapters addresses the internal viewpoint; that is, how the Jewish tradition itself understood hatred of Jews.[2] The overall aim of this essay is to bring together two disciplines that have until now been kept apart: Antisemitism Studies and Jewish Studies.

In keeping with the theme of this volume – Antisemitism and Law – I focus in this essay on the perceptions and reactions of the rabbinic elites who could be said to have formulated a »theory« of and an institutionalized response to antisemitism. The rabbinic elites are jurists who commented on social and political events through the medium of law and legal commentary. Until the post-Enlightenment era, much of the evidence of how Jews perceived and reacted to the hatred of Jews is contained in rabbinic legal literature: the Mishnah, Talmud and cognate sources that span the first through seventh century and the post-talmudic commentaries and responsa literature (case law) that continue to this day. To be sure, some of the most intriguing pieces of evidence of the internal viewpoint are in the narrative sections of the Talmud and, in the modern period, in sermons composed during the Shoah. But even these ostensibly non-legal sources are written largely by jurists or students of Jewish law and employ legal idioms that assume a background in Jewish law.

In the first part of this essay, I clear the ground for what follows by re-introducing a historical sense to the term »antisemitism«. As we see quite starkly in the current moment, humans are given to paradigmatic thinking. We associate current forms of antisemitism with past forms of antisemitism, most especially with the Shoah, eliding crucial differences. Yet, if are we to progress in combating antisemitism, we need to identify the historical conditions and political configurations that have given rise to various types of anti-Jewish sentiment in different times and places. Modern antisemitism is different in kind from the anti-Judaism of the medieval period and both differ from the forms of hatred of Jews apparent in antiquity. I shall review the different forms that antipathy to Jews and Judaism took in the three main eras of Jewish history –

1 Sol Goldberg/Scott Ury/Kalman Weiser (eds.), Key Concepts in the Study of Antisemitism (2021).

2 See *Martin Lokshin*, Sinat Yisrael (Hatred of Jews), in: Sol Goldberg/Scott Ury/Kalman Weiser (eds.), Key Concepts in the Study of Antisemitism (2021), pp. 273–286.

antiquity, the medieval period and the modern era – drawing both on external accounts by historians and internal accounts by rabbinic thinkers.

The second part of this essay turns to styles of legal reasoning and raises a necessary caution about treating legal sources as mirrors of social or political reality. I show how the rabbis often disguise legal reform of Jewish Law (the *halakhah*) through the twin devices of appealing to the dangers of antisemitism or to the perceived lack of rabbinic power to fully enforce Jewish legal norms in a hostile world. The tropes of antisemitism or powerlessness can mislead readers into thinking that hatred of Jews or Jewish powerlessness is the genuine subject of concern. Yet, a closer look at the texts suggests that the appeal to the phenomenon of antisemitism and to the reality of powerlessness is a rhetorical device that enables daring yet disguised internal legal reform.

II. Antisemitism. Anti-Judaism, and Group Enmity

1. Paradigmatic Approaches to History

A much-debated topic in the field of Antisemitism Studies is the difference between antisemitism, anti-Judaism, and garden variety conflict, including war and rebellion. The term antisemitism, *David Engel* argues, first came into common usage in 1880 in Germany »apparently as a designation for certain collective actions aimed at combating the incursion of Jewish culture in Germany« by advocating for legislation that would restrict access of Jews to the public sphere.[3] The term thus originally referred to actions but shortly thereafter came to denote a set of emotions. As a result, the term antisemitism became synonymous with an emotion that was thought to cross time and space and was built into the human psyche, in contradistinction to a historical phenomenon that originally reflected cultural and social conditions in Imperial Germany. In this way, as *Engel* puts it, »economic rivalries, social segregation, religious disputations, and violence all became treated as aspects of a single phenomenon.«[4] To illustrate this process, *Engel* notes the dramatic shift in encyclopedic accounts of antisemitism. The first time antisemitism was referenced in the »Encyclopedia Brittanica«, antisemitism was defined as follows:

3 *David Engel*, The Concept of Antisemitism in the Historical Scholarship of Amos Funkenstein, in: Journal of Social Studies (1999), pp. 111–129 (113).

4 Ibid.

»Antisemitism is not a revival of the primitive Jew-hatred of the Middle Ages but rather a matter of European politics, stemming from the Emancipation of the Jews in the 19th century.«[5] By contrast, the later editions of »Encyclopedia Britannica« define the term as »hostility to Jews« and state that it is found wherever Jews existed in the diaspora.

This process of turning modern social and cultural conditions into a permanent feature of the human psyche was only exacerbated by the fact of the Holocaust. The Holocaust was seen as but one example of a timeless phenomenon and earlier instances of anti-Jewish sentiment or behavior tended to be described – even by careful historians of Judaism – through imagery drawn from the Shoah. The Shoah provided the conceptual infrastructure for understanding the situation of Jews in the late antique world under Rome and Persia, the medieval Inquisition and expulsions, and, indeed, all Jewish-Christian relations in medieval Christendom.

In a very partial corrective to this a-historical approach, Jewish historians have now adopted the term Anti-Judaism to describe hatred of Jews before the modern period. But the root cause of modern antisemitism is still largely ascribed to a timeless phenomenon of hatred of Jews. Thus, *David Nirenberg* in his monumental book, »Anti-Judaism«, shows that pathological fantasies of Judaism were central to the history of ideas that became deeply engrained in the Western tradition and these pathological fantasies appeared throughout the course of history, in ancient civilizations, in medieval kingdoms, and in modern industrialized states.[6] All developed discourses about the threat Jews and Judaism posed for society. The fantasies were just that – fantasies – since many of the ideas were propounded by people who never met a Jew. While *Nirenberg* stops short of attributing causation of the Shoah to this long history, the implication is still very much there.

We can see precisely the same process of projecting backward a pervasive and uninterrupted hatred of Jews in the Jewish religious imagination as well. Today, if one mentions the rise of antisemitism in a gathering of traditionalist-minded Jews, one is apt to encounter the following statement: »It is a well-know *halakhah* (a Jewish religious law but here carrying the sense of a law of nature) that Esau hates Israel.« The statement appears prominently in a responsum by the great 20th century rabbinic decisor, *R. Moshe Feinstein*.[7] The

5 Quoted in *Engel* (fn. 3), at p.115.

6 See *David Nirenberg*, AntiJudaism: The Western Tradition (2013).

7 *Moshe Feinstein*, Responsa Iggrot Moshe, Vol. 2 (1980).

reference is to the biblical story of the two brothers, Esau the elder and Jacob the younger. Jacob tricked Esau into giving up to Jacob his birthright – including the biblical promises to be the ancestor of the nation of Israel – setting off a cycle of enmity. Years later, the two brothers agree to meet. Jacob feared a battle and prepared for it. But, the biblical text recounts, when Esau saw Jacob, he unexpectedly fell on him and kissed him.[8] The word »kissed him« is lexically marked in the Hebrew Bible, inviting interpretations. One such interpretation in the early Talmudic literature is that the diacritical marks are intended to suggest the very opposite of kissing: Rabbi *Shimon bar Yochai* is quoted as saying: »It is a well-known halakhah that Esau hates Jacob.«[9]

Yet, this interpretation appears only once in classical rabbinic sources and is accompanied by other interpretations of the biblical verse that go in the opposite direction. Moreover, in its original setting in the classical rabbinic literature, the interpretation citing Esau's hatred for Jacob is merely a comment on the behavior and emotions of the brothers, who are seen as real characters who interacted in a specific time. As *Martin Lokshin* has shown, it is only in the early medieval period that this Talmudic comment enters the popular imagination through the vehicle of the famous 11th century biblical commentator, *Rashi*, and is transformed into a comment on the eternal hatred of Jews by non-Jews.[10]

The process of reading history backward so that the new is seen as hidden in the old reflects a teleological approach to history. While most academic historians reject such an approach, this style of thought is especially pervasive in the Jewish religious imagination. In rabbinic culture, history is explained paradigmatically. History is a matter of repeating patterns and the events of the past are signs of what is to come. The destruction of the Temple on the Ninth of the month of Av in the Jewish calendar both prefigures and sets the religio-legal category for the proper commemoration of all tragedies that befall the Jewish people. I will return to this point in the next section because it is extremely noteworthy that even the most traditionally-minded rabbinic jurist refrain from assimilating the Holocaust into this paradigmatic model. In short, the paradigmatic imagination – the tendency to read history backwards – has obscured the varying ways Jews – including rabbinic elites – actually understood Jewish hatred and its root causes in different periods of history.

8 Genesis 33:4.

9 Sifre Numbers 69.

10 See *Lokshin* (fn. 2).

2. Retrieving an Historical Sense

We can roughly divide Jewish history into three periods antiquity, medieval Christendom, and modern Europe. Ancient, medieval, and modern forms of Anti-Jewish sentiment differ profoundly from one another. In late antiquity, Jews lived under Greco-Roman and later Persian rule. The Judean revolt against Roman rule was a major factor in anti-Jewish sentiment in the Greco-Roman period. Yet, by the third century, Jews were deemed citizens of the Roman Empire. In Persia, Jews generally enjoyed the benefits of the Persian policy of embracing minority groups. Most historians agree that even Rome was not particularly brutal to Jews, certainly no more so than to others. Cruel acts abounded but they were part of Roman standard legal practice and not aimed particularly against Jews.[11] By most accounts the main accusation against Jews in this period is that they were unsociable. As a result of self-segregation, dietary and purity laws, Jews did not fit easily into the Roman conception of proper civic behavior and most especially the ideal of universal brotherhood that Rome espoused.[12]

The philosopher *David Hume* once observed that polytheists, in contrast to monotheists, are inherently more tolerant and accepting of diversity and shaped their political spaces accordingly. The Jewish experience under medieval Christendom lends credence to *Hume's* observation. Nevertheless, *Amos Funkenstein*, perhaps the greatest intellectual historian to date of Jewish-Christian relations, never used the term antisemitism to describe the hatred of Jews in the medieval period.[13] Instead, he stressed the words polemic or disputation. For, in the medieval period, the overriding thematic was a battle of ideas that intensified over time, emerging more full-blown in the 12th century, with greater Christian familiarity with rabbinic literature. As numerous scholars have shown, anti-Jewish polemics and worse were often a means of doing battle with opposing Christian sects in which the Jews became a convenient

11 See generally *Saul Lieberman*, On the Persecution of the Jewish Religion (Hebrew), in: Saul Lieberman/Arthur Hyman (eds.), Salo Wittmayer Baron Jubilee Volume, Vol. 3 (1974).

12 See generally *Paula Fredericks*, Divinity, Ethnicity, Identity: Religion as a Political Category in Christian Antiquity, in: Armin Lange/Kerstin Mayerhofer/Dina Porat/Lawrence H. Shiffman (eds.), Comprehending Antisemitism through the Ages: A Historical Perspective, Vol. 3 (2021), pp. 103–120; *Peter Schäfer*, Judeophobia: Attitudes Toward the Jews in the Ancient World (1977).

13 See *Engel* (fn. 3).

pawn. Nonetheless, whereas the early Middle Ages adhered to the principle of relative tolerance, by the 12th century Judaism was depicted as a demonic religion. Much of the debate is theological and philosophical. The Church aspired to and insisted on a universal religion and a universal community embedded in the figure of Christ as the One. It is in this period that the scandal of Jewish particularism becomes acute. This theological objection is, to be sure, also a philosophical one that has emerged again most acutely in the last decades among philosophers such as *Alain Badiou* and *Slavoj Žižek*, who have taken up the figure of St Paul as a cosmopolitan political thinker for contemporary times. Nevertheless, *Funkenstein* emphatically declared: »Whatever its' driving forces, antisemitism seems to be worlds apart from Christian Anti-Jewish attitudes.«[14]

What then is the concept of antisemitism? In *Funkenstein's* view, it is uniquely and thoroughly modern and political. The modern target is not the Jewish religion and Jewish law, but rather the Jew in disguise: the emancipated, assimilated Jew who cleverly adapts to the host society and is about to disrupt the healthy texture of the new nation to which he pretends to belong.[15] It is aimed equally at the religious and the secular Jew. It presupposes Jewish Emancipation and is directed against it. Antisemitism implies that being Jewish is an immutable characteristic, unchangeable by baptism, repentance, or other external signs of changed identity. Hence, Antisemitism is profoundly connected to race theory. True, the different forms of anti-Jewish sentiment reinforce one another and have a cumulative effect but it is critical to mark the distinction. The hatred of Jews of the late antique world hardly rises even to anti-Judaism, let alone antisemitism, and the anti-Judaism of medieval Christendom is very different from modern antisemitism, epitomized by the Shoah.

3. A Closer Look at The Rabbinic Viewpoint

The sources I cite in this section are drawn from the rabbinic religio-legal tradition, extending from the Talmudic tradition to the contemporary era. Thus, they depict the worldview of religious adherents, and not secular Jews

14 *Amos Funkenstein*, Theological Interpretations of the Holocaust: A Balance, in: Francois Furet (ed.), Unanswered Questions: Nazi Germany and the Genocide of the Jews (1985), quoted in *Engel* (fn. 3), at p. 118.

15 Ibid.

nor modern Jewish philosophers. These rabbinic sources largely confirm the accounts of Jewish historians summarized above. Rabbinic writings from the late antique period (the Mishnah, Talmud, and Midrashic collections consisting of scriptural interpretation) mark the fact of anti-Jewish sentiment but do not view it as a metaphysical or permanent condition. It is only in the medieval period, with the rise of Christianity, that anti-Jewish sentiment is perceived as an ontological feature of the universe. Rabbinic writings responding to the Shoah, moreover, mark that event as utterly different in kind from prior forms of Anti-Jewish sentiment, an event that is bound up with a new, faithless age.

I begin with the Hebrew Bible. The Bible describes many wars between Israel and its neighbors. These wars largely stem from conflicts of interest. It is only relatively late in the biblical canon, in the Book of Esther, that we encounter something new and different. Here is the accusation made by the Persian King's advisor *Haman*, the villain in this book: »There is a certain people, scattered and dispersed among the other peoples in all the provinces of your realm, whose laws are different from those of any other people, and who do not obey the King's laws, and it is not in your Majesty's interest to tolerate them…«[16] In other words, the Jews' allegiance to their own laws caused them to be disloyal to the laws of the state. A few centuries later, the Jewish historian *Josephus*, writing for a Roman audience, summarizes *Haman's* accusation as follows: »There is a certain wicked nation scattered throughout the habitable land which was unfriendly and unsocial and neither had the same religion nor practiced the same laws as others.«[17]

Josephus adds to the biblical book's account of the Jews' failings, »amixia« – unsociability – the chief criticism of Jews that emerged in Roman literature.

Early rabbinic writings produced when Jews lived under Greco-Roman and later Babylonian rule, offer precisely the same account of how and why non-Jews resent or even hate Jews. According to the rabbis, adherence to a distinct and separate set of laws is the crux of the problem. The fear is both that Jews will not obey the king's laws and that Jewish law, given dietary and other restrictions will be an obstacle to good neighborly relations – that is, sociality. Thus in a Talmudic commentary on the Book of Esther, the Talmud puts the following in the mouth of *Haman*: »They won't eat from our food or marry our

16 Esther 3: 8–9.

17 *Flavius Josephus*, Antiquities of the Jews. Translated by Ralph Marcus (1958). See also *Lokshin* (fn. 2), p. 276.

women or allow their women to marry our men. They shirk their responsibilities by saying: It is the Sabbath. . .«[18]

That allegiance to a »foreign« law and lack of civic sociability were perceived by the rabbis as the source of Jewish hatred is clear from three different sets of Talmudic sources, one narrative and the others legal. The Talmud recounts a famous (although likely fictional) story of Roman jurisconsults sent by the Emperor to the legal study halls of the rabbis to study and inspect Jewish law. In the end of her story, the Romans say: »All your laws are good and fair except for two.«[19] The laws referred to were Jewish laws permitting certain forms of discrimination against Gentiles. Indeed, in various places the Talmud displays anxiety about how Jewish law could be perceived by outsiders and even permits reporting inaccurate accounts of the content of Jewish law lest outsiders not understand its internal logic. In short, as *Lokshin* baldly puts it, the Talmudic rabbis »saw the Romans' point of view.«[20]

The Talmudic rabbis attempted to mitigate accusations of lack of sociality and disloyalty in numerous ways. Thus, the rabbis enacted legislation aimed at enhancing sociality with non-Jews and fostering good neighborly relations. Despite Jewish laws of separation, the Mishnah states that one should visit the Gentile sick and bury the Gentile dead.[21] The rabbis openly declared that this legislation was »for the sake of peace«; that is, a preventative measure to fend off enmity. The Babylonian Talmud, composed largely under Persian rule, also proclaimed the well-known principle »the law of the kingdom is the law« as a means to diffuse charges of disloyalty to state law.[22] Obedience to the legitimate laws of the state thus became a cardinal principle of Jewish law. At the same time, the Talmudic tradition drew clear boundaries between legitimate laws of the kingdom (those laws addressed primarily to assuring good social order) and illegitimate laws that violated core Jewish religious precepts. For the rabbis, obedience to the halakhah is the whole point of Judaism. While the rabbis were willing to mitigate enmity, where possible, they never abandoned core precepts of Jewish law, including laws requiring separation from non-Jews such as dietary laws and the like. Instead, the rabbis developed new theological strategies to strengthen the community's adherence to halakhah. The heroes of

18 Babylonian Talmud, Megilla 13b.

19 Babylonian Talmud, Bava Kamma 38a.

20 See Lokshin (fn. 2), at p. 279.

21 Babylonian Talmud, Gittin 61a.

22 Babylonian Talmud, Bava Kamma 113a.

the famous martyr stories of the Talmud, for example, are those who withstood the temptation to abandon Jewish law even on pain of death.

Another theological development during this time was the re-description of persecution as divine punishment for the failure to obey Jewish law. The Bible already lay the groundwork for this basic idea. God rewards obedience to the law and punishes violations of the law at a collective level, as the Book of Deuteronomy makes clear. Collective calamities – both natural and human, from famine to persecution, are understood as emanating from God and occasion the search for sin in the community. They are a spur to intensified observance of the law and repentance. Thus the Talmud explains *Haman's* audacity and lack of fear of the Jewish God by putting the following words in *Haman's* mouth: »God will not intervene because the Jews have become lax in their observance of the law.«[23]

What is new in this post-biblical period is the intensified understanding of the actions of non-Jews as representatives, as it were, of God.[24] The Talmudic period is post-prophecy. The Gates of Heaven have closed and by and large law and life is conducted on the assumption that God no longer speaks or reveals Himself. It is the period where God acting in history is thus far less visible than in the Bible. Instead, the actions of others – of non Jewish rulers and even mobs – came to be seen as signs of God's continued presence on the stage of Jewish history. Non-Jewish persecution of Jews thus becomes equated with divine punishment for failure to maintain faithfulness with God's gift to Israel: the Torah.

These themes were intensified in the medieval period, with the rise of Christianity. The rabbis continue to view Jewish adherence to Jewish law as the core cause of enmity between Jews and Christians and there is certainly ample external evidence to support the rabbinic viewpoint. Consider the burning of the Talmud, the repository and symbol of Jewish law, as well as the well known accusations concerning the spirit versus the letter of the law, and the less well-known debates accusing Jews of lawlessness because they did not have well-developed civil and criminal enforcement laws. Yet, it is only in the medieval period under Christendom, and not earlier, that non-Jewish hatred of Jews is perceived to be a law of nature that can never be overcome, rather than a social

23 Babylonian Talmud, Megilla 16a.

24 On the emergence of the idea that Gentiles were the rod and staff God used to punish Israel, see *Adi Ophfir/Ishai Rosen-Zvi*, Goy: Toward a Geneaology, in: Dine Israel (2011), pp. 69–122.

fact rooted in time and place. In this period, the midrashic interpretation of the biblical verse about Esau and Jacob, cited above, becomes transformed into an ontological condition. Esau is no longer a historical figure, an actual person, but rather a hypostasis: a figure for all non-Jews and Jacob is a figure for Israel (the appellation Jews use to refer to themselves). The Talmudic comment that Esau hated Jacob now is understood as a statement about the persistent and perennial hatred of Jews built into the fabric of the universe, an understanding that seeps into Jewish consciousness. It is also in the medieval period that the »Hi Shel Amdah« prayer, which attests to a pervasive hatred of Jews in every generation, is added to the Passover Seder liturgy.

And what of the modern period, most especially after the Holocaust? Was there an intensification of the older paradigms? Or, rather, did a new understanding and new responses from within the Jewish tradition emerge? Did the tradition perceive the source of Jewish hatred in different ways – as racism, for example, rather than the source traditionally evoked: faithfulness to Jewish law? There is virtually no discussion of racism in modern rabbinic sources. (The rabbinic tradition, by and large, does not subscribe to ethnic markers of national identity, viewing such modern notions as antithetical to the core definition of Israel: a community created by law and defined by its observance.) Nor do rabbinic sources identify hatred of Jews as emanating from specifically Christian ideas. Instead, as one traditional rabbinical figure put it: the problem lay in man, in the substitution of the idea of progress for the idea of God.[25] Esau, the perennial enemy of Israel, is now secularism, whether in its totalitarian or liberal perfectionist guise, opening a rift among traditional and secular Jews, as well.

This is not the place for a full-scale review of post-Holocaust Jewish theology.[26] Yet, I want to highlight the reception of the Holocaust among the most traditional segments of Judaism. In the earlier years of the Nazi period, the persecution was simply assimilated into the older paradigms. Rabbis exhorted the congregation to examine their sins and the calamities were absorbed in paradigmatic fashion to past calamities, as if time was folded over. But with the increasing revelation and experience of the horrors of the extermination

25 *Rabbi Shlomo Zalman Ehrenreich* quoted in *Barbara Krawcowicz*, Paradigmatic Thinking and Holocaust Theology, in: Journal of Jewish Thought and Philosophy (2014), pp. 164–189.

26 See generally *Krawcowicz* (fn. 25).

camps, something different emerged: silence – a very deliberate and theologically inflected silence. Much scholarly attention has been directed to a fascinating question: Why did the greatest rabbis of the traditionalist camp uniformly forbid the inclusion of the Holocaust into the prayers recited on the ninth day of the month of Av, a fast day that is designated for mourning Jewish calamities? The ninth of Av is a day of mourning not only for the destruction of the First and Second Temples, which tradition claims occurred on that day, but also for the series of massacres and pogroms that punctuated Jewish history. Yet, contemporary rabbis ruled that the Shoah, should not be included. This refusal to incorporate the Shoah into the prayers assigned to the Ninth of Av, engendered enormous communal protest. Yet, the rabbis insisted that silence alone was the appropriate response to this catastrophe. In a sensitive study, *Arye Edrei* points out that, in place of mourning rituals as a means of preserving memory, the rabbinic community focused exclusively on the reconstruction of a lost generation and a lost way of life.[27] Modern antisemitism is a break – a new phenomenon – not only in the eyes of historians such as *Funkenstein* but also in the self-understanding of Jews immersed in the Talmudic tradition. The only way to repair that break, in the traditionalist imagination, is to reconstruct the lost link in the chain of tradition.

III. Jewish Law and the Rhetoric of Powerlessness

So far I have concentrated on rabbinic self-understanding of the nature and causes of gentile hatred of Jews and the Jewish theological discourses that violence against Jews engendered. I now raise a methodological caution. One must consider whether concessions of powerlessness in a hostile world and citations to the need to mitigate hatred of Jews were a means to accomplish internal legal reform in light of new understandings of justice, which could not be done directly, given certain methodological strictures of Jewish law. In other words, to what extent was the rabbinic discourse about Gentile hatred of Jews functional for the Jewish legal system?

Earlier, I noted internal developments within the Talmudic tradition aimed at mitigating hatred of Jews: beginning with the internal acknowledgement

27 See *Arye Edrei*, Holocaust Memorial: A Paradigm of Competing Memories in the Religious and Secular Societies in Israel, in: Doron Mendels (ed.), On Memory: An Interdisciplinary Approach (2007), pp. 37–134.

that Jewish civil laws discriminating against non-Jews could be perceived as inequitable. The Talmudic tradition, in fact, addressed this injustice. Given standard Jewish legal methodology, the discriminatory rules could not be directly overturned. The rabbis resorted, instead, to reinterpreting the import of the rules in light of overarching principles they deemed embedded in the Jewish legal system. Here, the rabbis invoke the principle of avoiding desecration of God (*Ḥillul ha-Shem*). This principle is a well-known vehicle for introducing ethical norms into the halakhah. The principle comes into play on occasions where there is a public, in the sense of a sphere of communicative action. Though this sphere may be exclusively Jewish, more commonly the principle is invoked in the context of mixed space in which the honor of God must be upheld before the watchful eyes of Gentiles. Looked at from this perspective, the story about the Roman jurisconsults' objections to several Jewish laws, cited above, serves as a justification for correcting the law internally.

Two examples of my larger claim, one Talmudic and the other modern, further illustrate the point. Earlier I cited the Talmudic principle »the law of the kingdom is the law«. The adoption of this principle could be seen as a response to accusations of Jewish disloyalty to state law. And, indeed, modern Jewish historians often fasten on the principle »the law of the kingdom is the law« as emblematic of the precarious position of Jews. Living within a host society, the rabbis had no choice but to give up some of the distinctiveness of Jewish law and bend to the power of Roman and Persian government. The principle also was prominently invoked in the responses of the Paris Sanhedrin, the Notables assembled by Napolean to determine whether Jews were ellgible for citizenship in the modern state. The questions posed revolved around issues of brotherhood between citizens and loyalty to the laws of the state. In this context, as the noted historian *Jacob Katz* writes, an obscure and limited principle was given new life.

But this assessment of the reasons for the adoption of the principle ignore how this principle actually functions within the Jewish legal system.[28] The

28 For a fuller analysis of the principle's function within *halakhah*, see *Suzanne Last Stone*, Religion and the State: Models of Separation from Within Jewish Law, in: ICON (2008), pp. 631–661; *Suzanne Last Stone*, Law Without Nation or Law Without State: The Case of Halakha, in: Austin Sarat/Laurence Douglas/Martha Humphrey (eds.), Law Without Nations – The Amherst Series in Law, Jurisprudence, and Social Thought (2010), pp. 101–137; *Suzanne Last Stone*, The Jewish Law of War: The Turn to International Law and Ethics, in: Sohail Hashimi (ed.), Just Wars, Holy Wars, and Jihad (2012), pp. 342–363.

principle should be viewed as a law of incorporation by reference. For after all, the principle that the »law of the kingdom is the law« is most often invoked in purely internal litigation between Jews. The principle is increasingly used to allow incorporation of foreign legal ideas and norms that appear more equitable than existing Jewish legal norms. And, in its original setting, the principle is invoked as a means of legitimating »acts of state« for the sole purpose of determining the rights and obligations of Jews vis à vis one another. The Talmud gives the following example: The Emperor has expropriated Reuven's palm trees to build a bridge for public use. Shimon crosses the bridge. Must Shimon pay for the use of Reuven's property? A principle mandating recognition of legitimate acts of government is required to evaluate acts of foreign governmental entities for the purpose of further legal reasoning about the rights and duties of Jews under Jewish law, thus enabling the halakhah to be fully functional even in conditions of exile. Every legal system confronts these challenges and has corollary principles. In short, the principle is an exercise of sovereignty far more than a concession of powerlessness or an emblem of loss of sovereignty.

My second example illustrates how the fact – and fantasy – of antisemitism and with it, a sense of powerlessness, has proved particularly useful for certain Jewish legal decisors in the twentieth century who are engaged in the project of reconciling halakhah with democracy, especially in the context of the modern State of Israel. Rabbinic law, as *Alex Kaye* put it, generally portrays itself as in a state of »institutional weakness« as a result of the exilic condition. What *Kaye* calls »the narrative or myth of exilic disempowerment« plays a genuine role in halakhic reasoning, most acutely in the context of the modern State of Israel, in which Jews have sovereignty and majority power.[29] Yet, if were one to read the legal writings of classical religious Zionist rabbis – rabbis fully committed to the idea of Jewish sovereignty – one would be surprised to learn that these writings were authored in circumstances of Jewish sovereignty. Instead, older discriminatory Jewish laws that theoretically apply when Jews have sovereignty are deemed inapplicable in modern conditions, despite external sovereignty, because Jews are powerless or because they are inapplicable in an age of antisemitism.

Jews really were powerless at many times in history, no more so than in the modern era of the Holocaust. But they also imagined themselves and even conducted themselves as sovereign in many respects: not only with respect to law

29 *Alexander Kaye*, Normative Uses of the Narrative of Exile in Modern Halakhic Thought, in: The Jewish Quarterly Review (2022), pp. 613–619.

but also in communal organization. And they used the very believable rhetoric of powerlessness to effectuate and enhance legal development. One of the great issues within traditional Jewish legal circles today is how to develop an alternative religious-legal rhetoric that can enhance humane development of the halakhah in actual conditions of power that is acknowledged as such. There are a few noteworthy examples of such legal discourse within the halakhic corpus, but they are still all too rare.[30]

IV. Conclusion

From the perspective of the rabbinic tradition, hatred of Jews is intimately tied to Jewish adherence to a distinct set of laws. The causes of this antipathy change over time. In late antiquity, Jewish adherence to halakhah is viewed both as a challenge to the sociality expected of citizens and as a threat to the universality of state law, which included state cultic rituals. In the medieval period, continued adherence to Jewish law became a symbol of rejection of the universality of Christianity. Modern antisemitism, from the external point of view, is racial and rooted in hatred of Jewish foreignness, which is all the more dangerous since it is disguised from ordinary view. Yet, from the internal perspective, modern antisemitism is the product of secularism and the abandonment of the worldview of the halakhah. Man comes to believe he is a God rather than created in the image of God.

This internal perception that secularism – the liberal separation of religion and politics – is a problem should be taken seriously. I do not mean to argue for a return to religion or to the early modern idea of a Christian liberal state. But I do wish to underscore that secularism is only a very partial political solution. The idea of separation of religion and state is an idea with a history and that history is largely Christian. Hence, separation of religion and state is congenial with Christianity and for less so with Judaism (and Islam). The privatization of Jewish (and Moslem) religious law and their transformation into a category called »religion« and not law, remains a continuing problem. It is all the more

30 For an analysis of one important attempt to re-frame *halakhic* obligations of social solidarity in light of Jewish majority power in the State of Israel, see *Suzanne Last Stone*, Sovereignty and Ethics in the Thought of Rabbi Chaim David HaLevi, in: David Myers/Shaul Seidler-Fellman (eds.), Swimming Against the Current: Re-Imagining Jewish Tradition in the Twenty-First Century (2020), pp. 269–283.

noteworthy that the contemporary face of antisemitism – anti-Zionism – now seeks to eliminate the one political formation across the entire globe in which Jews could experience a collective identity and be assured that they could, if they so desire, continue to practice the basic marker of Judaism from the traditional viewpoint: observance of Jewish law.