

## Racism, Incitement, and the Suppression of Religious Speech

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### I.

On Monday, June 27, 2011, Rabbi Dov Lior was driving from Hebron to Migron, an illegal settlement north of Jerusalem, when he was pulled over and arrested by Israeli police.<sup>1</sup> Lior, one of the most prominent rabbis in the nationalist-religious movement in Israel, was born in 1933 in Breslau, Silesia; survived the Holocaust; and made his way to Israel in 1948. As a student at Merkaz ha-Rav Kook, the leading nationalist-religious institution of higher learning in Israel, Lior distinguished himself and became a protégé of Rabbi Tzvi Yehuda Kook, son of the eponymous founder of the institution, Rabbi Abraham Isaac Kook. Today he is the rabbinical head (rosh yeshiva) of the talmudic academy (yeshiva) in Kiryat Arba, a settlement located since 1968 on the outskirts of Hebron on the West Bank.

The immediate reason for Lior's arrest was his open refusal over the course of several months to appear for questioning by Israeli police in connection with a one page endorsement -- a rabbinical blurb, if you will -- for a book entitled *Torat ha-Melekh: Dine Nefashot Beyn Yisra'el le-'Ammim* -- in English, roughly, *The Law of the King: Legal Principles of Life and Death Between Israel and the Nations*.<sup>2</sup> The book, co-authored by two young nationalist-religious rabbis and published in 2009 by a yeshiva, Od Yosef Hai (Joseph Still Lives) originally located

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<sup>1</sup> <http://www.ynetnews.com/articles/0,7340,L-4087844,00.html>;  
<http://www.israelnationalnews.com/News/News.aspx/145224>

<sup>2</sup> 5770 (=2009-10); published by "the Torah Institution beside Yeshiva Od Yosef Hai." The term *dine nefashot*, which literally means "the laws of souls," ordinarily refers to the law of capital punishment.

in a settlement outside of Nablus, is itself the subject of an ongoing criminal investigation. Both of its authors, Rabbis Yitzhak Shapira and Yosef Elitzur, were arrested in 2010 and charged with incitement to racism and to violence under Israeli law. I shall return to the complex content of this work shortly.

Lior's endorsement, however, can be summarized simply. He recommended the work to readers as a useful guide to the "abnormal situation in which we are enmeshed." He did not mention any specific doctrines or teachings of the work; indeed, he did not expressly claim to have read it.<sup>3</sup>

Lior was one of four rabbis to provide brief endorsements. One of the four subsequently retracted his endorsement, explaining that he had not read the work, but had relied on the presumption that rabbis produce competent work. Lior, for his part, not only declined to retract his endorsement, but publicly stated that, as a rabbi, he should not be called in for questioning regarding his opinion on matters of Jewish law (halakha). During the period of his refusal, legislation was introduced in the Israeli Knesset proposing immunity for rabbis regarding opinions expressed on religious matters; that legislation has not, as of this writing, been adopted.<sup>4</sup>

After questioning, Lior was released. The episode was national news in Israel. Asked about the arrest, Prime Minister Benjamin Netanyahu replied with a terse statement to the effect that the law applies to all citizens of Israel.<sup>5</sup> The formulation was no doubt intended to avoid

antagonizing the nationalist-religious camp more than was absolutely necessary, while

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<sup>3</sup>"I saw it and my heart was glad to see such a wonderful creation: full and brimming with the bringing of sources and the explanation of topics beginning with the Talud through our first [i.e. medieval] rabbis until the greatest of the rabbinic decisors in the later generations ... This is a subject which is especially actual, in particular during the time of the return of the people of Israel to its land. It is important to know the standpoint of true Jewish law in relation to the entire abnormal situation in which we are enmeshed. This [book] gives the correct direction and the true perspective on events and the struggle to come to terms with them." Translations my own.

<sup>4</sup> <http://www.haaretz.com/news/national/kiryat-arba-chief-rabbi-arrested-following-his-support-of-book-which-justifies-killing-of-non-jews-1.369879>

<sup>5</sup> <http://www.haaretz.com/news/national/netanyahu-responds-to-rabbi-dov-lior-s-arrest-israeli-law-applies-to-all-citizens-1.370087>

simultaneously avoiding mention of the several months' delay between Lior's statement and his arrest.

## II.

How should the liberal state address the question of incitement and racism in distinctively religious speech? In one sense, the problem is simply a subtype of the more general questions of how and whether the liberal state should prohibit forms of speech that devalue the equality of some persons or that may lead to violence. After all, speech of a religious character is still a type of speech. It is not immediately obvious that such speech should deserve greater protection than other kinds, nor is it obvious that religious speech presents greater risks of teaching racism or inciting violence than other speech.

Nevertheless, this paper shall claim that religious speech often has certain distinctive features that call for a more nuanced and particular discussion in the context of the question of suppression by the liberal state. In particular, I want to address religious beliefs and ideas that, depending on context, may be interpreted as discriminatory or as inciting violence, and which are also present within the discursive frames of the religious faith itself. Such ideas, I shall suggest, are far from uncommon in the best-known Western religious traditions.

These religious traditions -- Judaism, Christianity, and Islam -- reproduce themselves through complex, embedded webs of discourse. Disentangling those religious doctrines that lend themselves to racism or incitement requires a kind of delicate surgery on the body of religious tradition itself. Such an operation, I shall argue, bears an uncomfortable similarity to the Western tradition of religious censorship, in which a state or a religious body affiliated with the state

traditionally reviewed, edited, suppressed, and rewrote the content of religious teaching to correspond to some favored result.

The result of such a process, I want to argue, would look very different from the model in which the liberal state permits all discourse save certain prohibited ideas (such as racism) or discourse likely to produce certain prohibited results (such as violence against other citizens or the state). No doubt the enforcement of such speech limitations ordinarily requires subtle line drawing and prudential judgment. But it does not, I shall argue, ordinarily require the systematic reshaping of entire bodies of belief and thought. Or if it does, then the ordinary practice may be just as problematic as the practice of regulating religious discourse to exclude speech that is racist or that incites violence.

A quick note on my choice of examples before I proceed to my argument.<sup>6</sup> Rather than relying upon familiar examples of speech by Islamist terrorists, I have instead focused in this essay on speech by radical Israeli nationalist-religious zealots. The reason is simply that these cases afford examples of a Jewish state suppressing Jewish religious speech. This peculiarity can help us

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<sup>6</sup> In the United States, as is well-known, the question of suppressing racist speech for the most part does not arise. But see *RAV v. St. Paul*; *Virginia v. Black*. From a strictly doctrinal perspective, U.S. constitutional law does not allow what it calls content-based speech prohibition. In the context of incitement, U.S. constitutional law purports to uphold a standard under which speech may only be prohibited if it is intended to incite imminent violence and is likely to incite imminent violence -- a highly speech-protective standard. See *Brandenburg v. Ohio*. Recent legislation introduced in several U.S. states purporting to restrict the teaching of certain Islamic legal doctrines on the ground that they are subversive to the state has thus been facially unconstitutional. See proposed Tennessee statute. The reality, however, is considerably more complicated. During the last several decades, religious speech that might ordinarily be protected under the law of incitement and United States has nevertheless been criminally punished under the rubric of conspiracy and material support for terrorism. This can be seen most clearly in the conviction of Sheik Omar Abdel-Rahman for seditious conspiracy in 1995, and of his translator, Mohamed Yousry and Ahmed Abdel Sattar, for related crimes in 2005. The rubric, then, for making sense of specific cases of the suppression of religious speech in the United States will not be the law of incitement, but rather the law of material support. By contrast, in Israel, as in most European contexts, the law expressly prohibits racist speech as well as incitement to violence, and the constitutional doctrine that has developed considers religious speech under these familiar rubrics.

avoid some of the distortion that inevitably arises when majority-Christian states are engaged in suppressing the views of Muslims.

### III.

How is religious speech different from other speech when it comes to prohibitions against racism? The answer that I want to propose begins with the structural features of religious discourse in Judaism, Christianity, and Islam. Each of these traditions begins with scriptural sources of great antiquity that have subsequently been interpreted, reinterpreted, and supplemented over centuries. All three traditions are therefore in some important ways interpretive traditions. All recognize to a greater or lesser extent the human enterprise of attributing meaning to sources that are conceived as in some way divine. Thus, these religious traditions are all invested with the idea of polyvalent language -- language that can mean different things to different people in different moments without thereby sacrificing its claims to truth.

Antiquity matters because the beliefs and attitudes embedded in ancient scriptural traditions reflect ancient worldviews. With respect to racism -- a descriptive category born in the nineteenth century and prohibited by law only in the twentieth -- the consequences of scriptural antiquity are highly significant. The Hebrew Bible, the Qur'an, and in certain respects the New Testament contain hierarchical depictions of human groupings that today might plausibly be characterized as racist. What is more, in the aftermath of these scriptural commitments, all three of the major religious traditions deployed arguments and interpretations that can also be characterized as racist -- often for many generations.

As a historical matter, of course, there is something anachronistic about condemning premodern ideals and beliefs as “racist.” But law is not history. Legal analysis of language typically (and sometimes self-consciously) adopts the position of anachronism by asking whether the text before it satisfies a certain definition. One could mount a legal argument that texts preceding the issuance of the law should not be banned under its terms. But this rather obviously proves too much. Most of the classics of racist discourse preceded prohibitions on racism.

With respect to anachronism, there is, in fact, an analogy between moral analysis of ancient texts and legal analysis of the same texts. To ascertain whether some belief is moral, one needs to ask whether it would be immoral to hold the belief right now, today. Similarly, a law banning racist discourse is presumably intended to affect the beliefs and actions of ordinary citizens in the present. The antiquity of a particular “racist” proposition is therefore legally irrelevant.

Antiquity alone, however, is not what makes religious discourse distinctive -- the classics, too, incorporate “racist” beliefs, as when Aristotle arrays all humans on the continuum from bestial to divine.<sup>7</sup> It is, rather, the combination of antiquity and ongoing committed faith in the truth of the ancient text that renders religious discourse distinctive. In the case of other ancient beliefs, most contemporary readers of the text will have little trouble in subjecting the text’s claims to critical scrutiny. (Of course, there are counterexamples: Tacitus’ *Germania* was a classical text deployed anachronistically to shore up racist attitudes.<sup>8</sup>) When it comes to religion, however, the fact of antiquity typically is either ignored or else functions as a validating force for the belief. To the extent that the legal system is worried about how convincing a particular racist belief might be to

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<sup>7</sup> *Nicomachean Ethics* Book VII; 1145a 20 et seq.

<sup>8</sup> Christopher Krebs, *A Most Dangerous Book: Tacitus’ Germania from the Roman Empire to the Third Reich* (New York: W.W. Norton, 2011).

those who hear it expressed, antiquity in the context of religion might confer legitimacy, and might therefore make the text a better candidate for suppression.

Religious beliefs, then, are on account of their antiquity more likely than other, more contemporary beliefs to contain ideas that could be characterized as racist; and they are, simultaneously, particularly likely to be believed by contemporary listeners. For the purposes of legal analysis with respect to racism, this state of affairs alone would require special consideration. But there is a further feature of religious discourse that also calls for special consideration: the foundational nature of religious belief. It is not that other, nonreligious beliefs cannot also be foundational, for of course they can be. But it is characteristic of religious beliefs that their adherents take them to be the foundation of their mode of engaging with the world. The adherents, of course, may not be correct about the position of religious belief in their weltanschauung. Frequently, religious believers are unaware of the crucial role played by nonreligious beliefs in shaping their experience of the world. But many religious believers believe themselves to rely on religious belief as foundational -- and that alone should be relevant to our analysis.

The reason the real or perceived foundational nature of religious belief should matter is that the costs of prohibiting or suppressing certain beliefs rise when the believer takes them as foundational. The costs are both moral and practical. They are moral insofar as the liberal state is committed to the project of enabling people to form autonomous beliefs and live their lives accordingly. They are practical insofar as opposition to the law that is grounded in foundational belief may leave the believer with few available options other than resistance to the state itself.

IV.

With respect to incitement, the fact of antiquity matters less. What matters more is the combination of deep commitment to the truth of religious claims and the tradition of polyvalence associated with Western religious texts. When incitement is juxtaposed with a strong requirement of imminence, there is little reason to treat religious speech as different from other forms of speech that may be just as effective in rousing an individual or a crowd to immediate violent action. When the time horizon is extended, however, the depth of commitment associated with religious belief becomes relevant, as does polyvalence.

Imagine a believer who puzzles long and hard over the true meaning of scripture, then decides that it compels him to act violently. In this scenario, the believer is grappling precisely with the multiple possible interpretations that the text presents (or that are offered by the tradition considered more broadly). His struggle to understand is directly connected to the way the text presents itself as something other than easily or immediately self-interpreting. Thus, his sense of compulsion to act -- regardless of state strictures on violence -- is a product of the truth claims that religious tradition is often understood to make.

Notice that in this scenario -- a scenario we will examine more closely in the context of religiously inspired terrorism -- the religious text is certainly functioning as an incitement. And it is not doing so simply in the sense in which Oliver Wendell Holmes, Jr. famously said that "every idea is an incitement,"<sup>9</sup> namely that it proposes itself as a potential ground for action. Rather, the religious text presents itself as the binding word of God, which when properly interpreted *compels* the believer to action, regardless of what the state might demand.

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<sup>9</sup> *Gitlow v. New York* (Holmes, J., dissenting).

Notice, too, that the polyvalent feature of scripture as interpreted by religious tradition poses a further, distinctive problem with regard to incitement. Although the text can be plausibly interpreted as an incitement, that is not the only -- or even the most natural -- interpretation available. Suppressing the text on the grounds that it constitutes an incitement is therefore especially problematic insofar as it has non-inciting meanings.

Allegory can actually go both ways with regard to incitement. A text that on its face incites violence may be interpreted allegorically so as to "cleanse" it of its inciting meaning. Yet the opposite is also true. The text that on its face does not offer an incitement may nonetheless be interpreted allegorically so as to incite.

A practical example of this may be gleaned from Deuteronomy 25:17-19. Here is the text as given in the King James Version of the Bible:

17. Remember what Amalek did unto thee by the way, when ye were come forth out of Egypt; 18. How he met thee by the way, and smote the hindmost of thee, even all that were feeble behind thee, when thou wast faint and weary; and he feared not God. 19. Therefore it shall be, when the LORD thy God hath given thee rest from all thine enemies round about, in the land which the LORD thy God giveth thee for an inheritance to possess it, that thou shalt blot out the remembrance of Amalek from under heaven; thou shalt not forget it.

On its face the text is clearly an incitement to genocide, commanded by God as revenge for the Amalekite ambush on the children of Israel in the immediate aftermath of the Exodus. This interpretation is further underscored by the text of 1 Samuel 15. There God has given direct

instructions to King Saul to kill every living Amalekite, including women, children, and livestock. Saul fails to fulfill the command in all its particulars: he leaves alive Agag, the Amalekite king, as well as the sheep. For this act of wrongdoing, God informs Saul through the prophet Samuel that he has been rejected from his position as God's anointed king over Israel, that he will be replaced by another (eventually specified as David).

Faced with these biblical texts, the rabbinic tradition sought to minimize their character as incitement by explaining that, after Sennacherib of Assyria moved and combined populations, it was no longer possible to ascertain who constituted an Amalekite.<sup>10</sup> The biblical text is therefore rendered a dead letter, at least in so far as it might be understood as a guide to practical action. Although this is a case of limiting legal reasoning, rather than by allegory, it marks the possibility of interpretation to cleanse an inciting text of its potentially harmful character.

Imagine, however, a contemporary person who interprets the text of Deuteronomy both literally and allegorically at the same time. He might come to believe that he is literally obligated to slay Amalekites; but also, simultaneously, that the term “Amalekite” must be interpreted allegorically to apply to the contemporary enemies of the people of Israel. Although it has never been ascertained definitively, and the official Israeli government report does not expressly say so, Baruch Goldstein, an American-born Israeli settler, seems to have been in the grips of just such a set of views when he murdered 29 worshipers and injured another 125 in the mosque above the Cave of the Patriarchs in Hebron in 1994. He acted on Purim, the Jewish holiday commemorating the escape of the Jewish community of the Persian Empire from a descendent of

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the Agag, the Amalekite king spared by Saul against God's command. The previous Sabbath, the supplemental Torah reading in the synagogue was Deuteronomy 25: 17-19.

Assume, for the sake of argument, that Goldstein was in fact in the grips of simultaneous allegorical and literal readings of the text when he perpetrated the Hebron massacre. The task of determining whether the underlying biblical text qualifies as incitement is immensely complicated by the welter of different interpretations available to readers. It might be objected that every text is subject to the same nearly infinite range of interpretive possibilities. The point here, however, is that this broad range of possibilities, including the literal, the allegorical, and combinations thereof, is distinctively embedded in the discursive communities of religious interpretation. That is, there exist live, active, and familiar modes of textual interpretation that together play significant roles in the constitution of religious communities *in particular*. It is for this reason that I am claiming, in this section of the essay, that the question of the regulation of religious speech for racism and incitement is a distinctive one.

V.

Thus far I have proposed that religious speech needs to be treated distinctively; but I have not yet offered an argument about whether that special treatment ought to be more or less restrictive -- or perhaps ultimately no different -- than the general legal requirements regarding racist or inciting speech. I want to turn, now, to the question of what should be done. I want to do so through close analysis of an ongoing case taken from the Israeli context and involving radical Jewish religious speech. The conclusion I want to suggest is that there are some distinctive reasons the liberal state should be troubled by suppressing religious speech as racist or inciting. The core difficulty arises from the unfortunate fact that racism and incitement can be found pervasively within

Western religious traditions. A project of suppression therefore begins to take on the character of a reconstructive, censorship-driven project to reform those traditions by editing out some of their most unattractive features. This project is, I think, fundamentally at odds with the commitment of the liberal state to allowing the development of autonomous belief systems.

The conclusion, foreshadowed here, may immediately be dismissed by the reader as a characteristically American, speech protective attitude that naïvely ignores the great costs to be associated with racism and incitement. I hope it will become clear from the analysis I offer that I do not reach this conclusion lightly, nor do I derive it from any automatic or instinctual reliance on U.S.-specific free-speech principles. The example that I shall explore involves real, proximate threats of violence and identifiable racism. The proof, in any case, should be in the telling.

The case I want to explore involves the charges of incitement to violence and incitement to racism brought against Rabbis Yitzhak Shapira and Yosef Elitzur, the authors of the work *The Law of the King* mentioned at the beginning of this essay. The Israeli legal background can be sketched briefly. In 1977, intending to deal with the political movement and party called Kach (“Thus”) and associated with Rabbi Meir Kahane, Israel enacted a law prohibiting incitement to racism. The provision, modeled loosely on various European bans, defines racism as “persecution, humiliation, demeaning, displaying animosity, hostility, violence or strife toward a population group or parts of such a group, all on the basis of skin color or membership in a racial or ethnic-national grouping.”<sup>11</sup> The leading case interpreting the law, *Elba v. State of Israel*, applied it in 1995 to punish the writing of an unpublished essay by Rabbi Ido Elba that appeared to justify the killing of non-Jews in a wide range of circumstances. (Elba’s essay, according to

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<sup>11</sup> Criminal Code §144A.

some commentators, is a textual precursor to *The Law of the King*.<sup>12</sup>) Until the late 1990s, the Israeli law of incitement was relatively speech-protective, prohibiting only utterances that posed a clear and present danger. In 2002, however, influenced at least in part by the role of religious pronouncements in inspiring the 1995 assassination of Prime Minister Yitzhak Rabin, Israel passed a new and broad law banning incitement to violence.<sup>13</sup>

The book in question, *The Law of the King*, was initially published in an edition of 1000 copies in 2009, although it is possible that more have subsequently been printed.<sup>14</sup> Sometime after its initial publication, a coalition of nongovernmental organizations submitted an application to the Israeli High Court of Justice asking the court to compel the prosecutor-general to bring criminal charges against the authors of the book and to suppress its publication.<sup>15</sup> The application consists of a series of quotations taken from the work, combined with a legal analysis of the issues concerning incitement to racism and incitement to violence. The court never acted upon application, but in August 2010, the authors, Rabbis Yitzhak Shapira and Yosef Elitzur, were arrested, briefly detained, and apparently charged with violation of both statutes.

The book is in its form identifiably a work of classical Jewish legal (halakhic) analysis. It is written in fairly technical rabbinic Hebrew, much of which would not be accessible to the ordinary reader of modern Hebrew unless he or she was educated extensively in Talmudic

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<sup>12</sup> Amir Mashiah, Halakhic Militancy among Settlers in Judea and Samaria (in Hebrew, on file with the author).

<sup>13</sup> See Michal Buchhandler Raphael, Incitement to Violence Under Israeli Law and the Scope of Protection of Political Speech Under Israeli Freedom of Speech Jurisprudence: A Comparative Analysis and an Alternative Perspective, [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=michal\\_buchhandler\\_raphael&sei-redir=1#search=%22israeli%20law%20incitement%20violence%22](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=michal_buchhandler_raphael&sei-redir=1#search=%22israeli%20law%20incitement%20violence%22); see also Yehudah Mirsky, "A Grim Teaching," at <http://www.jewishideasdaily.com/content/module/2010/8/27/main-feature/1/a-grim-teaching>

<sup>14</sup> Hebrew original on file with the author; and see [http://www.12heshvan.org/pics/magazin\\_pics/%D7%A2%D7%AA%D7%99%D7%A8%D7%94%20%D7%9C%D7%91%D7%92%D7%A5-%20%D7%99%D7%91%20%D7%97%D7%A9%D7%95%D7%95%D7%9F.pdf](http://www.12heshvan.org/pics/magazin_pics/%D7%A2%D7%AA%D7%99%D7%A8%D7%94%20%D7%9C%D7%91%D7%92%D7%A5-%20%D7%99%D7%91%20%D7%97%D7%A9%D7%95%D7%95%D7%9F.pdf)

studies. It gathers a range of biblical and rabbinic sources and analyzes them using familiar modes of halakhic reasoning. Where mystical speculation enters the text, it is clearly marked as such and appears in appendices to the chapters, which are organized according to legal thematics.<sup>16</sup>

The charge of racism, presumably founded upon the principles of the *Elba* case, must logically relate to the treatment of non-Jews generally, since no particular population subgroup is ever directly identified in the work. The basis for the racism charge may relate straightforwardly to the book's legal judgment that the lives of non-Jews may be treated in warfare (and in some peacetime circumstances) differently than the lives of Jews. Or it may relate to arguments that the authors make (in a mystical vein) according to which the souls of Jews reside on a different plane than those of non-Jews and are therefore worth more. From the standpoint of ordinary language, it would not be difficult at all to depict either of these sorts of claims as racist. As we shall see, however, when viewed in the context of other doctrines of classical Jewish law and mysticism, the charge of racism becomes troublingly broad.

The charge of incitement to violence probably begins with the fact that the authors never specifically designate their work as purely theoretical. (Elba, interestingly, did include such explicit disclaimer in his unpublished essay; but because the issue was incitement to racism, rather than incitement to violence, the court was able to ignore it.<sup>17</sup>) Among other claims, the work states that individuals need not restrict their acts of force in protection of Jewish victims to action authorized by or within the framework of state authority.<sup>18</sup> It furthermore states that any

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<sup>16</sup> See, e.g., *The Law of the King*, p. 43 et seq.

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person, including any Jewish citizen of Israel, who impedes success of the Jewish army while it is at war may be considered to be aiding the enemy and endangering Jewish lives, and is therefore potentially fair game.<sup>19</sup> More provocatively -- though not necessarily from the standpoint of incitement -- the work argues that innocent non-Jewish bystanders, including children, may be killed in the course of hostilities, not only as collateral damage when they are being used as human shields, but also as targets for militarily necessary retaliation.<sup>20</sup> Most shockingly, the work asserts at one point that non-Jewish children who are presumptively likely to grow up to become evildoing enemies of the people of Israel may be killed preemptively.<sup>21</sup>

There is sufficient basis here, it would seem, for claims of incitement to violence. Indeed, a highly relevant contextual element is that students from the yeshiva which the authors lead, Od Yosef Chai, have been implicated in acts of terrorism and vandalism including the arson of a mosque in the Palestinian town of Yasuf.<sup>22</sup> Nevertheless, as I shall suggest, it is also worth noting that much of the morally repulsive argumentation just detailed presents itself as a theoretical exposition in the laws of war. A theoretical work analyzing legitimate and illegitimate uses of force -- addressing both *ius in bello* and *ius ad bellum* -- probably should not be understood constitute incitement simply because it states morally mistaken or false views. The incitement charge therefore must depend specifically on the religious nature of the text and on the expectation that readers might interpret the work to authorize or require them to act violently as a matter of religious obligation.

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<sup>22</sup> <http://www.ynetnews.com/articles/0,7340,L-3840085,00.html>

What does the specifically religious nature of the work in question imply with regard to the charges of racism and incitement? With respect to the racism charge, we can certainly observe the feature of antiquity discussed earlier: part of the reason that the text can present its (presumptively) racist conclusions is that it is building upon ancient texts that themselves are susceptible of being interpreted as racist. And presumably, the fact that some of the texts discussed are ancient religious ones makes them particularly likely to be believed sincerely by the authors, who do not adopt a skeptical or critical stance towards the religious sources they use, but rather proceed on the assumption that the sources are legitimate guides to belief and action because of their ultimate connection to a divine origin.

The problem that immediately arises, however, both with respect to the halakhic and mystical positions that could plausibly be characterized as racist, is that the views of the text *are not fundamentally different in kind from many other components of classical Jewish (or Islamic, or Christian) religious tradition*. All of the Western religious traditions contain sources within them proclaiming the common nature of humans as created in the divine image. And all contain as well powerful traditions that treat the value of the lives of believers and nonbelievers in fundamentally different ways. The same may be said for the metaphysical question of the value of the soul. All Western religious traditions offer some account of the common value of all human souls; and all contain material that can very plausibly be read to array the souls of humans in hierarchical order on the basis of faith, birth, divine election, or some other principle.

The difficulty, then, is not that *The Law of the King* fails to satisfy the legal requirements of racism. The difficulty is that, from the standpoint of content, it cannot readily be distinguished from significant components of the body of traditional Western religious thought. The

prosecution therefore appears to be ad hoc in the extreme. If not wholly politically motivated, it looks as though it aims to pick out the religious racism of certain actors.

What defensible rationale could exist for such an undertaking? It is of course possible to imagine that racism prosecutions might be brought only where there was also simultaneously a concern for incitement to actual violence. But presumably laws prohibiting incitement to violence suffice to satisfy this pressing need. It seems much more likely that the application of antiracism laws in religious contexts like that of *The Law of the King* is designed to shape religious discourse itself.

Such an approach is potentially defensible. One can easily sketch the view that it is desirable to work through the body of religious tradition and refine it so as to remove racism. I certainly would not like to argue that racism is so essential to Western religious tradition that the tradition in all its various forms could not exist without it. Nor is it obvious that this task could never be attempted by a state. Indeed, it could be argued that the attempt to cleanse or purify religion of its deviant and morally unattractive features is precisely the kind of task that is difficult to accomplish without the coercive power of the state arrayed behind the effort.

But the task of cleansing religious tradition of unattractive -- nay, immoral -- features is emphatically not the kind of task for which the *liberal* state is designed. It is not simply that the liberal state professes some sort of neutrality with respect to the good life. After all, the prohibition on racism is itself at least a partial deviation from strict neutrality, justified by our beliefs about the harms of racism and the dangers to the liberal state itself that can arise from racist social movements. The difficulty lies elsewhere, in the liberal state's commitment to the autonomy of individuals and groups who wish to shape their own life-worlds with respect to beliefs and values.

That commitment includes authorizing individuals and groups themselves to pick and choose among elements of their beliefs and commitments. Autonomy, that is, entails choice among options. By seeking to eliminate certain options, and thereby to shape the direction of the religious tradition in question, the state is fundamentally interfering with the exercise of autonomous self-fashioning. It is undertaking the same sort of process of censorship that we associate with inquisitions and religious purges. The state is not simply banning utterances that it considers locally harmful; it is trying to push the religious civilization itself in the direction of improvement and progressive amelioration.

Admittedly, by punishing racism, the liberal state already interferes with certain possible autonomous life-plans. A neo-Nazi organization may plausibly offer for its members the kind of foundational life-world offered by the Western religious traditions. If the organization is banned, its members are subject to a deprivation that by hypothesis is therefore comparably serious to that suffered by adherents of religious traditions from which racist elements are plucked out.

I take this objection extremely seriously. I want to acknowledge that the argument I have been offering has serious implications for the legitimacy of banning organizations that provide similar collective functions for individuals and groups of like-minded people. I recognize, of course, that in some sense, such organizations represent the archetypal case of what antiracism law means to prohibit. The National Socialist Party had at least some of the features that I am marking as worthy of protection in the liberal state.

As a very partial practical solution, I would like to suggest that groups offering foundational beliefs and the opportunity for collective self-fashioning should be exempt from antiracism laws -- at least insofar as they are not organizing themselves primarily for political action. It is of

course a separate question whether religious groups or groups that resemble them should have an independent right to engage in political activity. That question, thankfully, is beyond the scope of this essay; but it should be clear that I think there is reason to answer the question in the negative insofar as their political organization is devoted to the accomplishment of racist policies.

## VII.

Consider, now, the charge of incitement to violence against the authors of *The Law of the King* from the perspective of a distinctively religious form of speech. I argued earlier that the combination of polyvalent textual meaning and the assumed authority of the text as a source of truth offers a distinctive set of concerns about incitement to violence. The combination of these features is clearly visible here. *The Law of the King* does not at any point instruct its readers to go out and commit violent acts, either immediately or in the future. Instead, the text represents a complex, detailed, even labored working-through of legal interpretation that is intended to produce some sort of true result.

The idea that this form of interpretive text could constitute an incitement to violence must surely depend upon the idea that a religious reader might pore over the work, come to discover new ideas about what God's will truly requires, and then feel obligated or compelled to act upon it. Let me be extremely clear: I believe this could happen to a reader of this text. It seems entirely plausible that a reader -- even a relatively sophisticated reader -- might consider the extensive arguments presented, form a new view on that basis, and act upon that view to commit an act of violence. Let me further be clear that in a principled sense, the work would then indeed have incited the violent act in question.

The question, then, is not whether *The Law of the King* might incite violence. It might. Nor, by hypothesis, is the question merely one of imminence or likelihood. Israeli incitement law as presently configured does not weigh these concerns very heavily. The question, rather, is once again a question of the religious context: does this text incite violence in ways that are markedly dissimilar from a host of other texts to be found in the Western religious tradition?

The answer this question must certainly be no. No doubt context matters. But the students in radical nationalist-religious yeshivas who might read *The Law of the King* can also read Deuteronomy. There are a plethora of polyvalent religious texts that may be interpreted by the believer as requiring him to engage in acts of violence. Nor, let me hasten to add, are those texts restricted to any one of what I have been calling the Western religious traditions. The Qur'an has its own exhortations to the use of force.<sup>23</sup> And although one must scour the Gospels to find texts capable of supporting or mandating violence, they can in fact be found.<sup>24</sup> The grand history of religious violence in the name of Christ certainly equals and probably exceeds the violence perpetrated in the name of Islam -- and all of it enacted by believers fully committed to the idea that they were acting in accordance with the demands of the faith captured in its authoritative texts.

It follows, then, that to excise or least suppress those religious teachings that can function as incitement to violence would require a thoroughgoing reediting of the great Western religious traditions. And this project, much like cleansing traditional religious discourse of racism, would

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<sup>23</sup> For example, Q 9:5 ("Slay the polytheists wherever ye find them"); Q 9:29 ("Fight against those who do not believe in Allah nor in the last day.")

<sup>24</sup> See Matthew 10: 32-34, which reads as follows:

32. Whosoever therefore shall confess me before men, him will I confess also before my Father which is in heaven. 33. But whosoever shall deny me before men, him will I also deny before my Father which is in heaven. 34. Think not that I am come to send peace on earth: I came not to send peace, but a sword.

violate the basic commitments of the liberal state. The motives might be pure: one can easily imagine the desire to reduce violence in the world by reducing religious motivations for that violence. But it would require such a complex, involved editorial engagement with the complexly intertwined discourses of religious life that it would amount to a significant project of religious reform.

If context is not the answer that would legitimate a limited censorship of the religious corpus, then perhaps the alternative lies in suppressing only the production of new religious works that might have the capacity to incite violence. Something very like this idea seems to be behind the prosecution of the authors of *The Law of the King*. After all, the older texts on which the authors rely have sat for generations -- and in some cases millennia -- on the library shelves. Some of them even have incited violence in the past -- but without anyone seeking to repress them. On this view, it seems that what motivated the charge of incitement in this case was the renewed interpretation of those texts to demand a particularly and immediately violent result.

A variant on this possible interpretation would say that there are gradations with respect to inciting violence. Some interpretations are simply in their nature so extreme that they are more capable of inciting violence. Perhaps *The Law of the King* deserves to be banned because its authors have gone too far in drawing new conclusions derived from the traditional materials. It is possible to suggest that some of their conclusions are in fact unprecedented, particularly the claim that it might be justified to kill innocent children in anticipation of their future depredations against the Jewish people.

In the final analysis, however, these theories do not suffice to explain the charge of incitement to violence. The interpretations offered by the authors of *The Law of the King* are just that --

interpretations. They claim to be grounded in plausible readings of earlier religious authorities, including scriptural authorities. Indeed, the authors take pains to point out various scriptural precedents for their views. One authority they invoke is the act of Simeon and Levi, sons of Jacob, in killing the male residents of Shechem – corresponding roughly to today’s Nablus -- without having suffered any direct harm at their hands. One might protest in vain that Genesis 34 depicts a vengeful honor killing; but for the authors of the book, this is preemptive strategic killing -- taking place just steps from where their yeshiva was founded.<sup>25</sup> And as they point out, though the brothers were not sanctioned by Jacob in advance, there is no record of the biblical text of any punishment. Indeed, Jacob's objection to their act is wholly instrumental, devoid of moral content.<sup>26</sup>

In sum, the charge of incitement to violence, when deployed against religious texts like *The Law of the King*, seems inevitably to be justified only in terms of the product of religious reconstruction that is unsuitable for liberal state. Repulsive as such texts may well be, the liberal state must be committed to protecting them. It need hardly be added that the endorsement of such a text -- the act for which Dov Lior, with whom the essay began, was called in for questioning -- should fall rather squarely within the zone of autonomy that the liberal state ought to protect.

## VIII.

But have I, in this essay, simply repeated the characteristic American error of insisting that liberal principles demand strong protection of speech such that prohibitions on racism and incitement must be drawn narrowly or not at all? Perhaps the best defense of the Israeli laws

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<sup>25</sup> *The Law of the King*

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under which the authors of *The Law of the King* are being prosecuted is that the liberal state must act illiberally to protect its authority.

This, I can imagine it said, is the lesson of Weimar. The illiberal political movement exercises its right to speak freely; convinces some people of its views; radicalizes a population; introduces violence in lieu of rational discourse; then makes its play for control of the state. In the Israeli context, it is certainly possible to imagine the most radical wing of the nationalist-religious bloc undertaking to do just that. Its members reject liberalism both in the sphere of faith and in the sphere of politics. Many voices within the mainstream Israeli political spectrum fear precisely this result.<sup>27</sup>

I am not at all prepared to deny the plausibility of this view. Maybe, in the exercise of prudential judgment, the Israeli authorities are wise to deploy prosecution as a tactic of threat, harassment, and control. The terror threat they face is in no way theoretical. They have had a pro-peace prime minister assassinated, with serious regional and even global consequences. When the settlements in Gaza were evacuated by the Israeli military, significant numbers of nationalist-religious settlers engaged in nonviolent resistance. Should any future evacuation of West Bank settlements occur, it is entirely possible to imagine that resistance would become violent. Civil bloodshed is not out of the question. If the goal is helping state to avoid this result, perhaps illiberalism is fully justified

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<sup>27</sup> I have not, in this essay, addressed in any detail the suggestion that the threat to the Israeli state lies precisely in the claim of the most radical religious-nationalists to embody the true spirit of Zionism. According to this view, the de facto reason for the prosecution might be the desire on the part of the state to deny this definitional power to those who expressly advocate racism and violence. Those critics of the Zionist project who claim to see racism and violence inherent in it would of course welcome such an interpretation; on their view, precisely as in the view of the radical religious-nationalists, the authors of *The Law of the King* have actually captured the essence of what the state stands for. Les extrêmes se touchent.

Notice, however, that this argument eschews the idea of a principled limitation to the deployment of illiberal tactics. It would justify arbitrary arrest of threatening or dangerous figures in the radical religious-nationalist camp. It would justify the suppression of nonracist and non-inciting literature if that literature were to be deemed helpful to the development of the movement. Such conclusions are not at all unthinkable. But they do fall outside the commitment of the liberal state to offer principled justifications *even for its deviations from liberalism*.