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## ISRAEL'S ROSIT THE RIVETER: BETWEEN SECULAR LAW AND JEWISH LAW

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In the world of Judaism, the “end of men” is not in sight. Surely, tectonic plates are sliding and shifting, and a great deal of change is unfolding, but men are fighting hard to keep patriarchy alive. Deep inside, the Orthodox patriarchal man may be motivated by the sheer impulse to maintain his power, but outwardly he projects a profound commitment to his religious law, the law of God. He believes that his fight is a noble one ordained by divine will and that God is on his side. The problem is global; it appears in every Jewish community around the world.<sup>1</sup> By way of background, this Essay will briefly explain the problem in the Jewish world before delving into the particular case of Israel. The global reflects the local. Recent developments in Israel not only inform a comparative perspective, but they also point to an interesting phenomenon: the interaction between developments in Jewish law in the United States and developments in Israel. On the level of secular law, this Essay will highlight influences flowing from the United States that affect secular Israeli law.

Jewish Orthodoxy<sup>2</sup> is one of the last bastions of Judaism to openly oppose the equality of women.<sup>3</sup> Most, though not all, Orthodox rabbis – who are all

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<sup>1</sup> Similar phenomena are seen in the Catholic and Muslim worlds. See MARY JO WEAVER & DAVID BRAKKE, INTRODUCTION TO CHRISTIANITY 227 (4th ed. 2009) (“Some church leaders (mostly male), would say that, indeed, God did create women with natures and attributes that are different from those of men: men are strong, rational, naturally inclined toward philosophical speculation, and meant to rule, whereas women are weak, emotional, naturally inclined toward bodily life (motherhood), and meant to be ruled.”); Shahla Haeri, *No End in Sight: Paradox, Politics, and Gender Policies in Iran*, 93 B.U. L. REV. 1049, 1051-52 (2013) (“The Islamic state has consistently justified these discriminatory gender policies and procedures on the basis of three presumably inviolable principles, namely, the natural differences between the sexes, the divinely mandated gender hierarchy, and the Islamic law (Shari’a). These three principles form the main foundation of the Islamic Republic’s worldview and are believed to be sacrosanct and unchanging.”).

<sup>2</sup> Jewish Orthodoxy should be distinguished from other denominations, such as Conservative and Reform Judaism. Most other denominations have endorsed the principle of gender equality. See, e.g., SYLVIA BARACK FISHMAN, A BREATH OF LIFE: FEMINISM IN THE AMERICAN JEWISH COMMUNITY 7-9, 159 (1993) (recounting the growth of Jewish

men<sup>4</sup> – insist on a “separate but equal” approach to gender and trace this principle to God’s will.<sup>5</sup> The argument is that God requires that a woman be modest, and modesty commands a number of restrictions on women, especially in the public sphere.<sup>6</sup> Jewish communities exist in many parts of the world. In every center of Jewish life, one expects to find a segment of the community that is Orthodox, that is loyal to the traditional version of Jewish law, and that rejects the participation of women in public religious rituals.<sup>7</sup>

Outside the United States, the largest number of Jews live in Israel.<sup>8</sup> For reasons rooted in complex historical processes, the majority of Israelis are not

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organizations and acceptance of women rabbis in Reform and Conservative communities, and discussing the seeming “direct opposition” between the words Orthodox and feminist); PAULA E. HYMAN, GENDER AND ASSIMILATION IN MODERN JEWISH HISTORY 164 (1995) (describing how major Jewish organizations other than “Orthodox sisterhoods” went from calling for better women’s education to asserting “women’s claim to equal rights within communal institutions and/or the synagogue”). In Israel the Orthodox movement mostly adheres to the ultra-Orthodox and traditional versions of Judaism, and it has considerable political power. See Samuel C. Heilman, *Orthodoxy*, in THE OXFORD DICTIONARY OF THE JEWISH RELIGION 517 (R.J. Zwi Werblowsky & Geoffrey Wigoder eds., 1997). In Jewish communities elsewhere, a softer version, known as Modern Orthodoxy, has taken root. *Id.* at 516. Following the 2013 Israeli elections, the Orthodox have maintained their power but as of this writing are not included in the coalition cabinet. The party called The Jewish Home is the descendant of the “national religious” camp, and its leader heads the Ministry of Religions. It remains to be seen what his approach to gender equality will be.

<sup>3</sup> While I do not engage in a comparative study, it is quite clear that other religions experience a similar phenomenon. See, e.g., Haeri, *supra* note 1.

<sup>4</sup> One publicized exception is Sara Hurwitz, who became the first Modern Orthodox “rabba” at the Hebrew Institute of Riverdale in New York. Debra Nussbaum Cohen, *Woman ‘Rabba’ Roils Orthodox World*, JEWISH DAILY FORWARD (Mar. 3, 2010), <http://forward.com/articles/126454/woman-rabba-roils-orthodox-world/>.

<sup>5</sup> For a general authoritative account, see Blu Greenberg, *Women*, in THE OXFORD DICTIONARY OF THE JEWISH RELIGION, *supra* note 2, at 726-29. For a fine discussion of how to reconcile the dignity of women with rabbinic Judaism, see generally RACHEL ADLER, ENGENDERING JUDAISM: AN INCLUSIVE THEOLOGY AND ETHICS (Beacon Press 1999) (1998).

<sup>6</sup> ROCHELLE L. MILLEN, WOMEN, BIRTH, AND DEATH IN JEWISH LAW AND PRACTICE 4-5 (2004). The command that women remain in the private sphere is rooted in a biblical verse: “The honor of the daughter of the king is inward . . . .” *Psalms* 45:14 (Masoretic Text), translated in MILLEN, *supra*, at 5; see also Frances Raday, *Modesty Disrobed: Gendered Modesty Rules Under the Monotheistic Religions*, in FEMINISM, LAW AND RELIGION (Marie A. Failinger et al. eds., forthcoming July 2013).

<sup>7</sup> Cf., e.g., SERGIO DELLA PERGOLA, WORLD JEWISH POPULATION, 2010, at 46-51 (2010), available at [http://jewishdatabank.org/Reports/World\\_Jewish\\_Population\\_2010.pdf](http://jewishdatabank.org/Reports/World_Jewish_Population_2010.pdf) (stating that the United Kingdom’s Jewish population has become more Orthodox, and discussing the Belgian Orthodox population at Antwerp).

<sup>8</sup> By 2005 Israel had the largest Jewish population in the world. SERGIO DELLA PERGOLA, JEWISH PEOPLE POLICY INST., JEWISH DEMOGRAPHIC POLICIES: POPULATION TRENDS AND OPTIONS IN ISRAEL AND IN THE DIASPORA 7 (2011), available at [http://jppi.org.il/uploads/Jewish\\_Demographic\\_Policies.pdf](http://jppi.org.il/uploads/Jewish_Demographic_Policies.pdf).

Orthodox,<sup>9</sup> but the religious institutions designed to accommodate religion are mostly in the hands of Orthodox men.<sup>10</sup> Because these Orthodox men apply Jewish law in its most traditional form, they adhere to the principle that women should be confined to the private sphere and excluded from rituals held in public.<sup>11</sup> This position is compatible with women joining the workforce; in fact, in Jewish communities across the centuries, women did work outside the home.<sup>12</sup> Historically, in Eastern Europe, wives supported their husbands, who in turn devoted their lives to the study of Jewish law.<sup>13</sup> Learning was the more valued activity; therefore, the fact that women acted as breadwinners did not upset the patriarchal hierarchy.<sup>14</sup> Because women were barred from study, the development of Jewish law remained the monopoly of men.<sup>15</sup>

In the last twenty years, considerable progress has been made in raising feminist consciousness in the Orthodox world. The Jewish Orthodox Feminist Alliance (JOFA), an activist organization, has been investing energy, intellect, and money in offering reinterpretations of Jewish law (*halacha*) that comport with gender equality.<sup>16</sup> In Orthodox communities across the world, similar efforts are being made, with a measure of success. In Israel a feminist Orthodox organization called Kolech (Your Voice) is collaborating with JOFA, introducing notions of gender equality and inclusion to Jewish law.<sup>17</sup>

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<sup>9</sup> See MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 17 (2011) (“Most Jewish immigrants were secularists who saw nationalism as an alternative to religion and as the primary source of their self-identity. A largely secular Jewish society emerged as a result . . .”).

<sup>10</sup> These include the chief rabbinate, the two chief rabbis, the rabbinical courts (having exclusive jurisdiction in matters of marriage and divorce), and the religious councils. See AMNON RUBINSTEIN & BARAK MEDINA, 1 *HA-MISHPAT HAKONSTITUTIONI SHEL MEDINAT YISRAEL* [THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL] 357-73 (6th ed. 2005). The councils, which occasionally include a woman member, are in charge of supplying burial services. See *id.* at 362 n.186.

<sup>11</sup> MILLEN, *supra* note 6, at 155.

<sup>12</sup> See HYMAN, *supra* note 2, at 67.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* This situation is still prevalent in ultra-Orthodox circles in Israel. See Shulamit Almog & Lotem Perry-Hazan, *The Ability to Claim and the Opportunity to Imagine: Rights Consciousness and the Education of Ultra-Orthodox Girls*, 40 *J.L. & EDUC.* 273, 282-84 (2011).

<sup>15</sup> Susan Starr Sered, “*She Perceives Her Work to Be Rewarding*”: *Jewish Women in a Cross-Cultural Perspective*, in *FEMINIST PERSPECTIVES ON JEWISH STUDIES* 169, 172 (Lynn Davidman & Shelly Tenenbaum eds., 1994) (“Except for a few unusual situations, Jewish women as a group have systematically been barred access to Torah learning.”).

<sup>16</sup> See *Mission*, JOFA, <http://www.jofa.org/mission> (last visited Mar. 23, 2013).

<sup>17</sup> Kolech, initially inspired by JOFA, is active in promoting women’s equality within Orthodoxy. See *About Kolech*, KOLECH, <http://www.kolech.com/english/about.asp> (last visited Mar. 23, 2013).

Nonetheless, progress is not linear. Many Orthodox communities across the world have experienced a fundamentalist backlash as they attempt to combat feminist influences and defend the traditional separation between the sexes. For example, in both Jerusalem and Brooklyn, there have been efforts to require women to sit at the back of buses and men at the front.<sup>18</sup> Recently, Orthodox communities in both Jerusalem and Brooklyn have attempted to force women to walk on separate sidewalks.<sup>19</sup> The prohibition on female singing – that is, on a woman’s raising her voice and singing in the company of men – is another example of backlash.<sup>20</sup> The prohibition on women’s

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<sup>18</sup> For coverage of bus segregation in Brooklyn, see *Gender Segregation Continues on Brooklyn Bus Line*, FAILED MESSIAH (Oct. 28, 2011, 8:53 AM), [http://failedmessiah.typepad.com/failed\\_messiahcom/2011/10/gender-segregation-continues-on-brooklyn-bus-line-678.html](http://failedmessiah.typepad.com/failed_messiahcom/2011/10/gender-segregation-continues-on-brooklyn-bus-line-678.html). For coverage of bus segregation in Israel, see Matthew Wagner, *11 New Sex-Segregated Lines Added by Egged in 6 Months. Arad to J'lem is Latest: Unwitting Female Passengers Are Told to Move to the Back of the Bus*, JERUSALEM POST, Dec. 1, 2006, News, at 7. Even though Israel’s Supreme Court held that the segregation was illegal, H CJ 746/07 Ragen v. Ministry of Transp., ¶¶ 2, 19 (Jan. 5, 2011) (Isr.), translation available at [http://elyon1.court.gov.il/files\\_eng/07/460/007/t38/07007460.t38.pdf](http://elyon1.court.gov.il/files_eng/07/460/007/t38/07007460.t38.pdf), the harassment of women who refuse to sit at the back continues, see Darren Weir, *Ultra-Orthodox Men Verbally Attack Woman on Israel Public Bus*, DIGITAL J. (Sept. 1, 2012), <http://digitaljournal.com/article/331947>. For a deeper analysis of why bus segregation persists in Israel, see ISR. RELIGIOUS ACTION CTR., EXCLUDED, FOR GOD’S SAKE: GENDER SEGREGATION AND THE EXCLUSION OF WOMEN IN PUBLIC SPACE IN ISRAEL 19-27, 53-58 (2012), available at <http://www.irac.org/userfiles/gender-segregation-in-israel-2011.pdf>; Noya Rimalt, *Ha-Mishpat ke-Sokhen shel Rav Tarbutiut: Al Utopia u-Metsiut b’Parashat ha-Hafrada ba-Otobussim [Law as an Agent of Multiculturalism: Gender Segregation in Public Transportation Between Utopia and Reality]*, 42 MISHPATIM 773, 773 (2012) (arguing that the Israeli Supreme Court’s Ragen decision does not accurately address the cause of gender segregation on public buses); Zvi Triger, *Hafrada bein Gvarim l’Nashim ke-Hatrada Minit [Segregation of Men and Women as Sexual Harassment]*, 35 TEL AVIV U. L. REV. (forthcoming 2013) (detailing the harassment suffered by women who refuse to sit at the back of public buses).

<sup>19</sup> For reporting on sidewalk segregation in New York, see Naomi Zeveloff, *Sex-Segregation Spreads Among Orthodox: Buses, Public Sidewalks and Streets Split Between Men and Women*, JEWISH DAILY FORWARD, (Oct. 28, 2011), <http://forward.com/articles/144987/sex-segregation-spreads-among-orthodox/>. For reporting on sidewalk segregation in Israel, see Amy Teibel, *Gender Segregation on Rise in Israel*, GUARDIAN (Nov. 8, 2011), <http://www.guardian.co.uk/world/feedarticle/9935664> (“In some areas women have been shunted onto separate sidewalks, and buses and health clinics have been gender-segregated.”).

<sup>20</sup> See Neta Alexander, *The Hottest Party in Brooklyn for Orthodox Jews*, HAARETZ (Aug. 16, 2012, 3:46 PM), <http://www.haaretz.com/weekend/magazine/the-hottest-party-in-brooklyn-for-orthodox-new-york-jews-1.458781>; Allison Kaplan Sommer, *Silencing Girl Scouts: Women’s Singing Controversy Erupts Again*, HAARETZ (May 15, 2012, 6:53 PM), <http://www.haaretz.com/blogs/routine-emergencies/silencing-girl-scouts-women-s-singing-controversy-erupts-again-1.430673>.

communal prayer at the Western Wall in Jerusalem is yet another example.<sup>21</sup> Women's organizations committed to gender equality have been active, litigating under the secular law and using techniques of social movements and social media to combat these trends.<sup>22</sup>

In both the United States and Israel, secular law enters the picture if the government is involved in the segregation, or if the private entity is a "public accommodation."<sup>23</sup> One therefore encounters a three-dimensional interaction: between Jewish law and secular law, between versions of Jewish law itself, and between U.S. law and Israeli law.<sup>24</sup> Women who feel harmed by restrictive Orthodox rules may take one or all of the following steps: (1) offer the Orthodox leadership a more accommodating interpretation of Jewish law and hope they accept such interpretation; (2) apply the techniques of social movements to persuade both the Orthodox community and the larger public that gender-based discrimination is wrong;<sup>25</sup> and (3) appeal to the secular judicial system for redress of grievances through litigation.

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<sup>21</sup> See Pnina Lahav, *The Woes of WoW: The Women of the Wall as a Religious Social Movement and as Metaphor*, in RELIGION, CONFLICT & PEACE MAKING: SEEKING WISDOM IN INTERDISCIPLINARY DIALOGUE (John Berthrong ed., forthcoming 2013).

<sup>22</sup> At the forefront of the struggle in Israel is the Israel Action Religious Center (IRAC), whose mission includes "[o]ppos[ing] gender segregation and the exclusion of women from the public sphere." *Mission*, ISR. RELIGIOUS ACTION CTR., <http://www.irac.org/mission.aspx> (last visited Feb. 26, 2013). This organization is largely sponsored and is actively supported by the Jewish Reform Movement in the United States. See *Our Affiliates*, ISR. RELIGIOUS ACTION CTR., <http://www.irac.org/MovementPartners.aspx> (last visited Feb. 26, 2013).

<sup>23</sup> For an example of law prohibiting segregation in Israel, see Prohibition of Discrimination with Products, Services and Entry to Places of Entertainment and Public Places Law, 5761-2000, SH No. 1765 p. 58 (Isr.), as amended by SH No. 1995 p. 332, and SH No. 2293 p. 784. For an example of law prohibiting segregation in public accommodations "on the ground of race, color, religion, or national origin" in the United States, see Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243 (codified as amended at 42 U.S.C. § 2000a (2006)).

<sup>24</sup> A good example is the struggle within Jewish law on the question whether women are allowed to hold a communal (as distinct from private) prayer. A book recently published by JOFA includes articles supporting the legality of communal prayer, as well as articles rejecting its validity. See, e.g., Shlomo Riskin, *Torah Aliyyot for Women*, in WOMEN AND MEN IN COMMUNAL PRAYER: HALAKHIC PERSPECTIVES 361 (Chaim Trachtman ed., 2010). The fact that JOFA, dedicated as it is to egalitarian feminism, included articles opposed to this principle testifies to the tremendous pressures experienced by JOFA to hold the "traditional" point of view in great respect and deference.

<sup>25</sup> JOFA's work and IRAC's newsletter (surveying both public action and litigation) are examples of using social movements to try to alter Orthodox and greater public opinion about gender discrimination. See *History*, JOFA, <http://www.jofa.org/history> (last visited Feb. 26, 2013); *The Pluralist Newsletter*, ISR. RELIGIOUS ACTION CTR., <http://www.irac.org/newsletters.aspx> (last visited Feb. 26, 2013). Modern technological tools enable wide dissemination and participation in the fight against gender segregation. See, e.g., BeitShemeshWomen, *Official Bet Shemesh Women Flashmob*, YOUTUBE (Jan. 8, 2012), <http://www.youtube.com/watch?v=...>

The fact that the Orthodox campaign against the secular conception of gender and gender equality has intensified in the twenty-first century indicates that Orthodox men are determined to fight and use considerable political capital in order to maintain (or restore) the status quo ante.<sup>26</sup> The end of men is not in sight. Men as we used to know them, by which I mean men who adhere to patriarchal notions of gender roles, are very much alive and kicking, and one can easily, if not comfortably, state that the light at the end of this tunnel is very dim indeed.

This is a global problem. It takes place in every country with a Jewish community. In the United States, segregationist tendencies are resisted through the principle of the separation of church and state.<sup>27</sup> In the State of Israel, where the separation of church and state is a porous notion, deference to the rabbinical authorities derives from both statutes and the caselaw.<sup>28</sup> Nevertheless, there are many channels of communication between Israel and the United States on this matter, through which attempts are made to invigorate and sustain various ideologies and principles in the “sister” Jewish community. These channels include: (1) communication and influence between Orthodox establishments in both countries, with Orthodox rabbis sometimes competing to demonstrate their devotion to Jewish law through ever tighter rules concerning gender segregation; (2) communication between progressive Orthodox feminist organizations attempting to support and empower each other in their quest for equality under Jewish law; (3) communication between Reform or Conservative organizations in the United States and Israeli entities seeking to empower and encourage the quest for gender equality in Israel; and (4) communication between civil organizations in the United States and equivalent organizations in Israel trying to empower civil society in Israel and strengthen the constitutional principle of the separation of church and state.<sup>29</sup>

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[p://www.youtube.com/watch?v=pZd0kLWP01c](http://www.youtube.com/watch?v=pZd0kLWP01c) (posting a video of a “flash mob” to fight gender segregation, with more than 190,000 views). Social-movement techniques may also result in legislation, as is evident from the history of the Civil Rights Movement. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 360-63 (2004).

<sup>26</sup> See ELANA MARYLES SZTOKMAN, THE MEN’S SECTION: ORTHODOX JEWISH MEN IN AN EGALITARIAN WORLD 196-97 (2011).

<sup>27</sup> Cf. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 690 (1994) (holding that an act creating a separate school district along the boundaries of a religious community violated the Establishment Clause because it was “tantamount to an allocation of political power on a religious criterion and neither presuppose[d] nor require[d] governmental impartiality toward religion”). But the campaign against the right of access to abortion certainly has a religious core. From this perspective one is witness to the influence of religious law on the constitutional law of the United States. See MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 180-222 (2003).

<sup>28</sup> See MAUTNER, *supra* note 9, at 44-47.

<sup>29</sup> The Association for Civil Rights in Israel (ACRI) is one such organization. See *Women’s Rights*, ACRI, <http://www.acri.org.il/en/category/the-right-to-equality/women/>

One explanation for this development is the rise of global fundamentalism.<sup>30</sup> Religion has returned to the public square, and with it comes a rejection of the understanding of gender as socially constructed and a return to the idea of innate sex roles.<sup>31</sup> Another explanation is the infiltration of secular norms into Orthodox culture, which is also the fruit of globalization. When Orthodox men go to work or when they are exposed to media networks, they encounter the secular world and internalize some of its ways and insights, whether they like it or not. As these men experience the secular culture of work (rather than spend their time studying rabbinic texts), they tend to focus on women as possible corrupting agents of change.<sup>32</sup> This last explanation typically comes with a call to the religious community to refrain from radical changes. It goes like this: “Let us first concern ourselves with integrating the Orthodox man into the secular economy. Upsetting the entire cart may backfire. Women should remain segregated and perform their traditional roles. Later, slowly and patiently, the recognition of women’s equality will emerge.”

Israeli secular law has developed conflicting policy tracks. Israel’s Declaration of Independence guarantees gender equality,<sup>33</sup> but the Knesset has resisted all efforts to legislate the norm of equality into statutory law,<sup>34</sup>

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(last visited Feb. 26, 2013). Another is the New Israel Fund. See *Working for Women’s Rights*, NEW ISRAEL FUND, <http://www.nif.org/issue-areas/womens-rights> (last visited Feb. 26, 2013).

<sup>30</sup> See Michael O. Emerson & David Hartman, *The Rise of Religious Fundamentalism*, 32 ANN. REV. SOC. 127, 128 (2006) (“Far from disappearing, religion and religious movements appear to be resurging around the globe. . . . These movements have political influence.”).

<sup>31</sup> See *id.* at 135.

<sup>32</sup> This phenomenon is particularly visible in Israel’s military, where the progress made in integrating women into combat roles is threatened by the absorption of religious soldiers. Many of these male soldiers have adopted (probably following their rabbis) the “no touch rule,” which prompts them to rebel against military scenarios where a woman (say, a combat instructor) approaches to touch them. See Shani Boianjiu, Op-Ed., *What Happens When the Two Israels Meet*, N.Y. TIMES, Sept. 9, 2012, at SR8.

<sup>33</sup> Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3, 4 (1948), translation available at *Declaration of the Establishment of the State of Israel*, ISR. MINISTRY FOREIGN AFF., <http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Establishment%20of%20State%20of%20Israel> (last visited Feb. 26, 2013) (declaring that the State of Israel “will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex”).

<sup>34</sup> An important exception is a 1950s statute that provides a certain measure of gender equality. Women’s Equal Rights Law, 5711-1951, 5 LSI 171, § 1 (1950-1951) (Isr.) (“A man and a woman shall have equal status with regard to any legal proceeding . . .”). Because the reach of gender equality does not extend into areas governed by religious law, gross inequalities remain. *Id.* § 5 (“This Law shall not affect any legal prohibition or permission relating to marriage or divorce.”); see also Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That*

primarily out of fear that if gender equality is recognized it will unleash yet another crisis with the Orthodox camp.<sup>35</sup> Among the judiciary, some judges insist on the fundamental principle of gender equality entrenched in Israeli decisional law.<sup>36</sup> Other judges voice empathy, even sympathy, for the Orthodox and a willingness to accommodate their needs.<sup>37</sup>

These conflicts beg the following questions: If one is committed to gender equality, which should be the better policy to adopt? Should we insist on neutral principles, or should we profess pragmatism? Is it wiser to seek gender equality across the board, thereby applying neutral principles, or should we allow for pockets of discrimination and segregation within the polity in the hope that they will disappear over time?

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*Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 171 (2003) (“The Women’s Equal Rights Law sets out the principle of gender equality in all areas of life. However, the law specifically states that religious laws, which in Israel govern all matters of marriage and divorce, will not be subject to the principle of gender equality. This provision was needed precisely because the religious laws of marriage and divorce blatantly discriminate against women.”); *cf.* Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139, § 2 (1952-1953) (Isr.) (requiring that all marriages and divorces in Israel be conducted according to Jewish law). Similarly, Orthodox women are exempt from mandatory military service. *See* RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 156 (2004); NOYA RIMALT, HA-FEMINISM HA-MISHPATI MI-TEORYA L’MAASAE: HA-MAAVAK L’SHIVYON BEIN HA-MINIM B’YISRAEL U-VE-ARTZOT HA-BRIT [LEGAL FEMINISM FROM THEORY TO PRACTICE: THE STRUGGLE FOR GENDER EQUALITY IN ISRAEL AND IN THE UNITED STATES] 129-58 (2008).

<sup>35</sup> *See* Frances Raday, *Al Shivyon [On Equality]*, in MA’AMAD HA-ISHA BA-CHEVRA U-VA-MISHPAT [WOMEN’S STATUS IN ISRAELI LAW AND SOCIETY] 19, 32-33 (1995).

<sup>36</sup> Judge Amit Cohen is one such example. *See* File No. 33424-02-12 Small Claims Court (Be’er-Sheva), *Davidian v. Chevra Kadisha of Ofakim* (June 15, 2012), Psakdin Legal Database (by subscription) (Isr.).

<sup>37</sup> *See, e.g.*, HCJ 4128/00 *Dir. Gen. of the Prime Minister Office v. Hoffman* 57(3) PD 289, 318-20, 336 [2003] (Isr.) (holding in a five-to-four vote that the government must provide the organization Women of the Wall a suitable communal prayer area adjacent to the Western Wall, and holding in a seven-to-two vote that the Women of the Wall may pray at the Western Wall if the government fails to make such arrangements within one year). Among the five men in the five-to-four majority, two (Justices Englard and Turkel) were Orthodox men. *See* Frances Raday, *Women’s Human Rights: Dichotomy Between Religion and Secularism in Israel*, in ISRAELI DEMOCRACY AT THE CROSSROADS 86 (Raphael Cohen-Almagor ed., 2005) (describing Justices Englard and Turkel as “the religious justices on the court”). Their satisfaction at the victory of the Orthodox stance against women’s communal prayer was quite apparent in their concurring opinions. *See Hoffman*, 57(3) PD at 328-36 (Englard, J., concurring); *id.* at 322-28 (Turkel, J., concurring). In his opening paragraph, Justice Englard complained that the court did not address the charge that petitioners were provocatrices who were fighting an ideological war. *Id.* at 328 (Englard, J., concurring). Quoting the prophet Zacharia, Justice Turkel opined that allowing the Women of the Wall to pray at Robinson’s Arch instead of the Western Wall amounted to “law and peace.” *Id.* at 327 (Turkel, J., concurring).



The story of the Women of the Wall presents an example of the Israeli government's allowing gender segregation in public. The "Wall" in the organization's name refers to the Western Wall in Jerusalem, sacred to Jews in both Israel and the Diaspora.<sup>38</sup> Until April 2013 prayer at the women's section at the Wall plaza was prohibited to Orthodox Jewish women (Israelis as well as tourists from other countries) if they wanted to pray as a group.<sup>39</sup> Women were only allowed to pray as individuals.<sup>40</sup> If they wished to pray as a group, wear a *tallit* (Jewish prayer shawl), or raise their voice in prayer, they had to go elsewhere, to a place called "the Robinson Arch," technically a part of the Wall but remote from it.<sup>41</sup> These women face detention and criminal prosecution for "breach of the peace" every time they appear at the Wall plaza itself.<sup>42</sup> For them, the idea of the "end of men" was a joke. Power was firmly in the hands of men: the Minister of Justice, the Rabbi of the Wall, the police – all collaborating to intimidate these women into silence and obedience through the power of the secular positive law.<sup>43</sup>

Lest the reader think that the phenomenon of the Women of the Wall is *sui generis*, another story, this one concerning the right of women to participate in the public act of mourning the death of their dear ones, is illustrative. Like many other stories, it took place well into the twenty-first century. It raises the following question: Is the Jewish funeral a space where grieving women may participate with equality and dignity? For example, may a woman deliver a eulogy? And during the funeral and burial, must men and women be segregated, or may they mix? Should women walk humbly at the back of the funeral procession, or may they walk alongside the body of the deceased?<sup>44</sup> Even though rabbinical authorities have differed on the subject, Jewish custom

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<sup>38</sup> The organization advocates for the "right, as women, to wear prayer shawls, pray and read from the Torah collectively and out loud at the Western Wall." *Mission Statement*, WOMEN OF THE WALL, <http://womenofthewall.org.il/about/mission-statement/> (last visited Feb. 26, 2013).

<sup>39</sup> See Regulation for the Preservation of Jewish Holy Sites § 2(a)(1a), 1981, KT 4252, 1212, as amended by KT 5237, 190 (Isr.); *History*, WOMEN OF THE WALL, <http://womenofthewall.org.il/about/history/> (last visited Feb. 26, 2013) (stating that the amended regulation "prohibit[s] any religious ceremony at a holy place that is not in accordance with the custom of the holy site and which offends the sensitivities of the worshipers at the place").

<sup>40</sup> *Hoffman*, 57(3) PD at 318-20.

<sup>41</sup> *Id.*

<sup>42</sup> Andrew Esensten et al., *Four Women of the Wall Arrested amid 'Escalation of Restrictions' on Jewish Women's Rights*, HAARETZ (Dec. 15, 2012, 12:33 PM), <http://www.haaretz.com/jewish-world/jewish-world-news/four-women-of-the-wall-arrested-amid-escalation-of-restrictions-on-jewish-women-s-rights.premium-1.484966>.

<sup>43</sup> For changes introduced in April 2013, see *infra* Postscript.

<sup>44</sup> Typically, Jews bury their dead without a coffin. The body of the deceased is covered with a shroud and carried on a stretcher to the grave. Peter Knobel, *Burial*, in THE OXFORD DICTIONARY OF THE JEWISH RELIGION, *supra* note 2, at 143; Peter Knobel, *Funeral Service*, in THE OXFORD DICTIONARY OF THE JEWISH RELIGION, *supra* note 2, at 261-62.

and tradition, dating back to the Middle Ages, permits gender-based segregation and prohibits women from taking an active part in the funeral.<sup>45</sup>

Rosit Davidian had seven brothers and sisters.<sup>46</sup> When her father died in late August 2011, her family expected her to deliver the eulogy, and she prepared one to be read at the cemetery.<sup>47</sup> According to her brother Oz, she was the dominant sibling in the family and its spokesperson.<sup>48</sup> Rosit's father lived in the small town of Ofakim in the south of Israel, and his funeral took place there on September 1, 2011.<sup>49</sup> When the family arrived at the cemetery, the officiating rabbi informed them that Rosit could not deliver the eulogy.<sup>50</sup> Even though Rosit's brothers and other family members urged the rabbi to let her deliver her text, he refused.<sup>51</sup> He offered to read her eulogy himself, but Rosit did not wish for anyone else to read her own words to her father as she was bidding him farewell.<sup>52</sup> An argument ensued, but the rabbi was adamant, and grieving Rosit had no choice but to defer.<sup>53</sup> There was more. At the area designated for giving eulogies, the rabbi ordered the women to sit at the back, far from the father's body.<sup>54</sup> The rabbi himself eulogized the dead father, and then the cortege proceeded to the grave.<sup>55</sup> The women were instructed to walk at the back of the procession.<sup>56</sup> In 2011 Rosit did not get the comfort of participating in her father's funeral in a meaningful and dignified way. Men insisted on pursuing a Jewish custom and, despite Rosit's efforts, their opinion prevailed.

It is useful to focus on the violence embedded in the story before addressing the confrontation between secular and religious law. The rabbi who conducted the funeral was either an employee or a volunteer working for the *chevra kadisha* (burial society).<sup>57</sup> He was following the Jewish custom with which he

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<sup>45</sup> See MILLEN, *supra* note 6, at 143.

<sup>46</sup> Complaint ¶ 3, File No. 33424-02-12 Small Claims Court (Be'er-Sheva), Davidian v. Chevra Kadisha of Ofakim (Feb. 2012) (Isr.) (on file with author).

<sup>47</sup> *Id.* ¶ 1.

<sup>48</sup> *Davidian*, File No. 33424-02-12, ¶ 13.

<sup>49</sup> Complaint, *supra* note 46, ¶ 2.

<sup>50</sup> *Id.* ¶¶ 4, 5.

<sup>51</sup> *Id.* ¶ 5.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ¶ 6.

<sup>54</sup> *Id.* ¶ 3.

<sup>55</sup> *Id.* ¶ 7.

<sup>56</sup> *Id.*

<sup>57</sup> The burial society claimed that the rabbi was not its employee but a volunteer. File No. 33424-02-12 Small Claims Court (Be'er-Sheva), Davidian v. Chevra Kadisha of Ofakim, ¶ 8 (June 15, 2012), Psakdin Legal Database (by subscription) (Isr.). Still, the burial society agreed to take responsibility for his actions. *Id.* ¶ 15. The burial society must have been aware that a memorandum from the Ministry of Religions included instructions to burial societies to observe gender equality in the process of a funeral unless the parties wished otherwise. Complaint, *supra* note 46, ¶ 19.

was familiar, a custom that has regulated Jewish funerals since long before this particular funeral took place and one that may be observed in countless other Jewish cemeteries around the world. The rabbi seems to have understood very well that Rosit was challenging that custom, and he was determined not to allow her to get her way. Even though Rosit and her family outnumbered him, he was not alone; by virtue of his authority and power, he managed to prevail. There was violence in his insistence on conducting the ritual in his way – not physical violence, but certainly emotional violence. He had an obvious weapon. He could refuse to perform the ceremony and abort the burial, a quite horrifying scenario when the body of your dear one is lying before you. He exploited a situation in which a grieving group of people was dependent upon him to bury the dead father. He humiliated and shamed Rosit when he publicly asked the deceased to forgive the commotion at the cemetery, implying that the daughter's disrespectful behavior caused that commotion.<sup>58</sup> By designating her as a provocatress, he was opening an abyss between her and her father, at the very moment that she came to bury him. Such acts of violence and humiliation show that to this day men like this rabbi will do anything to preserve the status quo as they know it.

Secular Israeli law provides relief for persons like Rosit. It prohibits discrimination in public accommodations.<sup>59</sup> It does not lend dignity to the rabbi's position. Rosit sued in small claims court. Her brother testified on her behalf.<sup>60</sup> Another witness testified that she, too, experienced segregation during the funeral of her grandmother at the same cemetery.<sup>61</sup> Rosit's complaint related that women family members were excluded from burial ceremonies on many other occasions.<sup>62</sup> Judge Amit Cohen (a male judge) of

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<sup>58</sup> See Reply ¶ 6, *Davidian*, File No. 33424-02-12 (Apr. 2012) (on file with author).

<sup>59</sup> Prohibition of Discrimination with Products, Services and Entry to Places of Entertainment and Public Places Law § 3(a), 5761-2000, SH No. 1765 p. 58 (Isr.), as amended by SH No. 1995 p. 332, and SH No. 2293 p. 784, *translation available at* [http://www.financeisrael.mof.gov.il/FinanceIsrael/Docs/En/legislation/LaborSocialPolicy/5761-2000\\_Prohibition\\_of\\_Discrimination\\_with\\_Products\\_Ser.pdf](http://www.financeisrael.mof.gov.il/FinanceIsrael/Docs/En/legislation/LaborSocialPolicy/5761-2000_Prohibition_of_Discrimination_with_Products_Ser.pdf). Nevertheless, the law provides for exceptions; for example, segregation based on the actual preference of the parties involved is not deemed discrimination. *See id.* § 3(d). In this spirit the Supreme Court opined that the preference for gender-based segregation of an entire group (for example, a religious group) should be respected. HJC 746/07 Ragen v. Ministry of Transp., ¶¶ 8, 22 (Jan. 5, 2011) (Isr.), *translation available at* [http://elyon1.court.gov.il/files\\_eng/07/460/007/t38/07007460.t38.pdf](http://elyon1.court.gov.il/files_eng/07/460/007/t38/07007460.t38.pdf). The Court did not find, however, that gender-based segregation in buses was voluntary or that it reflected the preference of the women passengers. *Id.* ¶¶ 28-30. By analogy, one may theorize that certain religious groups would prefer to segregate the sexes during funerals, but this certainly did not occur in Rosit's case.

<sup>60</sup> *Davidian*, File No. 33424-02-12, ¶ 11.

<sup>61</sup> *Id.* ¶ 14.

<sup>62</sup> Complaint, *supra* note 46, ¶ 10.

the Be'er Sheva Small Claims Court ruled in Rosit's favor and ordered the burial society to pay her the equivalent of \$8500.<sup>63</sup>

Now to the end of men. There are many men in this story. Some fight for the survival of male supremacy: the rabbi who officiated at the funeral; presumably several of those in attendance; other rabbis who urge adherence to the customary rules that segregate women; and many in the government-run burial society. They are fighting for what they sincerely believe is the sacred law, but they are also fighting for their way of life, the way their ancestors lived, and the world they have known. This is no small matter. They feel the threat from the rising tide of women's claims for equality, and they resent women's invasion into their territory. There is a mix here of indignation on account of the threat to one's status in society and taking offense at seeing a *halachic* rule being challenged. In short, these men are fighting for their status and their power, but they are able to give their struggle the appearance of a fight for the rule of religious law.

The defendant in this case, the burial society (made up of only men), reflected awareness of the changing times. They understood that there was an egalitarian interpretation of Jewish law that would not support segregation. They also understood that Israeli positive law prohibited segregation. Therefore, in their answer, they denied that segregation was their practice.<sup>64</sup> Rather, they argued that what happened to Rosit was an aberration, an exception.<sup>65</sup> They flagged the principle of multiculturalism embedded in the law, stating that in each case the preference of the family should prevail.<sup>66</sup> If the family wanted segregation, the rabbi would segregate, and if the family wanted integration, the rabbi would abide. There is a sliver of light in this argument. It accepts equality, provided that this is the preference of the parties. But anyone loyal to the principle of gender equality should beware of this argument. If women – either because they are convinced that this is God's law, or because they fear revenge or feel pressure to comply – opt for segregation, then segregation will remain entrenched. Surely this approach, even though it contains a grain of fairness, does not signal the end of men. In Rosit's case, the court found that the burial society misrepresented the facts. Implicit in the court's warning to the burial society to verify, in the future, that all who administer funerals be apprised of the injunction to avoid segregation is the court's understanding that hitherto segregation was the norm, not the exception.<sup>67</sup>

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<sup>63</sup> *Davidian*, File No. 33424-02-12, ¶¶ 27-28 (awarding 31,900 NIS in damages and 1000 NIS in attorney's fees). The exchange rate at the time of the judgment was 3.87 NIS to one U.S. dollar.

<sup>64</sup> Answer ¶ 2, *Davidian*, File No. 33424-02-12 (Mar. 19, 2012) (on file with author).

<sup>65</sup> *Id.* ¶ 7.

<sup>66</sup> *Id.* ¶ 2.

<sup>67</sup> See *Davidian*, File No. 33424-02-12, ¶¶ 22, 26.

The burial society made another familiar argument in its defense: that Rosit was simply riding the “recent wave of media attention to gender-based segregation and was slandering the reputation of the Burial Society.”<sup>68</sup> The accusation of slander is familiar – it is an age-old technique to chill dissent, which shrouds hostility in righteousness. It echoes the technique used against civil rights leaders and their media supporters in the landmark U.S. case, *New York Times Co. v. Sullivan*.<sup>69</sup> The attempt to stigmatize the dissenter as a “defamer” is well known. Designating a person as one who “rides a wave of media coverage” is also a familiar tactic. From the perspective of the end of men, the defendant’s argument reveals an attempt to put down women: they are mindlessly riding a popular wave, not insisting on principle; they engage in vulgar slandering. In Rosit’s case, the court ignored these arguments.<sup>70</sup> The court’s clear statement that Israeli law was violated amounts to a silent rejection of both arguments.<sup>71</sup> Rosit had a legal right not to be segregated, and it follows that she could also, if she wanted, make use of the media to amplify her right.

What is playing out here is a battle within civil society. The defendants feel that the tide is against them and they blame the media. Still, because they know that the secular positive law may not support them, they no longer insist on the validity of custom across the board. They simply argue that the plaintiff was not speaking the truth and that, in fact, they did allow choice.

On the other hand, the judge, also a man, represents positive Israeli law. He belongs to a group of Israeli judges, both men and women, who accept their obligation to award full damages and costs against the public entities that discriminate. In the camp of the male judge stood Rosit’s brothers and uncles, but presumably also her dead father, who must have raised his daughter to be assertive and outspoken, and who was deprived of the opportunity to have her eulogize him on his last journey.

Another group of stakeholders in this battle is the nongovernmental organizations. In this particular case, Rosit was assisted by an excellent attorney from the Israeli Religious Action Center (IRAC), who argued on her behalf.<sup>72</sup> IRAC is a progressive organization that fights for an egalitarian

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<sup>68</sup> Answer, *supra* note 64, ¶ 4 (author’s translation).

<sup>69</sup> 376 U.S. 254 (1964). The U.S. Supreme Court understood well the danger that defamation law might be used to crush the Civil Rights Movement and provided protection to the press in covering controversial events. *See id.* at 292; ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 143-49 (1991) (describing the protection afforded to the press and the higher standard required to prove libel in Justice Brennan’s majority opinion in *Sullivan*).

<sup>70</sup> *See Davidian*, File No. 33424-02-12, ¶¶ 17-22 (laying out the rationale for the court’s decision).

<sup>71</sup> *Id.* ¶¶ 18, 22.

<sup>72</sup> ISR. RELIGIOUS ACTION CTR., WOMEN TALK ABOUT SEGREGATION IN ISRAEL: THIRTEEN WOMEN ON DISCRIMINATION IN THE PUBLIC SPHERE 11 (2012), available at <http://www.irac.org/userfiles/women-talk-about-segregation-in-israel.pdf>.

Israeli society.<sup>73</sup> This is interesting for several reasons. First, IRAC – whose director, Anat Hoffman, also leads the struggle for the right of freedom of worship of the Women of the Wall – is engaged in the campaign against segregation in public transportation.<sup>74</sup> IRAC is largely supported by the Reform movement in the United States.<sup>75</sup> One sees here both an American (Jewish) involvement in the shaping of Israeli civic culture and a permutation of the centuries-old struggle between the Orthodox and the Reform movements in Judaism.<sup>76</sup> The American fingerprints also show in another aspect of this battle: the attorney who argued on behalf of Rosit, who is leading a litigation campaign to bring cases of segregation and discrimination before the courts, was trained in the United States.<sup>77</sup> The male judge and the female attorney in Rosit’s case collaborated in applying the positive law to defend equality. They stood against an Orthodox establishment, made up of both men and women, who insisted that traditional custom and ways of interpreting Jewish law should not be changed.

The Orthodox establishment and the patriarchal principles to which they adhere are not defended by men alone. Women, too, are willing to go on the barricades in defense of this position.<sup>78</sup> A similar situation is discernible in the United States with regard to those in the religious sector who oppose abortion. Of course, there will be no end of men as long as women support the

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<sup>73</sup> See *supra* note 22.

<sup>74</sup> Joshua Mitnick, *From Back of the Bus, Israeli Women Fight Segregation*, WALL ST. J. (Jan. 5, 2012), <http://online.wsj.com/article/SB10001424052970204368104577136253309226604.html> (“As the number of segregated bus lines grew into the dozens and complaints emerged, the liberal Israel Religious Action Center, an affiliate of the U.S. Reform Jewish movement, petitioned the Supreme Court [of Israel] to ban segregation on buses.”).

<sup>75</sup> See *supra* note 22.

<sup>76</sup> See JONATHAN D. SARNA, *AMERICAN JUDAISM: A HISTORY* 135-207 (2004).

<sup>77</sup> In addition to having been trained in Israel, attorney Orly Erez-Likhovsky holds an LL.M. from Columbia Law School – where she studied human rights and civil rights jurisprudence – and passed the New York State bar examination. See David Segal, *Meet the Staff: Attorney Orly Erez-Likhovski*, RELIGIOUS ACTION CENTER OF REFORM JUDAISM, [http://rac.org/advocacy/specialresources/archive/irac/enewsletters/april\\_monthly\\_2006/orly\\_profile/](http://rac.org/advocacy/specialresources/archive/irac/enewsletters/april_monthly_2006/orly_profile/) (last visited Feb. 26, 2013). For an analysis of the links between the American and Israeli legal establishments, see Pnina Lahav, *American Moments: When, How, and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools?*, 10 THEORETICAL INQUIRIES L. 653, 692 (2009).

<sup>78</sup> See, e.g., Jeremy Sharon, *MKs Slam Colleagues Who Joined Women of the Wall*, JERUSALEM POST (Mar. 12, 2013, 5:25 PM), <http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=306192> (“Several [members of the Knesset], including Aliza Lavie of Yesh Atid, have criticized the participation of their Knesset colleagues in Tuesday’s Women of the Wall prayer service at the Western Wall.”). Aliza Lavie is the editor of a book on women’s prayers, but her worldview confines women to private prayer. Cf. *A JEWISH WOMAN’S PRAYER BOOK*, at xvii-xxvi (Aliza Lavie ed., 2008).

hegemony of the male order, or as long as they resist seeing that this hegemony is socially constructed rather than ordained by God.

In countries where the separation of church and state is unstable, as in Israel, the secular law is less immune to change. Moreover, progress is not linear. Israel does not have a constitution.<sup>79</sup> It does recognize the principle of gender equality, and this principle is even a part of Israel's Declaration of Independence.<sup>80</sup> The jurisprudence of the Supreme Court has, by and large, supported equality.<sup>81</sup> But this may change.

The religious establishment in Israel has considerable power. It has parties represented in the Knesset and ministers in the Cabinet. If the religious establishment comes to feel too threatened by the rising tide in favor of gender equality in the religious arena, it may well flex its muscle and pressure the cabinet and the Knesset to amend the statutory law. This may be justified as a measure to protect "the State of Israel as a Jewish and democratic state"<sup>82</sup> or to protect minorities whose feelings are offended when the age-old rituals are not followed. If the statutory laws were to change in ways denying women equality, would the courts stand guard and declare such amendments invalid? Not necessarily. The American experience may illuminate our march through the tunnel. Israel's courts, like U.S. courts, have been known to accommodate serious political pressures.<sup>83</sup> Moreover, the composition of the courts may change. Slow but persistent appointment of judges who support the patriarchal Orthodox establishment may eventually yield the desired fruit. One need only see how U.S. federal courts have changed since President Ronald Reagan took office, and how American constitutional law has transformed as a result.<sup>84</sup> Suffice it to say that a dwindling number of lower federal court judges in the United States still apply the progressive holding in *Lemon v. Kurtzman*,<sup>85</sup> a

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<sup>79</sup> Jeffrey M. Albert, *Constitutional Adjudication Without a Constitution: The Case of Israel*, 82 HARV. L. REV. 1245, 1245 (1969).

<sup>80</sup> See *supra* note 33.

<sup>81</sup> See MAUTNER, *supra* note 9, at 90-99.

<sup>82</sup> Basic Law: Human Dignity and Liberty § 1a, 5752-1992, SH No. 1391 p. 150, as amended by SH No. 1454 p. 90 (Isr.), translation available at [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) (last visited Mar. 24, 2013); Basic Law: Freedom of Occupation § 2, 5754-1994, SH No. 1454 p. 90 (Isr.), translation available at [http://www.knesset.gov.il/laws/special/eng/basic4\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic4_eng.htm) (last visited Mar. 24, 2013); see also Frances Raday, *D'yokano shel ha-Nassi Aharon Barak: Shivyon b'Medina Yehudit ve-Demokratit* [Profile of Chief Justice Aharon Barak: Equality in a Jewish and Democratic State], in SEFER BARAK: IYUNIM B'ASSIYATO HA-SHIPUTIT SHEL AHARON BARAK [THE JUDICIAL LEGACY OF AHARON BARAK] 225, 248-55 (Celia Fassberg et al. eds., 2009).

<sup>83</sup> The holding in *Hoffman* that the Women of the Wall cannot pray communally in front of the Western Wall is one such glaring example. See *supra* note 37.

<sup>84</sup> See Pamela S. Karlan, *The Supreme Court, 2011 Term – Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 10-11 (2012).

<sup>85</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (setting out a three-part test for assessing statutes' conformity to the Establishment Clause: "First, the statute must have a

strong precedent for the separation between church and state, while the U.S. Supreme Court has distanced itself from this holding,<sup>86</sup> and the time may come when that precedent is solidly abandoned.<sup>87</sup>

Against the rising fundamentalist tide, another movement is growing: religious feminism. Women have entered the field of Jewish law, challenged the traditional interpretations, and shown which religious traditions are not necessarily the command of God.<sup>88</sup> This movement has been nurtured by men – fathers, brothers, and husbands – who are well versed in Jewish law. Some are eminent rabbis themselves, who put their prestige and high position on the line and defend the right of their daughters, sisters, and wives to stand as created in the image of God, and therefore as equal under God.<sup>89</sup> With regard to the immediate case of burial rituals and the question of the legality of women's participation in them, some progress was made when prominent rabbis decreed that a woman may say *Kaddish*<sup>90</sup> for her parent, thereby removing the age-old prohibition on the recitation of the ancient prayer.<sup>91</sup> Rosit's case is instructive here. The burial society itself argued that it does not

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secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion'" (citation omitted)).

<sup>86</sup> See GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 671 (4th ed. 2012) ("The so-called *Lemon* test has not been formally repudiated by the Supreme Court. A majority of the justices sitting in 2011 have criticized it, and it has not been relied on by a majority to invalidate any practice since 1985.").

<sup>87</sup> Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 802 (2001) ("In *Lynch v. Donnelly*, 465 U.S. 668 (1984)], Chief Justice Burger's opinion effectively evaded the rigors of the three-part test of *Lemon*, also authored by Burger, and failed to put in its place a metric for evaluating government's religious speech."). The trajectory of the Supreme Court's abortion jurisprudence offers another example of this conservative shift. See Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915, 917-18 (2010) (arguing that *Gonzales v. Carhart* reveals that the undue burden standard of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which superseded the *Roe v. Wade* trimester framework, is "incapable of defending the abortion right from being diminished by incrementalist legislation").

<sup>88</sup> See TAMAR ROSS, *EXPANDING THE PALACE OF TORAH: ORTHODOXY AND FEMINISM* 184-87 (2004) (describing the potential for Orthodox women to read the language of the Torah through different eyes than their male counterparts and "to offer a unique theological contribution, in reconciling a feminist self-image with the notion of a divine Torah").

<sup>89</sup> See, e.g., Daniel Sperber, *Congregational Dignity and Human Dignity: Women and Public Torah Reading*, in *WOMEN AND MEN IN COMMUNAL PRAYER: HALAKHIC PERSPECTIVES*, *supra* note 24, at 27, 119.

<sup>90</sup> See *infra* note 98.

<sup>91</sup> For example, Orthodox Rabbi Ovadya Yosef decreed that a woman may say *Kaddish*, but only if she has no brothers, and only if she recites it at home, not in the synagogue. *Rav Ovadya Yosef: A Woman Can Recite Kaddish for Parents in a Minyan at Home*, VOZ IZ NEIAS?, <http://www.vosizneias.com/48303> (last visited Feb. 26, 2013).



practice gender discrimination.<sup>92</sup> That is progress. Judge Amit Cohen, ordering the burial society to pay damages, included in his opinion a very important instruction:

It should be hoped that the defendant will use due diligence in applying its [egalitarian] rules, will make sure that all the rabbis who represent it are familiar with this practice and follow it, and make sure that instances such as the one in this case will not repeat. The defendant should be mindful that it is not enough to issue instructions to the rabbis who officiate and that it must verify that these instructions are being followed.<sup>93</sup>

This strong language should serve as a model for future opinions. Judge Cohen explicitly instructed the burial society to verify that loyalty to the principle of egalitarianism is not only professed, but also applied. His explicit articulation of the legal burden on the burial society leaves no room for winks and nods. What unfolds in the decision is an interesting dialogue among men. Some may be feminists. Some are open to persuasion. Others may have to be dragged kicking and screaming to recognize the right to gender equality. But they do cross the lines and join the camp of women. This is not the end of men. This is the end of the patriarchal man and the birth of the egalitarian male.

The interaction between law, litigation, and social movements as manifested in Rosit's case seems to be the correct and wise approach to the problem of discrimination against women. Social movements should actively promote serious and substantive alternatives to the discriminatory religious law. They should bring their alternatives to the attention of the public and make every effort to persuade it that Jewish law need not be chauvinistic and gender based. The more successful they are, the more support they will get as they litigate or campaign for changes in the statutory law.

Instead of telling men that their end is near, supporters of women's equality should endeavor to persuade them that the options for which they advocate are legitimate and provide dignity and respect for men as well. Women have been harmed, and a correction (*tikkun*) is needed. But women cannot do it alone. Rosit needed Judge Amit Cohen to find that her complaint was just. Men must be full participants in this correction because it cannot and should not take place without them. After all, what did Rosit ask for? To eulogize her father, the paterfamilias.

Rosit's name is strikingly apropos for her story. Rosit is probably an attempt to hebraize the name Rose. In fact, she is known as Rosie among her family and friends. Her name calls to mind Rosie the Riveter and Rosa Parks.<sup>94</sup> This

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<sup>92</sup> See *supra* note 64 and accompanying text.

<sup>93</sup> File No. 33424-02-12 Small Claims Court (Be'er-Sheva), Davidian v. Chevra Kadisha of Ofakim, ¶ 26 (June 15, 2012), Psakdin Legal Database (by subscription) (Isr.) (author's translation).

<sup>94</sup> Rosa Parks is regularly invoked in Israel in conjunction with the campaign against bus segregation. See Tamar Rotem, *Israel's Real Rosa Parks Takes to the Buses*, HAARETZ

connection invites parallels between the United States and Israel. Both societies are fighting fundamentalism and the effort to return women to their “traditional” place. Without the Jewish component of the feminist movement in the United States, the Israeli Rosit would not have been aware of the idea that women, too, may eulogize their fathers. Without the support of the U.S. Jewish Reform Movement, IRAC would not have the means to defend her. Rosit lives near Ofakim, a small desert town, probably similar to small towns in Texas or Arizona.<sup>95</sup> It has a population of 27,000, thirty percent of which are ultra-Orthodox.<sup>96</sup> Ofakim means horizons, a name which lends a clue in this struggle for gender equality. Women and men need horizons to envision the possible. The male judge, Rosit’s brothers and uncles, some Israeli legislators – all men – opted for equality and solidarity. This is not a zero-sum game, but rather a game that needs wise balancing with eyes constantly on the prize – that all males and females are entitled to equality.

#### POSTSCRIPT

This Essay goes to press at a volatile time, when the struggle for gender equality in religious ritual is escalating and is likely to continue. It is worthwhile to focus on recent developments and bring the reader up to date. In early April 2013, the Jerusalem district police commander sent a letter to the Women of the Wall.<sup>97</sup> He informed them that the police would enforce the ban on women saying *Kaddish* and other prayers at the Western Wall.<sup>98</sup> Almost instantly, there followed an angry backlash by both Israeli and American public opinion.<sup>99</sup> The rabbi of the Western Wall quickly announced that he would not request the arrest of women who recite the *Kaddish*.<sup>100</sup> Beyond the quick reversal, one is witness to an unadulterated entanglement between

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(Dec. 23, 2011, 11:47 AM), <http://www.haaretz.com/weekend/week-s-end/israel-s-real-rosa-parks-takes-to-the-buses-1.403135>.

<sup>95</sup> See Ruth Sinai, *New Horizons for Ofakim*, HAARETZ (Nov. 2, 2008, 12:00 AM), <http://www.haaretz.com/print-edition/features/new-horizons-for-ofakim-1.256467> (describing the geography and conditions in Ofakim).

<sup>96</sup> See *Ofakim: Odot Ha-Ir 2012* [*Ofakim: City Presentation 2012*], CITY OF OFAKIM (Mar. 5, 2012), <http://www.ofaqim.muni.il/Sites/ofakim/content/File/Misc/ofaqim.pdf>; Sinai, *supra* note 95.

<sup>97</sup> Kobi Nachshoni, *Police Ban Kaddish by Women at Kotel*, YNETNEWS (Apr. 4, 2013, 2:38 PM), <http://www.ynetnews.com/articles/0,7340,L-4363969,00.html>.

<sup>98</sup> *Id.* The *Kaddish* is a prayer recited for the dead, but it also appears at the end of the prayer cycle. The text is identical.

<sup>99</sup> Debra Nussbaum Cohen, *Anger over Kotel Kaddish Ban Leads to Reversal*, JEWISH DAILY FORWARD SISTERHOOD BLOG (Apr. 4, 2013, 4:19 PM), <http://blogs.forward.com/sisterhood-blog/174300/anger-over-kotel-kaddish-ban-leads-to-reversal>.

<sup>100</sup> *Id.* Rosit Davidian herself did not go as far as requesting to recite the *Kaddish* at her father’s funeral but rather made a more humble and circumscribed request to deliver the eulogy for her dead father. See *supra* text accompanying notes 46-56.

religion and state. It appears as if the Ministry of Justice was taking its orders directly from the rabbi of the Western Wall, acting in his rabbinical capacity (interpreter of Jewish law), and transmitting them to the police commander who threatened to deploy the power of the secular police against the women.

The letter by the police commander tied the prohibition on the recitation of Kaddish to a general warning to the Women of the Wall to avoid both wearing prayer shawls and engaging in communal prayers at the site of the Wall or else they would be arrested and prosecuted for breach of the peace.<sup>101</sup> On April 11, 2013, following such communal prayer, five women were arrested and brought before a magistrate court judge for breaching the peace.<sup>102</sup> Representing the police, the state attorneys asked the judge to release the women on bail, provided that they agreed to avoid the site of the Wall for three months (and thereby refrain from praying there).<sup>103</sup> The judge (a woman) rejected the request and freed the women.<sup>104</sup> Upon viewing a videotape of the incident, she found that the provocations leading to the breach of the peace did not originate with the women but with the spectators.<sup>105</sup> If anyone was to blame, it was those who took action to prevent the women's prayer. The state appealed. On April 24, 2013, District Court Judge Moshe Sobel (a man) dismissed the appeal.<sup>106</sup> In a tightly written opinion of eight pages, devoid of rhetoric and rich in legal analysis, the court delivered a landmark opinion concerning the legal status of the controversy. The opinion consisted of three pathbreaking holdings. First, the district court upheld the finding of the magistrate court that the women detainees did not engage in any provocations.<sup>107</sup> Second, the court punctured the long-held belief that Israel's Supreme Court previously prohibited the women from praying at the site of the Wall.<sup>108</sup> Dissecting previous precedents with a sharp scalpel, the district court found no prohibition in the language of those precedents, and certainly nothing that would amount to a prohibition that

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<sup>101</sup> Nachshoni, *supra* note 97.

<sup>102</sup> Judy Maltz, *Jerusalem Police Detain Women at Western Wall for Wearing Tallits*, HAARETZ (Apr. 11, 2013, 2:54 PM), <http://www.haaretz.com/jewish-world/jewish-world-news/jerusalem-police-detain-women-at-western-wall-for-wearing-tallits.premium-1.514817>; see also Pnina Lahav, *Women of the Wall: A Temporary but Meaningful Milestone*, 'HAMISHPAT' ONLINE: HUMAN RIGHTS – INSIGHT INTO RECENT JUDGMENTS, 1 (June 2013), [http://www.colman.ac.il/research/research\\_institute/katedra\\_HumanRights/Psika/Documents/9/9\\_june\\_2013\\_3\\_Lahav\\_EN.pdf](http://www.colman.ac.il/research/research_institute/katedra_HumanRights/Psika/Documents/9/9_june_2013_3_Lahav_EN.pdf).

<sup>103</sup> File No. 23834-04-13 District Court (Jerusalem), ¶ 1, *State of Israel v. Ras* (Apr. 24, 2013), Takdin Legal Database (by subscription) (Isr.), *translation available at* [http://womenofthewall.org.il/wp-content/uploads/2012/06/Final-File\\_Women-of-the-Wall-Ruling\\_April-25-2013-2.pdf](http://womenofthewall.org.il/wp-content/uploads/2012/06/Final-File_Women-of-the-Wall-Ruling_April-25-2013-2.pdf) (describing the proceedings before the magistrate court).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* ¶ 3.

<sup>106</sup> *Id.* ¶ 10.

<sup>107</sup> *Id.* ¶ 9.

<sup>108</sup> *Id.* ¶ 7.

may permit a criminal sanction.<sup>109</sup> The court observed that the Supreme Court precedent ended with a recommendation to the government to construct an adjacent site (the Robinson Arch) where the Women of the Wall could pray.<sup>110</sup> If that site were indeed constructed, the district court observed, then the women could be expected to pray there; so far no such construction has been undertaken and therefore the question was moot.<sup>111</sup> It was a meticulous legal analysis, carefully separating the remedy (a recommendation to the government) from the right (to hold communal prayers). Third, the district court rejected the notion that the phrase “the custom of the holy site,” which appears in the regulations concerning the holy places,<sup>112</sup> is identical to the Orthodox custom of prayer that excludes women.<sup>113</sup> Again, relying on language from the three Supreme Court opinions addressing the issue, the district court held that those Supreme Court opinions could not be interpreted as holding that the women’s manner of prayer violated the custom of the holy site.<sup>114</sup> Without explicitly saying so, the district court implied that the communal prayer of women is as legitimate as other rites held at the site of the Western Wall, whether the Orthodox movement agreed with them or not. In doing so, the court tacitly accepted the women’s argument that because they have been conducting communal prayers for thirty years, their ritual has become a custom.<sup>115</sup> On May 6, 2013, the attorney general decided not to appeal the district court ruling.<sup>116</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (“If we note that the outcome of the Hoffman Additional Hearing was phrased in the manner of the stipulation, and in the absence of any determination by a court of law, at the time when the offenses attributed to the Respondents were committed, confirming that the Government had complied with the condition which was established in the Hoffman Additional Hearing, the ruling in question cannot be considered as an absolute order, which imposes a final and unequivocal order which is capable of giving rise to criminal liability for the breach thereof.”).

<sup>112</sup> *See supra* note 39.

<sup>113</sup> *Ras*, File No. 23834-04-13, ¶ 8. This, in fact, is the gist of the controversy, as the legal basis for the breach-of-the-peace allegations was the regulation issued by the rabbi of the Wall prohibiting a prayer at the site that does not conform to the “custom of the holy site.” *See supra* note 39.

<sup>114</sup> *Ras*, File No. 23834-04-13, ¶ 8.

<sup>115</sup> *See id.* The fourth, and equally significant, holding addressed criminal procedure and the propriety of tying release on bail to restrictions on freedom of movement. *Id.* ¶ 9. The court opined that Israeli law did not sanction prohibiting respondents from coming to the site of the Wall before trial. *Id.* Because it was clear that the women’s behavior did not endanger the public safety, there was no justification for requiring that they give their consent to a limitation on their freedom of movement before the state issued an indictment. *Id.* This was a condemnation of a practice that had been used by the police many times before.

<sup>116</sup> Kobi Nachshoni, *Sharansky: Kotel Equality in 10 Months*, YNETNEWS (May 7, 2013,

Context matters. As this postscript is being written, Israel's newly formed cabinet, following the 2013 elections, does not include any member of the religious parties. Moreover, the Minister of Justice is a secular woman. The Prime Minister, ever mindful of American public opinion, may wish to avoid further escalations lest Israel be seen as a clerical state oblivious to gender equality. And yet, even without political representation in the cabinet, the Orthodox camp in Israel is powerful and influential. The final step in this saga has not been taken. There may be an occasion for another essay.