

**THE WOES OF WoW:  
THE WOMEN OF THE WALL AS A RELIGIOUS SOCIAL MOVEMENT AND  
AS METAPHOR**

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## ***The Woes of WoW:***

***The Women of the Wall as a religious social movement and as metaphor\****  
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*On the first day of every lunar month [in Hebrew, Rosh Hodesh] at 7:30 in the morning, a small group of women assemble at the right hand corner of the entrance to the women's section of the Western Wall in Jerusalem.<sup>1</sup> They are the Women of the Wall (hereafter WoW). The first day of the lunar calendar is a sacred and festive day in Judaism, and the traffic of worshippers is heavy in both the men's and the women's sections. The WoW huddle together and sing the traditional hymns, which precede the prayer service. They then leave the Wall plaza and march down a path to a location known as "The Robinson Arch" where they unfurl a Torah Scroll, place it on a folding table, and begin the prayer service.*

*Back at the women's section of the Wall the women are watched carefully by the guards in charge of maintaining peace at the sacred site. They are also watched by vigilant orthodox women who come from all over Israel to celebrate the first of the month. There is a sense of foreboding and defiance in the WoW body language as they leave the Wall area. Only at the Robinson Arch does the mood begin to change, and one can hear the relief in their voices as well as the festive*

*joy of communal prayer. Why is this? Why are they watched carefully as if they were transgressors, and why do they pray elsewhere, as if they do not belong with the rest of the Jewish worshippers?*

*It turns out that Israeli law forbids them from praying as a group at the site of the Wall. At the Wall they may pray only as individuals. They are also forbidden from bringing their own Torah scroll into the women's section of the Wall. Any attempt to pray as a group or to bring in the Torah scroll is a criminal offense which may end in arrest, in police interrogation and in prosecution.<sup>2</sup>*

*The site of the Wall is governed by an Israeli statute related to the administration of the holy places. The statute vests in the minister of religions the power to regulate the Wall. The minister in turn created a position called "the Rabbi of the Wall", and endowed the Rabbi with the authority to administer the place. Israeli criminal law does not directly prohibit WoW to hold collective prayers at the Wall. But over two decades ago, the Rabbi of the Wall issued a regulation prohibiting any prayer that is not "in keeping" with Jewish custom (minhag hamakom).<sup>3</sup> Orthodox Judaism interprets "custom" to mean that only men can congregate in communal prayer; therefore traditional orthodox adherents hold that women are excluded from such religious ritual. Because the worshippers at the Wall mostly view the WoW as an unacceptable deviation from traditional Jewish practice, they tend to react noisily, sometimes even violently (verbally and physically), to the sight of women collectively raising their voice in song or holding a Torah scroll. Undue noise at the sacred site, or violent action in public, would typically require*

*that the police apprehend the perpetrators and bring them to justice. But the regulation prohibiting communal prayer of WoW was deemed valid by Israel's Supreme Court. Therefore, the police target the WoW for violations of the regulation, rather than the other worshippers who in fact obstruct WoW's free exercise of religion. Put differently, the abused women, not the men and women who abuse them, are accused of breach of the peace. Thus in the clash between the worshippers' right not to be offended as they exercises their religion, and the right of WoW to free exercise of its form of religious worship, the worshippers (mostly men, backed by male rabbis) have the upper hand.*

*In this article, which is a part of a book in the making, I shall introduce the WoW, briefly explain the legal complexities of their claim to freedom of worship, and review the consequences of their 30-year struggle to fulfill their right to free exercise of religion. I present WoW as an international and pluralist social movement, one insisting on the notion that Judaism is a coat of many colors, embracing various and equally legitimate forms of religious ritual. The Women of the Wall come from many corners: modern orthodox, reform, conservative, and secular. They challenge the Israeli rabbinic monopoly over the interpretation of Jewish law and insist that this body of law does not prohibit the communal prayer of women. This argument has been rejected by the government of Israel and Israel's Supreme Court validated the government's position. The case of WoW therefore presents tension between various interpretations of religious and secular law, where the secular law chooses to resolve the conflict in favor of a hegemonic religious interpretation, thereby negating its own principles of the*

*separation of church and state, the equal access to freedom of worship and women's rights to equal dignity under the law.*<sup>4</sup>

*The problem of legal interpretation and hermeneutics and the question of which legal system should prevail at the Wall – the secular state's or the rabbinic halacha -- is by itself extremely interesting and worthy of investigation.<sup>5</sup> But there is more to the phenomenon of the WoW. WoW and its woes are a metaphor for the trouble experienced by the Israeli polity, as it struggles to be a democratic state while maintaining a Jewish character. Israel is committed to the idea that it is a Jewish state, and therefore is a representative of all Jews and all Jewish cultures and interests. But does the case of WoW present a challenge to this commitment? WoW are not merely a small and insignificant local Israeli group. Rather, they represent a growing and substantial body of Jewish women in the diaspora. They are an international group. As such, WoW represents the Jewish people everywhere, as distinct from the Jewish people residing in Israel. Furthermore, they represent a cultural pluralism not very well understood or accepted in Israel. They represent a religious commitment that is not fundamentalist, but rather flexible and openly seeking to adjust the religious commands to the needs of the present day. I argue that WoW should be accepted at their word, that they represent the panoply of Jewish expression in the modern world: modern orthodoxy, conservative, reform, reconstructionist, and secular (cultural) Jewish lifestyles, mostly rejected in Israel as inauthentic.<sup>6</sup>*

*As a state, Israel raises the banner not only of a Jewish state but also as a democracy. A democracy is the political system of self-government. But who qualifies to participate in the decision making process? In the context of WoW, who qualifies to legally exclude WoW from the Wall and exile it to the Robinson Arch? Is it the Jewish people residing in the diaspora, or only the citizens of the state itself? WoW is about the eternal conflict within Jewish thought, between the homeland and the diaspora. When WoW insists on its right to be included, and the government of Israel feels bound to enforce the rabbinic opposition to women's communal prayer, the conflict is also between Israel and the diaspora. Should compromise and accommodation, or should fundamentalist orthodoxy, prevail? What does the State of Israel owe the Jewish communities in the diaspora?<sup>7</sup> The conflict of WoW should be seen as a prism inviting a meditation on the meaning of the religious experience and the entitlement of women to be included within its embrace, and the question whether the Jewish State does indeed represent the religious identities of all Jews, residing in their various diasporic communities.*

- 1. WoW: Who are they? A very brief introduction to the domestic and international dimensions and their ramifications*

*The year 1988 marks the beginning when an international conference dedicated to women's issues was held in the City of Jerusalem. The conference attracted women from many corners of the Jewish Diaspora. One participant, Rivka Haut, an orthodox woman from New York, had an idea: the participants should borrow*

*a Torah scroll from one of Jerusalem's progressive synagogues and make a pilgrimage to the Western Wall, there to conduct a communal prayer service. Haut, mother of two daughters, was passionate about Judaism and the Jewish way of life. Also, her study of Jewish Law raised her awareness of its complexity and ambiguity: it was not at all clear that Jewish law itself prohibited women's communal prayer. Rather, the rabbis, as creatures of a tradition of patriarchal world views, interpreted the given law as reflecting patriarchy. But this interpretation was not the only one available to a discerning reader, unencumbered by patriarchal values.*

*With the help of her husband, a rabbi and a man comfortable with gender equality, she developed an alternative reading of the rabbinic sources which permitted the communal prayer.<sup>8</sup> She mastered the art of leading the communal service as well as chant from the Torah scroll. Throughout the 1980s, in New York, she actively spread the idea that women were perfectly within the four corners of Jewish law when they congregated to pray together, in the company of women, wearing the traditional prayer shawl and raising their voices in collective prayer.<sup>9</sup> In the United States, Haut was a pioneer in the world of Orthodox Judaism, and her prayer groups have taken root and are now practiced in many orthodox communities, including in Israel.<sup>10</sup> But in 1988 her project was novel, attractive to few and startling to many.*

*Haut persuaded conference participants, women and men, to join her in making a pilgrimage to the site of Wall in Jerusalem, and there hold the very first women's*



*only prayer service at the Women's Section. The space of the Wall, the most sacred in Judaism, is presently operated as a traditional orthodox synagogue. In keeping with tradition, the plaza adjoining the Wall is divided into a large section for men, and a rather narrow section for women. A fence separates the two sections.<sup>11</sup> When Haut's group unfurled the Torah Scroll and began chanting from the Torah, the worshippers present at the site were at first flabbergasted. What they witnessed was so alien to their world view that they could barely believe it was happening. They had never imagined, let alone heard, of women actively participating in communal worship. But very quickly they concluded that they were witnessing the essence of heresy. Perceiving themselves as "guardians of the faith," soldiers in the "army of God", they reacted with violence, determined to nip the practice in the bud. There and then WoW was born.*

*The participants at the 1988 conference came mostly from abroad, primarily from the United States. Not all of them were religious, and their religiosity itself was diverse. In other words, they were a true reflection of the American Jewish community which is pluralistic and tolerant.<sup>12</sup> Some were modern orthodox like Rivka Haut, some conservative, a few were reform, while others were interested in Israel but were solidly secular. However, they did have something in common: all were committed to gender equality in one way or another. As Americans, the members of the original group had already been sensitized to feminism, to women's struggle to partake in all spheres of life, including religious life, and to the civic activism that life in civic society entails (that's why they traveled to Jerusalem to participate in the conference, a reflection of civic social action). As*

*Americans, too, they were accustomed to a constitutional order. The ethos of American constitutionalism is that the constitution enshrines certain universal principles that cannot and should not be violated. Among them is the free exercise of religion (the First Amendment), and the equal protection of the law (the Fourteenth Amendment).<sup>13</sup> The American constitutional ethos also holds that if you perceive these principles to be violated, you may petition the courts, and that if your grievance is valid a court of law will declare the practice unconstitutional. Thus, for the American women in the group the problem was rather simple: the fundamental law of the land was violated and litigation was likely to bring relief.*

*But that was true in the United States. Was Israeli fundamental law violated as well, and would an Israeli court declare the practice invalid? Did this analysis apply to Israel as well? The American members had some reason to believe that this was so.<sup>14</sup>*

*Indeed, Israel is one of the few democracies without a constitution, but both the principles of free exercise of religion and of equality, particularly gender equality, have been recognized as being part of the Israeli constitutional system.<sup>15</sup>*

*Furthermore, just as the WoW were beginning to articulate their cause, Israel's High Court of Justice was beginning to gain a reputation as a court that recognizes and actively defends political and civil liberties. I shall not elaborate on this development, but only note in passing that it was a part of a larger transformation of Israeli society into a more civic and rights oriented polity. Two*

*examples, directly relevant to our subject matter will be presented here.<sup>16</sup> In 1987, a modern orthodox woman, Leah Shakdiel, challenged the refusal of the Minister of the Interior to consider her application to serve on a religious council. The minister had statutory authority to convene such local councils and appoint its members.<sup>17</sup> Never before had a woman been included in such a local body. The issue was extremely controversial, but the Court held that women were perfectly eligible to serve and ordered the minister to consider Shakdiel's application on the merit.<sup>18</sup> That same year the city of Tel Aviv was preparing to elect its chief rabbi. The orthodox parties opposed the idea that women councilmembers would vote in the election of a rabbi. The women went to court and won: the Court held that they were entitled to participate in the election of a rabbi, who was a government employee and subject to the laws of the state.<sup>19</sup> These recent (in 1988) gains in gender equality could persuade the skeptics – both Americans and Israelis -- that the ground was laid for another round of litigation which would vindicate WoW's right to pray at the Wall.<sup>20</sup>*

*In the United States, the American group formed an organization and called it ICWoW (International Committee for the Women of the Wall). Several of their leaders were experienced veterans of the civil rights movement and the feminist movement, and knew well how to organize a social movement and how to take steps to galvanize public opinion in support of their cause. One of the more eminent women in the group was Phyllis Chesler, a well known psychologist, feminist, activist, and theoretician of women's issues.<sup>21</sup> She was active in establishing the ICWoW, and in forming the policy it would pursue in its*

*campaign to get access to the Wall. But at the moment that the ICWoW began to contemplate what steps to take, the nascent social movement confronted the constraints of being not only women, not only Jewesses, but members of the larger community of American Jews. The loaded question of the relationship between the diaspora and Israel was placed on the table.*

*The ICWoW were ardent supporters of the State of Israel, and looked upon Israel as a progressive polity which shared American values and sensibilities.<sup>22</sup> They were not sufficiently aware of the complex reality of Israel, where constitutionalism was only beginning to assert itself, and where orthodoxy was rather fundamentalist, patriarchal and in possession of political power. Their challenge to this form of orthodoxy, in possession of political power, brought them into conflict with matters of foreign affairs as they are practiced by Israel's government.*

*How did the matter of prayer at the Wall gain a connection to foreign affairs? As soon as they embarked on their campaign to facilitate the communal women prayers at the Wall, ICWoW faced the probability of a conflict with the leadership of the American Jewish community. This leadership is largely devoted to defending the State of Israel in the context of the Arab-Israeli conflict. It is therefore quite sensitive to any issues that may cast a negative light upon Israel, thereby swaying American public opinion against it. Furthermore, when defending Israeli interests, the U.S. Jewish community strives to present a united front. The issue of WoW was divisive. Reform, conservative, and modern*

*orthodox found themselves on one side of the divide, with the fundamentalist orthodox on the other side. In addition, the ICWoW was called upon to display awareness of the traditional Jewish sensitivity to matters of solidarity. Like any minority group, Jews have historically been sensitive to issues which might cast a negative light on the community (known as “hanging dirty laundry in public”). Airing the conflict between traditional Orthodox and progressive Jewry in the matter of gender (can women pray as a group), and providing details of the treatment WoW was getting as it was holding communal prayer at the Wall, could “cast a bad light” on Jews. Therefore, a vocal movement calling attention to the fact that in Jerusalem, at once Israel’s capital and the most holy space for the Jewish people, women were denied freedom of religious worship, was perceived as disloyal to the larger agenda of Jewish interests and values.<sup>23</sup> It is quite likely that ICWoW was urged to “be discreet” and to avoid the general media so as to refrain from addition possible ammunition to those critical of Israel.<sup>24</sup> Therefore, as a social movement, the members of ICWOW placed themselves at a disadvantage. They did not, perhaps could not, use the tools and skills that they possessed in order to alert American and world public opinion to the strange phenomenon: freedom of Jewish worship, the freedom of women to pray in accordance with their legitimate (if controversial) beliefs, is denied in the State of Israel -- the same state that claims it is the better guardian of religious worship in the old City of Jerusalem and that, at least formally, is proud of its long standing commitment to gender equality. But as they did thus subordinate their rights to what they perceived as the “Jewish public interest”, they also, perhaps tragically,*

*walked in the footsteps of their mothers and grandmothers: women's rights were once again sacrificed to a perceived greater good, defined largely by men.<sup>25</sup>*

*The Israeli women who were among the original group had much in common with their international sisters, but they were also markedly different. Their concern was for their civil rights in their own country of residence. Citizenship does make a difference, and the difference is no less meaningful when religious experience is concerned. They felt about the communal prayer at the Wall in exactly the same way Chesler and her sisters felt about any gender equality issue in the United States. Their Israeli citizenship immunized them to the subtle pressures experienced by their sisters abroad, who were fully integrated in the civil society of their respective countries, but were also conscious of being members of a small religious community.<sup>26</sup> For them, the politics of the American-Jewish community and its worries about American public opinion in matters of American foreign affairs were less relevant.<sup>27</sup> Furthermore, they were accustomed to working in the arena of public opinion for purposes of advancing their collective interests. They also had other differences with the American group of WoW founders.*

*First, religious pluralism, while taken for granted in the United States, has been (and to a large degree still is) a marginal phenomenon in Israel, at least in the Jewish sector. In Israel, the meaning of Jewishness is different than it is in the United States. Most of the founders of Zionist ideology, Benjamin Z. Herzl to David Ben-Gurion and Zeev Zabotinsky, understood themselves as developing*

*an alternative to the religious lifestyle. They rejected religion as a relic of the past and, in its stead, upheld the agenda of national revival. Therefore, the emerging Israeli society was encouraged to embrace a secular lifestyle and distance itself from “the dark clerical past” of rabbinic rule. A small space was carved out for the orthodox, who were a minority, and it is not an exaggeration to say that a metaphorical wall has been separating the two Jewish communities. The conservative and reform movements, which outside of Israel served as a bridge between a religious lifestyle and modernity and represent the majority of Jews, failed to take root in Israel, and were rejected by the state.<sup>28</sup> Conservative and Reform religious life styles were practiced in tiny local communities, mostly by immigrants who came from English speaking countries and were not supported by the state apparatus. Tension existed between traditional orthodoxy and modern orthodoxy, but by and large it did not concern the secular public which failed to appreciate the differences between the two. The religious part of the Israeli public, including those who call themselves “traditional” (masorti -- selectively observing the principal tenets of the religious way of life), has been predominantly orthodox, especially when the matter was women’s status under the law. Most secular Israelis, encouraged by state ideology, view Zionist ideology as the legitimate modern heir of Judaism. They view the pluralistic schools of Reform and Conservative Judaism as inauthentic (an effort to imitate Protestantism).<sup>29</sup> They are utterly indifferent to the question whether women should or should not participate in communal prayer. (Most Israelis are only dimly aware of the group and its struggle.)<sup>30</sup>*

*Second, and not less important, theories of feminism and gender equality have been slow to penetrate the Israeli consciousness. By 1988, the Israeli public was still hostile to feminism and most well-accomplished women felt an inner desire to keep their distance from it. Thus, most of the Israeli women who attended the 1988 conference were more interested in the agenda of promoting gender equality in the secular Israeli world, and less aware of the significance of women's communal prayer. To make a commitment to the cause of WoW, Israeli feminists had to embrace the concept of Jewish religious pluralism, which at that time had only a weak hold on their consciousness. They also had to accept the utter indifference of the majority of the secular Israeli public (their natural allies in the struggle for gender equality) to religious practice, to find room in their ferociously crowded priority list for this issue (not a simple matter), and to carve an alliance between those amongst them who were strictly orthodox, and those who were either wholly secular but sympathetic in principle, or those who were slowly moving towards the realization that Israeli spiritual life could benefit from religious pluralism. Many Israeli feminists viewed the controversy as an internal religious affair – a controversy about the meaning of Jewish law and modern orthodoxy. But before I proceed to discuss the leadership of the Israeli WoW, I should strongly suggest that it may well be that the reluctance of the Israeli feminist camp to rally around WoW could have deeper causes. Israeli feminists have been well aware of the fact that in Israel women are controlled by the rabbinical establishment in the most profound aspect of their being – in matters of marriage and divorce. Many of them are angry and frustrated by this state of*



*affairs. The phenomenon of communal praying, in the women's section, appeared as alien and esoteric, even blind, to the suffering of the individual Israeli woman in need of divorce or other help related to family matters. The presence of WoW was both a reminder of their own impotence in fighting the rabbinical establishment and a dangerous effort to fortify religious practice (prayer), when the goal should be to break religion's hold on a woman's freedom and dignity (getting a divorce or an adequate financial settlement upon divorce). Indeed, the Israeli members of WoW did not see it this way. They sought change and reform in Jewish law, and believed that just as they could show that communal prayer was permissible, so they could show that there were ways to make the law of divorce more supportive and accommodating to the rights of women.*

*In any event, the feminist agenda in Israel was a tall order, a demanding puzzle, and a major woe of WoW was to find support for their cause among feminists. The woman endowed with natural leadership gifts, and who eventually became the Israeli leader of WoW, Anat Hoffman, represents this agenda.<sup>31</sup> A member of Meretz (the Civil Rights Party, advocating a rigorous separation of Church and State similar to the American model), she gradually adopted the reform movement of progressive Judaism and developed a passion for restoring a place for Jewish religious life in Israeli identity. In doing so she has been fighting an uphill battle with the hostile orthodox camp, with the indifferent secular public, and with the State which eventually came to side with the orthodox. At the same time she had to negotiate with her partners in the United States (the ICWoW). All*

*of the above illustrate the woes of WoW. The maze in which they have been forced to navigate is formidable indeed.*

*It is important to re-emphasize that WoW itself is diverse and complex. At a minimum, it is divided into two groups, the Israeli chapter, and the international chapter. The fence separating them is low and somewhat invisible. Members move from one group to the other as they change their place of residence or their interpretation of current or past events. But they do have their differences, and the milieu within which they operate (Israel for WoW, and mainly the U.S. for ICWoW) affects them in different ways. These constraints are one major aspect of the woes of WoW, referred to in the title.*

*But there are more, no less formidable, constraints. On the legal level, the WoW was forced to simultaneously confront two legal systems, each with its own dynamics and limitations: the legal system of the State of Israel, and Jewish law as understood by the Orthodox camp. In addition, it was arguing for a hybrid constitutional right: freedom of religious worship for women. The woes of WoW are thus not only sociological and geographical, but also distinctly and significantly legal.*

**2. The significance of the particular location for the controversy:  
The Western Wall in Jerusalem, and its impact on the legal controversy**

*Situated within a Western style democratic state, Israeli constitutional law upholds the principle of the separation of church and state as well as the principle of the free exercise of religious worship.<sup>32</sup> Thus, in principle, Haut's*

*concept of women's prayer groups has never been prohibited by Israeli secular law. Israeli women could always congregate in a private space of their choice (such as a reform or conservative synagogue or a home), or indeed establish their own synagogue and fulfill their yearning for the experience of communal prayer.<sup>33</sup> The controversy erupted because WoW has been insisting on holding their communal prayers at the site of the Wall -- the most public religious space in Israel, indeed in the Jewish world. WoW wanted access to the public space in order to emphasize their equal citizenship in the Jewish space, to make the point that their "place" was not only in the private home or private synagogue, but in the public realm as well. If you wish, this was their point of contention regarding the public/private distinction that has been dominating women's lives for millennia.<sup>34</sup>*

*Why the Wall? The Western Wall in Jerusalem is the only remnant of the Jewish Temple, the most sacred site for Jews from time immemorial. When the Temple was destroyed in the year 70 CE, a part of its Western wall was left relatively intact. For Jews all over the world, this wall has retained special significance from then on.<sup>35</sup> Tradition holds that the spirit of God resides right above the space of the Wall, and that is why pilgrims from the four corners of the world arrive there to express their wishes, grievances and heartfelt emotions. The ancient custom of placing a note to God in the cracks of the Wall is based on the perception that the space is endowed with divine qualities.*

*The bloody war of 1948, escalating on the heels of Israel's declaration of independence, ended with the division of the City of Jerusalem. The kingdom of Jordan took control of the Wall, and access to Jews was strictly forbidden. The 1967 Six Day War united the city and brought the Wall under Israeli control. Within days, the area around the Wall was cleared to create a vast plaza to accommodate the growing numbers of visitors. At the same time, and after fierce deliberations, the Israeli government agreed to place the administration of the Wall under the jurisdiction of the Ministry of Religions.<sup>36</sup> Promptly, the Ministry fashioned the space as a synagogue and created a special position for the person placed in charge of the space: the Rabbi of the Wall. Because the religious public in Israel at the time was overwhelmingly orthodox, the synagogue created at the Wall, which occupied all of its space, was an orthodox synagogue. In keeping with orthodox custom, the lion's share of the space was allocated to the male worshippers. Less than one third was allocated to women. Also in keeping with orthodox custom, a high fence (mehiza) was built to separate men from women. The men's section was well-stocked with Torah Scrolls and folding table's appropriate for conducting the Jewish religious rituals. The women's section was allocated a small room stocked with regular prayer books (siddurim). No Torah scrolls or tables were furnished as women, in accordance with orthodox custom, were neither permitted nor expected to pray except as single individuals. This was the situation that Haut's group encountered when it first arrived at the Wall to conduct its communal prayer.<sup>37</sup>*

*Since 1967, Israel's government has emphasized the significance of the Wall in Jewish heritage and history, and encouraged tourists to make a pilgrimage to the Wall. The Wall came to symbolize Jewish sovereignty, the political legitimacy of the continuous Jewish (and Zionist) claim to the land of Israel, and the commitment to keep the City of Jerusalem united. Important state functions have been held there to bolster the assertions of sovereignty. Every eminent visitor to Israel is encouraged to visit the Wall, to place the customary note in the cracks, and to be photographed. The list of such visitors is long and impressive, from the Pope, to Presidents of the United States. Women visitors have also been happily hosted and photographed.<sup>38</sup> Given the intense international public relations campaign on behalf of the Wall and its meaning for the contemporary State of Israel, and given the Israeli government's emphasis that Israel is the state of the entire Jewish people and that, therefore, the Wall is a space for all Jews regardless of citizenship or gender, it is small wonder that Haut felt this would be the most appropriate place to hold the communal women's prayer. An ordinary synagogue would not open the deep wells of yearning and inclusion as the Wall could. In addition, it would not send the message that communal prayer at the Wall would send: that women have arrived, that they are equal members of the Jewish people, and that they are accorded the dignity of the equal protection of Israeli law. The connection between women's rights, the State of Israel, and Jewish heritage could best be communicated through the communal prayer at the women's section at the Wall.*

*At this junction, it is important to train our lens on the concept of “orthodoxy.” Jewish orthodoxy is a continuum. One extreme is ultra-orthodox, a fundamentalist movement even denying the legitimacy of the State of Israel. The other extreme is modern orthodoxy and its attempt to reconcile the Jewish lifestyle with modern society.<sup>39</sup> Haut was a radical within the modern orthodox camp. Her project of “women’s prayer groups,” praying behind the mehiza, and yet performing much of the ritual, as a group, was perceived as radical even for the modern orthodox. The Wall synagogue was administered and controlled by men who were closer to ultra-orthodox on the continuum of orthodoxy, and who therefore could not empathize with Haut’s demands.<sup>40</sup>*

*A large measure of naïvete lay at the core of Haut’s high expectations. Haut and her friends underestimated the fierce commitment to tradition, which has dominated the orthodox community and the unease Israeli orthodox, even modern orthodox, experience with the American style of modern orthodoxy, let alone modern orthodoxy receptive to feminist ideas. Nor did they understand the political dynamics of the relations between church and state in Israel, or the impact of this dynamic on Israeli law.*

*When the worshippers at the site of the Wall unleashed their rage at the conference participants, Haut and her fellow worshipers expected police protection as well as sympathy. After all, they were modernizing Jewish religion and bringing it more in tune with its glorious heritage of equality and justice, and thereby were in tune with the best hopes of Zionism itself. At the scene of the*

*Wall, frightening verbal abuse, and even more offensive acts, such as the hurling of metal chairs at them (from the men's section), and even the throwing of one or two tear gas grenades (originally meant to disperse Arab-Palestinian demonstrations), took place. The police, always present at the site of the Wall, chose the role of passive observers. They allowed the rage to sizzle for a while, and finally moved to arrest a few of the women participants, on the ground that it was they who broken the law (breach of the peace) by offending the feelings of the worshippers.<sup>41</sup>*

Thereafter, the Rabbi of the Wall, using his statutory authority, issued a regulation prohibiting any prayer on the premises of the Wall which contravened "custom" (literal translation, "the custom of the place", or in Hebrew "minhag hamakom)."<sup>42</sup>

*For American women in particular, heirs of the civil rights movement and accustomed to judicial protection of First Amendment rights under the U.S. Constitution, these events were quite upsetting. The events served as a consciousness awakening and consciousness raising. The state's complicity, putting secular law at the service of the orthodox, opened their eyes to the vast gap between themselves and the "others," and ignited a determination to fight and eradicate one more vestige of patriarchy and sex discrimination.*

*Back in the United States, ICWoW was prepared to sue, and it persuaded its Israeli sisters to join it.<sup>43</sup> Thus far they were dealing with the executive branch of the government. Now they petitioned the Judiciary. The international flavor of*

*WoW again became apparent. Much of the financing of this protracted litigation was from sources outside of Israel. ICWoW intimately identified with the struggle, which concerned their identity as Jewish women. Furthermore, support for WoW was yet another aspect of the general U.S. effort to cultivate a civic society in Israel, thereby deepening its democratic culture and perhaps making it more similar to the United States. Thus began a very long struggle before Israel's High Court of Justice.*

### **3. The legal battle**

What was the legal framework of the controversy? The Rabbi of the Wall, issuing the regulation that prohibited women's communal prayer in the entire space of the Wall area, was serving two masters. On the one hand, he was a government employee (of the ministry of religious affairs), and therefore required to abide by secular Israeli law. On the other hand, he was a distinguished rabbi, well respected in orthodox circles, and committed to Jewish law.

WoW and ICWoW asked the High Court to enforce the following well accepted principles of Israeli constitutional law: all government employees must abide by the law of the State; State law includes the principles of separation of church and state, of free exercise of religion and of gender equality.<sup>44</sup> However, these principles, so easily understood by the modern citizen of a secular state, at least on the abstract level, are not as accessible to someone wholly immersed in the religious social world view. From the orthodox religious perspective, the duality



of legal systems is tolerable if, and only if, there is no perceived conflict between the two legal systems.<sup>45</sup>

The government (and its justice department) had to make a hard choice, uphold the well-articulated principles of the rule of law (equality, free exercise of religion) and protect WoW, or side with the orthodox camp. Many of the cabinet ministers were not orthodox, and were agnostic about the issue of women prayer groups, yet still they decided to side with the orthodox camp.

But things were even more complicated. The conflict opened a controversy between rabbis and scholars of Jewish law. Some held that Jewish law categorically withheld the right of communal prayer to women, whereas others insisted, with equally learned scholarship, that in fact Jewish law is either supportive of the notion or at least is ambiguous about it.<sup>46</sup> Should the Court take a stand? The conflict furthermore opened a disagreement about secular Israeli law. Should the Court view this issue as a case of first impression and analyze it with analytical tools from feminist legal theory and civil rights theory? Or should the court defer to the concept of the “status quo”, whereby the orthodox sector of Israel was recognized as the guardian of “things religious”?<sup>47</sup> Moreover, the hard question of territorial identity was raising a stubborn head. If Israel was the homeland of all Jews, then certainly members of ICWoW had a right to petition the Court for redress of grievances. But if Israel was a state “like all states”, with a distinct “Israeli” culture, then the members of ICWoW and their

sisters of WoW (most of whom had some ties to the U.S.) were foreigners trying to intervene in domestic affairs.<sup>48</sup>

One should not be surprised to hear that at the sacred space of the Wall, operating as an Orthodox synagogue, the religious Jewish pluralism from which WoW sprang, appeared as a direct assault on Jewish Law, a radical departure from the natural order of things.<sup>49</sup> Well aware of the enormous resistance, WoW asked for permission to pray only once a month, on Rosh Hodesh, at 7:30 in the morning. WoW expected that this rather minimal request would make it easy for the Court, if not for the Orthodox camp, to accept their petition. After all, they were asking for only a very tiny bite of the pie. Still, the rabbis resisted. Hence, the intensity of the conflict WoW placed at the feet of the High Court of Justice. Several, not merely two, worlds collided and challenged the Justices in acute ways.

The legal battle lasted from 1989 to 2003, and ended in a compromise. In the end, WoW was denied the right to hold a communal prayer at the women's section of the Wall. After protracted controversy and endless negotiations, the government agreed to prepare an alternative site, at an archeological garden known as the Robinson Arch. The Robinson Arch, formally a part of the ancient Wall of the Jewish Temple, has not been as sacred as the Wall area, and is located at a distance from the Wall itself. The Robinson Arch was renovated to allow access the women (including the handicapped). Members of the Reform and Conservative denominations, where mixed-gender prayers are the norm, may

also pray at the Robinson Arch (as a mixed gendered group they do not have a space of their own at the site of the Wall itself, which strictly segregates men and women).<sup>50</sup> As this article goes to press, women are prohibited from holding communal prayers at the Wall, but are allowed to hold these prayers at the Robinson Arch. Women are also forbidden from bringing Torah scrolls into the Wall area.<sup>51</sup>

Back to the trajectory of the legal battle. Like in any other democracy, law enforcement is a matter for the executive branch, and there is no doubt that the government agonized about the matter. It is not clear precisely what went into the deliberations, but two factors must have weighed heavily in favor of the status quo and against the WoW. First, the orthodox camp in Israel is more than a sizable religious group. Several political parties represent orthodox interests, and they hold significant leverage in the Knesset (Parliament), and often in the cabinet.<sup>52</sup> An important example of leverage is the peace process. No peace process can move forward without the support of at least some of these parties. Any change in the status quo at the Wall may well result in withdrawal of political support on the diplomatic front. The second factor is Israeli secular consciousness. Israelis have long assimilated the grand compromise of Zionism: religious practice would be defined by the Orthodox, while the majority of Zionists would be secular, at once ignorant of and indifferent to religious practice. Therefore, the secular majority of Israelis did not have the intellectual tools to appreciate the arguments put forth by WoW, or to evaluate their significance for Jewish life. One may even go as far as to say that the majority

would have wanted these women to go away and remove the annoying issue from the crowded agenda. These factors fed the government's determination to side with the religious camp rather than with WoW.

As indicated above, ICWoW took the lead in launching the legal battle. They hired a very prominent male attorney and planned to petition the High Court of Justice for an injunction. The Israeli WoW did not happily comply. The feminist movement was in its developing stages in Israel. The Israeli members of WoW wanted their voice to be heard. They also wanted a woman attorney to represent them. Again, this episode, which deserves further documentation, illustrates the internal woes of WoW. A movement wishes to present itself to the outside world as united and cohesive, but one should always expect disagreement, even discord, underneath. Ultimately, a very fine woman attorney, Hebrew University Law Professor Frances Raday, was asked to represent WoW.<sup>53</sup>

In evaluating the legal battle, one should again dwell on the woes of WoW in contemporaneous Israeli society. At the time that Raday was fighting on behalf of WoW, she was conducting an array of other legal battles before the Court. The reader is invited to appreciate the battle of WoW in the context of the larger struggle of Israeli women for equality. In the late 1980's and early 1990s, gender-based discrimination was rampant. Women's income was significantly lower than men's; very few women (the formidable career of Golda Meir honoring the breach of the norm of sex equality) rose to positions of power; age discrimination in the workplace compelled women to retire before men; leadership positions in

the military, the apple of Israel's eye, were closed to women; and sexual harassment was perceived as the material entitlement of men. Therefore, as I mentioned in my introduction, WoW was competing in a very crowded space, where the issues of women's inequality were many and severe, and where, given the secular context of the Israeli women's movement, it could be expected that their struggle would get a low place on the priority list.<sup>54</sup> It does appear that WoW was indeed assigned a low place on the priority list of the High Court itself.

*4. There were three phases in the struggle before the Court, and I shall review them in the order they were decided*

*The First Round: Israel's Court typically sits in a panel of three justices. Three male justices were appointed (at that time there were two women justices in the court), to review the petition: Chief Justice Meir Shamgar and Shlomo Levin, both secular men, and Deputy Chief Justice Menahem Elon, an international authority on Jewish Law and a modern orthodox man.*

The petition was submitted in 1989, and the decision was delivered in 1994. The Court, as was increasingly its policy in political controversies, decided to postpone the legal resolution of the case.<sup>55</sup> Chief Justice Shamgar held that, indeed, WoW's claim had merit, but because of the sensitivity of the issue, he recommended that the government establish a commission which would develop an appropriate solution. Justice Shlomo Levin joined him, but his rhetoric displayed a more adamant commitment to the free exercise of religion. Justice Menachem Elon delivered an astonishing, lengthy, opinion. His opinion analyzed in great detail the women's claim that Jewish Law, in fact, permitted them to hold

communal prayers. In a learned and encyclopedic discussion, he explained that WoW was correct: Jewish Law did not prohibit the communal prayers of women.<sup>56</sup> But Elon did not conclude that WoW should bring their practice to the site of the Wall itself. Custom, he held, allowed only men to conduct a communal prayer. The women should defer to this custom, and refrain from challenging it at the Wall. The site of the Wall demanded unity of worship, and WoW should sacrifice its valid claim so as to perpetuate the precious unity. Practically, the ball was again in the government's court. The executive branch was required to develop an appropriate solution to WoW's petition.

*Time passed. Prime Minister Yitzhak Rabin was assassinated (by a young man motivated by excessive religious fervor, determined to derail the peace process which he understood to violate Jewish law), and in the ensuing 1996 elections the Orthodox gained more power. Commissions were appointed, dragged their feet, and could not reach conclusions. Evidently the issue was both low on the priority list, and too explosive to address. WoW petitioned the Court to expedite review and was denied. The Court preferred to wait for the commissions to articulate a solution, but the commissions stalled because of lack of consensus. In 1999, almost ten years after the initial event of communal prayer at the Wall, the Court agreed again to hear WoW's petition.<sup>57</sup>*

*The Second Round: As the 21<sup>st</sup> century dawned, in May, 2000, the Court issued a unanimous opinion in favor of WoW. Three justices, one man -- Justice Eliyahu Matza, who wrote the opinion for the Court -- and two women (Justice Tova*

*Strassberg Cohen and Justice Dorit Beinisch, presently serving as the Chief Justice), authored a well-reasoned, superbly crafted, opinion explaining that, under Israeli constitutional law, it is the duty of the government to protect the women as they exercise their right to freedom of worship. However, mindful of the explosive ramifications of its holding, the Court refrained from providing the customary remedy of ordering the government to let the WoW pray. Rather, it postponed the final order, calling upon the government to make appropriate arrangements within six months.<sup>58</sup>*

*In June, 2000, the attorney general petitioned the Court for a “further hearing.” His petition was granted. The attorney general’s petition could only be explained in the context of the volatility of the conflict and the high profile it has acquired. In general, and traditionally or by custom, further hearings, by an expanded panel of justices, are only granted when the decision in question is legally controversial. The best indication of such legal controversy is a strong dissenting opinion providing reasons why the majority misunderstood the law. It is only then that an expanded panel has conventionally been convened, in order to set the law straight. In this case there was no indication that legal error was detectable. The panel of three justices was unanimous that the WoW had a right to hold communal prayer at the site of the Wall. Hence tradition or custom would not justify a further hearing. This is interesting because it exposes the flexible approach to the concept of tradition or custom. When it came to communal prayer, tradition was invoked as a sufficiently strong argument to prevent the*

*practice. But when it came to the secular court's precedent, tradition and custom was cast aside in order to facilitate review of the opinion and a different result.*

*Clearly, the conflict was also political, not only legal. By the year 2000, the backlash was accelerating in opposition to efforts by the High Court of Justice to expand on notions of the separation of church and state, as well as to court's interpretation of the principle of freedom of worship.<sup>59</sup> One may imagine (although this author has no proof) that the then Attorney General, Eliakim Rubinstein, an Orthodox man, must have been put under tremendous pressure to derail the Court opinion. It stands to reason to expect that the Court itself understood the volatility of the situation when it accepted the attorney general's request for a further hearing.<sup>60</sup>*

*One may pause to indulge in counterfactual scenarios. What would happen if the government, led by a Prime Minister committed to the right to freedom of worship, decided to go forth and implement the second Court decision? After all, WoW was aware of the sensitivity of its claim, and therefore confined it only to one hour once a month, excluding the period of heavy traffic during the high holidays. If WoW's request were implemented by the government, the burden on the Orthodox worshippers would have been miniscule indeed. One may imagine, counterfactually, a prime minister using leadership skills, explaining to the orthodox camp, the Israeli public, world public opinion, that Israel must be true to its commitment to democratic values, indeed, Zionist values, and therefore it was honor bound to uphold the right of the tiny minority in its midst. One can also*



*imagine, counterfactually that, had the police been instructed to protect the women steadfastly, the Orthodox camp would have acquiesced after a few arrests for breach of the peace. Such a scenario is not altogether fantastical.<sup>61</sup> But it does depend on context. In Israel of the 21<sup>st</sup> century, the Orthodox camp enjoys considerable power, especially when it comes to defining what is Jewish. Protracted violence and a political crisis were also possible. Either because it feared such violence, or because the cause of WoW or the principles it invoked did not carry enough weight, the government was determined to overturn the Court's opinion and deny the WoW their request, and it urged the Court to overturn its opinion.*

**The Third Round:** Nine Justices were appointed to the panel that reviewed the unanimous opinion issued by three justices in the second round. Among them were the then Chief Justice, Aharon Barak, and Justice Mishael Cheshin, both secular men, known for their brilliant legal skills as well as for their commitment to the separation of religion and state. Again, the Court took its time, and rumors were that behind-the-scenes intense negotiations were taking place to find a compromise. In 2003, the Court issued its opinion: a sharply divided Court ruled against WoW. Only four thought that WoW's claims should prevail.<sup>62</sup>

## 5. Aftermath

WoW lost in court, and WoW lost in the legislative arena. However, its struggle persists. To its credit, it is now the owner of some formidable judicial opinions: the holding by Justice Elon, a scholar of Jewish law, that women do have the

right to pray communally under Jewish law, and the holding of the unanimous three-judge panel that secular Israeli law and fundamental principles of civil rights support their petition, and the dissenting opinions of the four justices in the third round. These too, are legal documents, well crafted and well reasoned, which support WoW's cause and when the time is ripe may prevail. As a social movement, WoW has been proven resilient and persistent. The yearning to pray together at the site of the Wall had evidently been genuine and nurturing. They persisted using the skills of other civic organizations and social movements. They have harnessed technology to their cause. They have a web site, they are on Facebook, they try to mobilize support through various devices, such as selling hand-made tallitot (prayer shawls) with the names of the four Jewish matriarchs embroidered in the four corners, encouraging tourists to hold bat mitzvas and other celebrations with them, and through spreading the message of gender equality. Two film documentaries track the struggle, and are available to the general public.<sup>63</sup> For a while, WoW attempted to discreetly hold their ritual at the site of the Wall. For a while, the police turned a blind eye, and on occasion even chilled the enthusiasm of the worshippers who wanted to sabotage the ritual (was this another indication of the ambivalence of the executive branch?). But recently different winds have started blowing. In 2009, one of WoW's most loyal members, Nofrat Frenkel, was arrested for attempting to hold the prayer group at the site of the Wall itself. It is not clear whether this arrest will end in a prosecution.<sup>64</sup> In July, 2010, WoW's leader, Anat Hoffman, was arrested for bringing a Torah Scroll to the site of the Wall. She, too, was taken to the police

headquarters, interrogated, and required to go through the steps applied to ordinary suspected criminals, including the submission of her fingerprints.

Again, it is not clear whether an indictment will ensue. Nor is it clear whether the police were given the green light to tighten the rope around WoW and, if so, by whom.

The irony of the “legal shield” deployed by the opponents of WoW after the final Court holding is interesting. For years, WoW claimed that the secular law was on their side (the principle of the entitlement of all to the free exercise of religion), and the religious camp retorted that their interpretation of Jewish law (Jewish custom forbidding prayer groups) trumped secular principles. Now the religious camp raises the banner of the secular law. One hears opponents at the Wall insisting that Israeli law forbids the practice (they mean the regulation forbidding prayer not in accordance with custom).<sup>65</sup>

But the fact that, outside of the space of the Wall, the argument is intensifying concerning the validity of all women prayer groups under Jewish Law proves that this reliance on secular Israeli law is perfunctory at best. The entire Jewish world is engaged in the deliberation, not only rabbis residing in Israel. Women Prayer groups are proliferating everywhere, in Australia, Canada, the U.K., and France. In the United States (recall that Rivka Haut, the leader of the prayer group project, is a New Yorker), two prominent rabbis and experts of Jewish law, Rabbi Isador Twersky and Rabbi Moshe Meiselman, both members of the modern Orthodox camp issued opinions casting doubt on the legitimacy of the practice.<sup>66</sup> In 2010, a

book entitled *Women and Men in Communal Prayer* was published, offering detailed and learned defense of the practice by eminent Rabbi and Professor Daniel Sperber.<sup>67</sup> As the intellectual debate intensifies, it appears that the practice of communal prayer is growing and spreading in Israel itself (but not at the Wall). Clearly, women find communal prayer satisfying and fulfilling and wish to be a part of it. It appears that this is a movement that cannot be stopped. It may well be that sometime in the future this social movement will win, that once the dust settles the Orthodox world, including those closer to the ultra-Orthodox, will embrace the prayer groups as flesh of their flesh.<sup>68</sup> At such time, it will be interesting to see whether the synagogue at the Wall, protected by the secular Israeli government, remains adamant to its opposition, leaving the Wall as the only site where Jews (Jewesses) are denied freedom of worship, or whether the leadership decides to integrate the concept of gender equality into its dogma.

#### **6. *Makom: Wow as metaphor***

*WoW is not only a social movement and an important contributor to religious life. It is also a metaphor. Let me start with the concept of Makom.*

*The Hebrew word Makom has several meanings. In liturgy it stands for God. As I indicated in the introduction, Jewish tradition holds that the ancient geographical place of the Jewish Temple is where God's spirit took residence.<sup>69</sup> In modern Hebrew, Makom means space, a place. Zionist ideology holds that there is no other "place" for Jews but the State of Israel. This is the justification Zionists give for the stubborn insistence on the right of the Jewish people to inhabit the*

*land, claimed too by the Palestinian people. Ein Makom Acher - "There is no other place" - was the title of an important book by the Israeli literary critic, Gershon Shaked. In it he discussed the role of this particular geographic spot – Israel – in Hebrew literature and in Zionist thought.*

*Makom as place is an important analytical tool in feminist theory. The traditional division of labor between the sexes was based on the expectation that women had a place, a particular place, and that that place was the home, the private realm, not the public. Much of feminist theory was devoted to analyze the role of "place" – "Makom" -- in the shaping of women's legal and cultural status over the generations.*

*The Wall as space, makom, has multiple meanings. God, the State of Israel, women's place, and more, are all represented. In rejecting the petition of WoW, the State of Israel – all three branches of its government -- agreed that the Wall was not "their place." They had to go elsewhere. The act of exiling the women to the Robinson Arch, taken after considerable agony and controversy, therefore captures the complex agony of Zionism and the State of Israel itself. The State of Israel is justified by Zionist ideology, but it cannot find a space -- "makom" -- for its women, not if they insist on equality and spirituality. Thereby, the State is compelled, by the Orthodox camp and in the name of God (makom), to deny space to Jew[esses] who want to pray communally, at a space the State conceded, and no one denies, ties the Jewish people to its most ancient roots. WoW is driven to the margins, to an alien place (the Robinson Arch) where they*

*will be neither seen nor heard. Thereby, the core of Zionist ideology is compromised. Add to the concept of Makom the other great pillar of original Zionist ideology, the idea that religion should be confined to the private realm. WoW's experience proves exactly the opposite: progress is brushed away to the margins, and the old tradition of Jewish prayer, with its exclusion of Conservative and Reform Judaism, exclusion of women as equal agents before God, emerges triumphant. One has a feeling that the State faces these developments helplessly, unable to imagine an egalitarian and inclusive future. The agony of the State, the embarrassment of the Zionist enterprise, is folded into the story of the Women of the Wall.*

*Ironically, it is precisely WoW and ICWoW, being international social movements that stand for a concept of Jewishness that fits well with Zionist ideals, with the democratic component of the State of Israel, and with a forward looking and inclusive Judaism, that stand for pluralism, for accommodation, for inclusion, and for dignity. They also stand for the rule of law -- both the secular and the religious. They, too, are a metaphor for the State of Israel: for the hope embedded in its secular national hymn, and for the revelation in Genesis, that both women and men were created in the image of God.*

### **ENDNOTES**

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<sup>1</sup> On the special meaning of the Rosh Hodesh ritual for women see M. Puterkovsky, *Traditions and Celebrations for the Bat Mitzvah*, Urim Publications, 2003. In general, for further reading about terms related to Jewish Law see R.J. Z. Werblowsky and G. Wigoder, *The Oxford Dictionary of the Jewish Religion* (Oxford U. Press: 1997).

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<sup>2</sup> See Protection of Holy Places Law, 1967 [English translation, site of Israel's Ministry of Foreign Affairs, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Protection+of+Holy+Places+Law.htm>, (last visited July 29, 2011). This statute vests power in the minister of religious affairs to make regulations to protect the Western Wall. The ministry, in turn, issued the decrees described in the text. See also, Rubinstein and Medina, *The Constitutional Law of the State of Israel*, volume 1 at 6.46 (p.373) (Schocken, 6<sup>th</sup> ed. 2005) (Hebrew).

<sup>3</sup> On the significance of the term "makom" ("space") see below, text accompanying endnote 67.

<sup>4</sup> For a comparative and theoretical discussion of this problem, which is not peculiar to Israel, see Ran Hirschl, *Constitutional Theocracy* (Harvard University Press: 2010), esp. pp. 139-51.

<sup>5</sup> See F. Raday, *Claiming Equal Religious Personhood: Women of the Wall's Constitutional Saga*, in *Religion in the Public Sphere, A Comparative Analysis of German, Israeli, American and International Law*, W. Brugger and M. Karayanni eds. (Max Planck Institute: 2007) p. 255.

<sup>6</sup> Indeed, the Women of The Wall represent a Jewish denominationalist the is modern. Their conflict with the ultra-orthodox is itself a conflict between pre-modern Jewry (still vibrant and strong) and modern Jewry with all of its manifestation. On the inauthenticity of this ideological belief (that only ultra-orthodoxy is authentic) see Z. Triger, *Segregation Between the Sexes as Sexual Harassment*, Iyunei Mishapt, forthcoming (Hebrew).

<sup>7</sup> See S. Rabinovitch ed., *Jews and Diaspora Nationalism*. (Brandeis University Press, forthcoming 2012) particularly S. Rabinovitch, Introduction.

<sup>8</sup> Her reading was circumscribed and conservative and did not allow a "minyan" and certain other portions of the prayer, but by and large permitted much of it. In this paper I do not elaborate on the details of the controversy about the extent to which the entire communal prayer is accessible to women's participation.

<sup>9</sup> Judaism has at least three main schools of thought and religious practice, orthodox, conservative, and reform. The orthodox school, based on pre-enlightenment world view, excludes women from the public sphere and delegates to them specific roles within the family and the private sphere. However, the modern orthodox movement attempts to adjust this world-view to the modern context. The reform movement, inspired by the enlightenment, upholds gender equality, and is the most willing to adjust its practice to enhance egalitarianism. The conservative school, located between the previous two schools, has accepted gender equality, and has accelerated its commitment to egalitarianism since the 1970s. See Lahav, *Seeking Recognition: Women's Struggle for Full Citizenship in the Community of Religious Worship*, in H. Herzog and A. Bradue, *Gendering Religion and Politics* (Palgrave, 2009) p.125. Coming from the strictly Orthodox milieu in New York City, Haut was a beacon in her effort to understand the intellectual underpinnings of womens' exclusion, and to sift the rules requiring exclusion that are based on divine commands (and therefore may not be amended), and rules based on cultural customs which should be open to re-assessment. Her conclusion was that the prohibition on women's communal prayer is not divinely ordained. For an interesting discussion see T. Ross, *Expanding the Palace of Torah, Orthodoxy and Feminism* (Brandeis University Press: 2004) and references there, and Sperber et al, *Women and Men in Communal Prayer* (JOFA publication: 2010). Of course, whether consciously or not, these women were influenced by the spirit of the women's rights movement then raging in the United States and sending its message to other societies, but the important point to remember is that these women were committed to a religious way of life and aspired to equality within Judaism and under Jewish law. In other words, and this is crucial, these women did not wish to exit their religious communities, build other communities, or become secular. They wanted to retain their identity and have the religious law change, by shedding the skin of patriarchy, which was not divinely required, and assume an egalitarian approach, which they argued, was perfectly coherent and compatible with the core of Jewish orthodoxy.

<sup>10</sup> See T. Hartman, *Feminism Encounters Traditional Judaism* (Brandeis U. Press: 2007).

<sup>11</sup> In keeping with traditional orthodoxy, there was no Torah scroll at the women's section, or any furniture (such as a table) to assist in the performance of the ritual. The women's section had a few prayer books, "fit for women", the space itself is a statement that women are excluded from the religious ritual.

<sup>12</sup> In my discussion I refer to American Judaism because it represents the largest Jewish Community outside of Israel, but the reader should keep in mind that pluralistic Judaism thrives in other parts of the Jewish Diaspora, from Canada to Europe, Australia, South Africa, and parts of Asia as well. I also emphasize that this is modern, not



traditional orthodoxy, and that the emphasis on the segregation on the basis of gender was meant to honor the orthodox canon that women and men should not perform the ritual prayer together.

<sup>13</sup> U.S. Constitution, First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof." Fourteenth Amendment: "No state shall ...deny to any person within its jurisdiction the equal protection of the laws."

<sup>14</sup> Indeed, the tension between Israel's image as the state of the Jewish people (diaspora Jewry included), and of Israel as a state whose legal apparatus applies to its citizens alone, could be raised in the form of challenging ICWoW's standing to petition before the Court, as ICWoW, was an extraterritorial group, but the government, evidently mindful of this potentially explosive issue, decided not to challenge their standing. Miriam Benson, In Chesler and Haut eds., *Women of the Wall: Claiming Sacred Ground at Judaism's Holy Site* (Jewish Light Publishing: 2003, Woodstock, Vermont.) p. 142.

<sup>15</sup> Both principles appear explicitly in Israel's Declaration of independence and have been consistently honored by the courts. See generally Rubinstein and Medina, *supra* n.2, volume 2 chapter 6.

<sup>16</sup> For a general review of the court's contribution to political and civil liberties and of the backlash which followed see P. Lahav, *Israel's Supreme Court*, in R. O. Freedman, *Contemporary Israel*, (Westview:2009) p. 135.

<sup>17</sup> *Shakdiel v. Minister of Religions*, HC 153/87 42(2) PD (22)1 309. Shakdiel was thereafter admitted as a member of the religious council of her local community.

<sup>18</sup> P. Woods, *Judicial Power and National Politics*, (SUNY: 2008) at pp.160-63.

<sup>19</sup> *Poraz v. Shlomo Lahat, Mayor of Tel Aviv*, HC 953/87, 42 (2) PD. See generally, Ruth Halperin Kaddari, *Women in Israel, A State of Their Own* (2004: University of Pennsylvania Press: Philadelphia). For the struggle of women to vote in community elections during the pre-state period (beginning in 1971) see Margalit Shiloh, *Feminist Voices regarding Gender Equality in the Struggle for the Right to Vote in the Yishuv*, in Katvan et al, eds., *One Law for Man and Woman* (Bar Ilan University Press : 2010) p.221 (Hebrew).

<sup>20</sup> See S. Sered, comparing these two cases to the case of WoW and concluding that WoW was qualitatively different and therefore unlikely to win. However, it appears that Sered takes the orthodox position on the question of women group prayer as static (i.e., Jewish law cannot accept it). Given recent developments in the Jewish world, it may well be that the orthodox position is dynamic and capable of change, albeit a slow change. S. Sered, *Women and Religious Change in Israel: Rebellion or Revolution*, 58 *Sociology of Religion* 1 (1997).

<sup>21</sup> See <http://www.phyllis-chesler.com/> for comprehensive information on Chesler. Last visited on July 19, 2011.

<sup>22</sup> Indeed, the leaders of ICWOW dedicated their book on the subject "to the State of Israel", see Chesler and Haut, *supra* n. 14.

<sup>23</sup> From the feminist perspective a question should be raised whether, with all of their considerable sophistication in matters of feminist theory, members of the ICWoW were not simply conforming and adhering to the patriarchal leadership of the U.S. Jewish Community and its judgment about the legitimate contours of criticism. The call for unity has historically been deployed in order to subordinate women's equality to other social goals. Women were encouraged to sacrifice their interests for the purpose of pursuing "other, more pressing" social agendas.

<sup>24</sup> See generally Aronoff, in Chesler and Haut, *supra* n.15 at 187: "We were tying one hand behind our back by shunning the general media and negative publicity for Israel, but concern about damaging Israel took precedence at that time." *Id.*

<sup>25</sup> There is one bright line which the U.S. Jewish community is not prepared to cross, and this is the issue of conversion, also known as the question of who is a Jew. Repeated efforts by the Israeli orthodox establishment to change the law of return so that it recognizes only orthodox conversions, has consistently met with the firm opposition of the American Jewish leadership. See e.g., E. Bronner, *Israel puts off crisis over conversion law*, *New York Times*, July 23, 2010, <http://www.nytimes.com/2010/07/24/world/middleeast/24israel.html> (last visited July 31, 2011).

<sup>26</sup> I.e., they were American or Brazilian or British citizens, but also Jewish, and thus a minority within the national boundaries of their respective non-Jewish polities. See S. Rabinovitch, *Jews and Diaspora Nationalism*, *supra* n. 7

<sup>27</sup> Note that American Jewish politics remain relevant, as much of the emotional and financial support for the cause depended on U.S. good will.

<sup>28</sup> Conservative and Reform Judaism, which is the overwhelming practice of American Jews, is practiced in tiny (although presently may be growing) communities, and there is an on-going legal struggle concerning state recognition of their legitimacy. See, for example, the current debate about whether reform and conservative conversions should be recognized by state institutions: see generally Woods, *supra* n.17. For the decades-long struggle about recognition of conservative and reform conversions to Judaism (qualifying the convert to citizenship under the law of return) see Bryna Bogoch and Yifat Holzman Gazit, *Clashing Over Conversion: "Who is a Jew"*, and *Media Representations of an Israeli Supreme Court Decision*, *Int. J Semiot Law*, DOI 10.1007/s11196-010-9172-y particularly sections 3.1 to 3.3.

<sup>29</sup> See Jonathan Sarna, *American Judaism* (Yale University Press: 2004) for a historical analysis of the development of the distinct form of American Jewish pluralism. Evidently, these developments were rooted in American conditions which were not present in either Israel, and therefore failed to take root there.

<sup>30</sup> Media coverage of the WoW in Hebrew newspapers was largely negative. They were perceived as provocateurs, undermining the status quo and the public peace. Regardless of their protestations, they were labeled as reform (even though only 2 of the 110 members of the original group were reform and most were modern orthodox. See R. Kampf, "Searching for Cracks in the Wall": The Interaction Between Women's Groups and the Israeli Press, *3 Patu"ach*, March 1996, p. 4. It is interesting to compare this common attitude to the Israeli attitude towards gays. While Israelis are willing to be tolerant towards gays and gay rights, many feel that conducting the "gay parade" in Jerusalem is inappropriate because "it hurts the feelings of the orthodox". See Z. Triger, *Between Jerusalem and Um al Fahm*, *27 Hamishpat* 61 (2009) (Hebrew) (An English version will be available from Dr. Triger shortly).

<sup>31</sup> <http://reformjudaismmag.org/Articles/index.cfm?id=1414>, last visited July 19, 2011. Hoffman is also president of IRAC (Israel Religious Action Center) in Israel, an NGO which aims to introduce progressive Judaism into Israeli society. See <http://www.irac.org/>, last visited on July 19, 2011.

<sup>32</sup> The Israeli principle of the separation of church and state co-exists with state support religion in many forms (including religious schooling) and does have a ministry of Religions, supported by tax-payers money.

<sup>33</sup> Israeli orthodox women, however, are discouraged from attempting to introduce gender equality into the synagogue ritual. See T. Hartman, *supra* n. 10. Hartman is the founder of Shira Hadasha (Hebrew for "A new song"), a Jerusalem modern orthodox synagogue based on gender equality. The synagogue was established more than a decade after Haut first led her group to pray at the Wall.

<sup>34</sup> But see sociologist Susan Sered's insight that the problem here lies with the "traditional Jewish conflation of women and sacred text, both of which are subject to male control and scrutiny. By holding Torah scrolls at the Wall they have changed their ontological status from that of symbol to that of agent, a transformation that cannot but evoke fury in a culture predicated upon male ownership of the symbol system." S. Sered, *What Makes Women Sick* (Brandeis University Press: 2000) at p.140. See also S. Sered, *Women and Religious Change in Israel: Rebellion or Revolution*, *58 Sociology of Religion* 1 (1997).

<sup>35</sup> Recently, a foundation to preserve the heritage of the Wall (and trumpet the policies of the ministry of religious affairs) has been established, where information concerning the historic Jewish attachment to the Wall is displayed, <http://english.thekotel.org/> (last visited July 29, 2011). The Foundation and its website appears to be hostile to WoW. See *infra* n.65

<sup>36</sup> *Supra* n.2.

<sup>37</sup> The segregation between the sexes at the Wall's plaza began at this time. Historically, men and women prayed together at the Kotel. See Z. Triger, *Gender Based Segregation as Sexual Harassment*, *Iyunei Mishpat*, forthcoming, text accompanying fn. 80-86. (Hebrew, an English version will also be published).

<sup>38</sup> U.S. Secretary of State (then Senator) Hillary Clinton, also visited the Wall during her 2005 visit to Israel, see <http://www.haaretz.com/print-edition/news/hillary-clinton-visits-western-wall-1.174139> (last visited July 19, 2011). While orthodox women are instructed to avoid wearing trousers, Clinton appeared at the Wall wearing trousers. Her picture was widely distributed. The ministry of religious affairs, evidently, is willing to make exceptions to its rules.

<sup>39</sup> For a good discussion see G. Barzilai, *Communities and Law: Politics and Cultures of Legal Identities* (U. of Michigan Press: 2003) p. 209.

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<sup>40</sup> For an analysis see L. Shakdiel, *Women of the Wall: Radical Feminism as an Opportunity for a New Discourse in Israel*, 21 *Journal of Israeli History* (2002) p.126. See also Rada's critique, supra n.5.

<sup>41</sup> For a description see Chesler and Haut, *Women of the Wall*, supra n.14 at pp.4-6.

<sup>42</sup> In 1981, the regulations prohibited all religious rituals not held in accordance with the "custom of the space" ("minhag hamakom") and which offend the feelings of the worshippers toward the space. Rubinstein and Medina, supra n.2, vol. 1 at p.378. Note that the term "space" was cleverly chosen. The Hebrew word for space is "Makom". "The custom of 'makom'" therefore implies that the banning of women from communal prayer is the will of God. Similarly, the offense to the feelings of the worshippers is "towards the makom", i.e., towards God. See discussion infra, text accompanying fn. 69.

<sup>43</sup> See Miriam Benson, *The Lawsuit: 1989-Present*, in Chesler and Haut, supra n.14 p.136.

<sup>44</sup> F. Rada, *The Fight Against Being Silenced*, in Chesler and Haut, supra n. 14 at 115. See also Ruth Halperin Kaddari, *Women in Israel*, supra n. 19.

<sup>45</sup> See generally P. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Doubleday: 1967), and P. Berger et al, *The Homeless Mind* (Vintage Books: 1974).

<sup>46</sup> Sperber et al, *Women and Men in Communal Prayer* (Jofa: New York, 2010). D. Sperber is an eminent rabbi as well as a professor of Jewish Law at Bar Ilan University.

<sup>47</sup> See Rubinstein and Medina, supra n.2 volume 2 chapter 6.

<sup>48</sup> Sered, supra n.34 at p.138;

<sup>49</sup> For example, the Rabbi of the Wall was quoted as saying that "a woman carrying the Torah is like a pig at the Wailing Wall", Sered, supra n.34 p.139.

<sup>50</sup> But it is important to stress the difference between WoW and the reform and conservative movements. WoW includes women who are strictly (modern) orthodox. It is thus a group reflecting religious pluralism in Judaism.

<sup>51</sup> This was another regulation issued by the Rabbi of the Wall, prohibiting usage of Torah Scrolls not already available at the Wall itself. Because women do not have access to these scrolls (they are forbidden from using them), the WoW had to use its own private scroll. The prohibition, seemingly neutral, was designed to prevent the WoW from reading from the Torah scroll at the Wall's site. See <http://thekotel.org/content.asp?id=361> (Hebrew) (last visited July 30, 2011).

<sup>52</sup> Until 1990, the major religious parties were the national religious party (Mafdal), the sephardi party (Shas), and the ultra orthodox party (Agudat Yisrael). See <http://www.knesset.gov.il/faction/heb/FactionListAll.asp?view=1> (last visited Aug. 16, 2011).

<sup>53</sup> Evidently in the beginning the ICWoW was not sufficiently tuned to the feminist aspect of the controversy and more focused on the religion/state aspects of it.

<sup>54</sup> See R. Kampf, supra n.30, suggesting that indeed WoW was perceived by the Israeli media as a marginal group. See too R. Hirschl's theory that their marginality led to their defeat at the hands of the court, R. Hirschl, *Towards Juristocracy: The Origins and the Consequences of the New Constitutionalism* (Harvard University Press: 2004). But see Frances Rada, supra n.5, for a critique of this thesis. See also L. McClain and J. Fleming, *Constitutionalism, Judicial Review and Progressive Change*, 84 *Texas L. R.* 433 (2005). It is important to add that women still suffer extensive gender discrimination in Israel. See generally N. Rimalt, *Legal Feminism From Theory to Practice: The Struggle for Gender Equality in Israel and the United States* *Pardes Publishing House, Haifa University Press* (2010) (Hebrew) and H. Herzog ed., *Sex Gender Politics — Women in Israel* (Tel Aviv: Hakibbutz Hameuchad 1999,) (Hebrew).

<sup>55</sup> *Hoffman v. Western Wall Commissioner (the Rabbi of the Wall)* 48(2) PD 265 (1994).

<sup>56</sup> Because "conflict and religion" is the overall theme of this volume, I should add that even though Justice Elon was a distinguished scholar of Jewish law, his opinion has not met due deference in the orthodox world. For the orthodox, Elon represented the secular establishment (by virtue of his service on a secular court) and his opinion was therefore not considered authoritative. As a learned scholar of Jewish law said to me: "Elon said it, so what? His opinion does not matter to those in authority."

<sup>57</sup> For a chronology see, Chesler and Haut, supra n.14 p.362.

<sup>58</sup> Hoffman v. Prime Minister Office, Tak-Al 2000(2)846, Quite naively and shortsightedly, I celebrated the opinion as a happy ending to the saga. P. Lahav, Up Against the Wall, 16 Israel Studies Bulletin 19 (2000)

<sup>59</sup> See M. Mautner, Law and the Culture of Israel (Oxford University Press: 2010) discussing the nature of the tension between the religious and the secular camps and their cultural and legal ramifications. See also Rubinstein and Medina, supra n. 2 volume 2 chapter 6. The foremost Israeli scholar studying religious society in Israel and its interaction with secular society is Menachem Friedman. Friedman has published several books and many articles about this subject, and the reader is referred to his scholarship.

<sup>60</sup> Compare the hardships described by Tova Hartman as she went forth with her plan to establish an egalitarian synagogue in Jerusalem, supra, n.10.

<sup>61</sup> Compare the confrontation between the pro-segregation forces in the American South and the National Guard, sent by President Eisenhower to enforce the Supreme Court's order. Eisenhower was not a supporter of desegregation, but deployed the machinery of the federal government to defend the constitution as interpreted by the Supreme Court. See T.A Freyer, The Little Rock Crisis: A Constitutional Interpretation (Greenwood Press: 1984).

<sup>62</sup> Further hearing 4128/00, Director of Prime Minister's Office v. Hoffman, 47(3) PD 289.

<sup>63</sup> Faye Lederman, Women of the Wall, <http://www.newday.com/films/WomenoftheWall.html> (last visited on July 19, 2011), and Yael Katzir, In her own voice, <http://israelifilm.blogspot.com/2009/02/women-of-wall.html> (last visited on July 19, 2011). YouTube also has a number of videos on this subject.

<sup>64</sup> The deterrent effect of such an arrest is significant. Nofrat Frenkel is a medical student, and a conviction may jeopardize her chances to get a license to practice medicine. For Ms. Frenkel's description of the event see <http://judaism.about.com/b/2009/11/24/in-her-own-words-nofrat-frenkel.htm> (last visited July 29, 2011). One can only imagine the deterrent power of such a move on professional women and the significance of putting state power (licensing) behind religious preferences.

<sup>65</sup> See e.g., statement issued by the Rabbi of the Wall, in July 2010: "Thousands of worshippers arrived this morning at the Wall, and instead of performing uniting with God they were forced to witness a zealous political campaign, by an extremist group, conducted at their expense. The Wall is a place for the unity of the Jewish people, not of emphasizing differences and distinctions. I am very sorry for the choice of interest groups to turn the Wall Plaza into a contentious place, in contradiction with the explicit holding of the Supreme Court [a secular court, PL], [translation from the Hebrew by PL]. <http://www.thekotel.org/content.asp?id=357> (last visited on July 30, 2011). In the eyes of the Rabbi of the Wall, it is the WoW, not the worshippers, who are the zealous, extremist group. Another interpretation, however, is that the Rabbi is invoking the Court because he believes that this is the legal authority that appeals to WoW. If this is correct, than the Rabbi is denying the "orthodoxy" of some members of WoW.

<sup>66</sup> See T. Hartman, supra n.10 pp.106-13. Twersky and Meiselman are significant because they are both eminent rabbis and related to Rav J. Soloveichik, the founder and expounder of the modern orthodox movement. They therefore enjoy the extra shine accorded to the founder himself.

<sup>67</sup> Supra n. 46. Sperber et al, Women and Men in Communal Prayer, it is interesting to note that while the book is published by JOFA (Jewish Orthodox Feminist Alliance) it includes both a translation from Hebrew of Sperber's book favoring communal prayer by women and chapters by other scholars opposing prayer groups. It is not clear whether this format was made for intellectual reasons (document diversity) or whether it reflects subtle pressures on the publisher to avoid an all out endorsement of the concept.

תל: "אלפי מתפללים הגיעו הבוקר אל הכותל המערבי; ובמקום ליחיד עם קדושת המקום נאלצו להיות עדים למאנאי של קבוצה קיצונית. שמתנהל על גבם. הכותל המערבי הוא מקום של אחדות עם ישראל ולא מקום של קיטוב וחיידוד הבהלים. אני מוצר צער רב על בחירתם של גורמים אינטרסנטים להפוך את רחבת הכותל המערבי לאדמת מריבה, כנגד פסיקתו המפורשת של בית המשפט העליון – ובייחוד בתשעת אב, היום שבו חרב בית מקדשנו בעוון שגאת חזי

<sup>68</sup> Women in Israel are also engaged in the effort to make religion less patriarchal and more sensitive to gender dignity. This is not the place to review these phenomena. I should flag the NGO KOLECH ("your voice") which addresses Halachic issues concerning women and the growing profession of rabbinical advocates, women who are trained to appear before the rabbinical courts. <http://www.kolech.com/> (last visited August 14, 2011), and <http://www.yadlaisha.org.il/> (last visited August 14, 2011) and the Rackman Center for the Advancement of the

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Status of Women headed by Professor Ruth Halperin Kaddari <http://law.biu.ac.il/en/node/197> (last visited on Aug. 23, 2011) .

<sup>69</sup> See Ariel Hirschfeld's analysis of the Wall as Makom, in Hirschfeld, Local Notes (Am Oved: 2002) at p.13.