

Women of the Wall: A Normative Analysis of the Place of Religion in the Public Sphere

YUVAL JOBANI* AND NAHSHON PEREZ**

The place of religion in the public sphere is a controversial issue, and scholarly opinions differ, from insisting on a public sphere that reflects the religion of the majority, to those who insist on it being religion-free. Using the method of inquiry of contextual political theory, we examine the struggle of the Women of Wall (WoW) to pray collectively at the Western Wall. Their struggle began in 1988, and by 2013 includes many Courts decision, social struggles, public committees, and the involvement of many politicians and organizations, both in Israel and the USA. As this struggle takes place at the holiest place for observant Jews, it raises questions beyond its geographical location. The article describes three main normative approaches to state–religion relations (privatization, evenhandedness, and ‘dominant culture view’—DCV), examines them, and attempts to consider their application to the WoW case. Our conclusion points to the advantages of the privatization model, the permissibility of the evenhanded model and points to major shortcomings of the DCV.

Various scholars have strikingly different views regarding the ways in which liberal democratic governments should manage the plurality of religions within their borders: they must determine whether to allow the display of religious symbols in public institutions, such as courts or public schools; whether religious arguments may be used to justify legislation or court decisions; whether governments can single out one religion for a measure of greater or lesser favouritism according to that religion’s role in the public culture; and multiple other questions.

This article contributes to the scholarly debate regarding the relations between liberal governments and religion by examining one complex, controversial, and sensitive case in which religion plays a central role: the case of the Women of the Wall. This group of religious Jewish women has attempted, over

* Department of Hebrew Culture Studies and School of Education, Tel-Aviv University, Ramat-Aviv 69978, Israel; Email: jobani@post.tau.ac.il

** Department of Political Studies, Bar Ilan University, Ramat Gan 5290002, Israel; Email: nahshonp@gmail.com

The authors would like to thank the following scholars and colleagues who have contributed important insights and suggestions: Hanit Benglas, Julie Cooper, Avigail Eisenberg, Orly Erez-Likhovski, Alon Harel, Pnina Lahav, Menachem Lorberbaum, Hannah Mayne, Meital Pinto, Frances Raday, Jonathan Rynhold, Elisheva Rosman-Stollman, Richard A. Shweder, Jeff Spinner Halev, Bernard Susser, and two anonymous reviewers for the *OJLR*.

the last 25 years, to convince the Israeli authorities to allow them to pray collectively at the Western Wall, while wearing *Tallitot* (prayer shawls traditionally worn by men). Following the method of contextual political theory,¹ we shall assume that carefully attending to the details of the case is a valuable endeavour and that moving between the details of the case and the relevant theories will sharpen our understanding of both.

This article consists of three sections. Section 1 describes three influential normative approaches that prescribe specific ways for democratic states to manage religions within their borders: privatization, evenhandedness, and what we shall term the ‘dominant culture view’ or DCV (see Section 1 for elaboration). These views do not exhaust the full range of approaches explored in the literature (we immediately dismiss all illiberal options), but they are influential and used with enough frequency to merit our focus. Section 2 presents a succinct description of the Women of the Wall (WoW) case. Section 3 examines how the three normative approaches would attempt to solve (or ‘manage’) the WoW case and analyses the advantages and disadvantages of each approach. We will point to major advantages of the privatization approach, to the permissibility of the evenhanded approach, and to important and perhaps decisive shortcomings of the dominant culture view (at least in situations sufficiently similar to the WoW case). The conclusion adds some final thoughts on the applicability of our analysis of the WoW case to further, non-Israeli disputes regarding religion–state relations. A theory that can offer a reasonable path to follow in this highly complex and sensitive case, if supported by transferable arguments, is worthy of special consideration when attempting to solve other cases.

1. *Privatization, Evenhandedness, and Dominant Culture View*

This section introduces three major schematizations of possible relations between religion and state. We will accept, as an important premise, the view advanced by Martha Nussbaum² and Ronald Dworkin³ that the status of citizens in liberal democratic states—entitled to equal concern and respect—places certain constraints on the ways any democratic government may conduct itself in religious affairs. This includes a ban on any clear-cut legal discrimination based on religious affiliation—for example, a ban on Jewish candidates (or other religious minorities) to run for public office as existed in many European states before the emancipation of mid to late 19th century.⁴ However, beyond agreeing on the unacceptability of such blunt discrimination, the three approaches reach different conclusions about the proper relationship between the state and religions and how citizens’ entitlement to equal concern

¹ Joseph Carens, ‘A Contextual Approach to Political Theory’ (2004) 7 *Ethical Theor Moral Pract* 117; David Miller, *Principles of Social Justice* (Harvard University Press 2001); Dennis Thompson, *Political Ethics and Public Office* (Harvard University Press 1987).

² Martha Nussbaum, *Liberty of Conscience* (Basic Books 2008) 224.

³ Ronald Dworkin, ‘Liberalism’ in Stuart Hampshire (ed), *Private and Public Morality* (Cambridge University Press 1978) 113, among others.

⁴ Pierre Birnbaum and Ira Katznelson (eds), *Paths of Emancipation: Jews, States and Citizenship* (Princeton University Press 1995).

and respect ought to be translated into policies regarding religion. This issue has developed a tremendous amount of literature, and we do not aim to summarize all or even some of it (see Audi⁵ for an excellent introduction); rather our aim is to elucidate the main normative attributes of each approach. Note also that while each approach has dominant examples in important countries, the following analysis focuses on normative principles rather than on specific examples.

A. Privatization⁶

This approach attempts to reduce, as much as possible, governmental entanglement with religion by strictly limiting the role religion can play in political life, while simultaneously respecting the autonomy of religious institutions. The reasoning behind this approach is as follows: as the citizens of western democracies are religiously diverse, and the government is committed to treating all of its citizens with equal respect and concern, a government that adheres to one given religion would violate its commitment to respect all of its citizens equally. Therefore, the government should attempt, as much as possible, to avoid establishing or favouring a given religion and, consequently, discriminating against individuals based on religious belief. A major advantage of the privatization approach is that it keeps religion and state apart and safeguards the equal status of citizens belonging to different denominations. Other advantages include reducing the danger of factionalism, respecting the sovereignty of the denominations within the state, and avoiding complex entanglements of the government with religion. The most elegant way to achieve this set of important goals is via privatization of religion: religious beliefs, religious institutions, and houses of worship are given to the choice of the individual citizen or, through freedom of association, to an aggregation of individuals. The government remains indifferent, so to speak, to the religious affiliations of its citizens and does not have any religious identity of its own.⁷

This privatization strategy does not stem from, or lead to, an indifference of individuals towards religion. The United States, for example, one of the first countries to adopt this strategy, is also the Western state with the highest statistics for religious belief and practice.⁸ The privatization strategy is a solution to problems that arise when religious beliefs are *too* important and permitting them entrance to the political sphere is *too* dangerous⁹; a lesson learned from the European history of violent factionalism between Catholics and Protestants. This strategy also protects religious groups from meddling

⁵ Robert Audi, *Democratic Authority and the Separation of Church and State* (Oxford University Press 2011).

⁶ The term was used by Brian Barry (*Culture and Equality* (Polity 2001)) and our description owes much to his formulations even though we do not follow him in every detail. This approach obviously resembles the American separation model, but we prefer 'privatization' to 'separation' in order to emphasize the normative, rather than the descriptive, nature of our analysis and categories (and the American separation model is dissimilar in some points to the privatization model). Perhaps most importantly, 'privatization' in religion and state relations does not presume a commitment to privatization in the relation between state and economy, as well demonstrated by John Rawls (*Political Liberalism* (Columbia University Press 1993) 195).

⁷ Nussbaum (n 2); Rawls (n 6) 133, 195.

⁸ Charles Taylor, *A Secular Age* (Harvard University Press 2007) 2.

⁹ Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton University Press 2003) chs 5, 8.

done by the government, and the problematic identification of religion with the machinery of the state.¹⁰ Importantly, this strategy does not depend on the indifference of a given religion towards the public sphere, rather it is a normative response to religious demands regarding the political arena and the public sphere if and when they arise.¹¹

This approach means not only that the state must not establish a formal religion, but that it must not adopt religiously based state symbols, or any other religious identification. Such an approach and aspiration is never complete,¹² as evidenced by the many and varied debates in the literature regarding difficult cases, such as the choice of days of rest that usually follow the religious calendar of the majority.¹³ Particularly difficult questions arise regarding religious symbols presented ‘passively’ by state institutions as some such symbols (as some argue) also have a secular purpose (as in celebrating a holiday: see the *Lynch v Donnelly*¹⁴ case and the analysis in Van Alstyne¹⁵); requests of religious minorities for certain exemptions from generally applicable laws¹⁶ that, if granted, might suggest the state favours one religion.¹⁷ However, despite frequently repeated criticisms that the complete privatization of religion is impossible, supporters of this approach argue that getting as close as possible to such complete privatization—a hands-off approach—is the best possible strategy for religion–state relations and that states working towards this ideal are executing a valuable service for their citizens.^{18,19}

B. *Evenhandedness*

Like the privatization approach, the evenhandedness strategy emphasizes the importance of treating all the state’s citizens with equal concern and respect. However, this strategy does not require that the government adopt a hands-off

¹⁰ Andrew Koppelman, ‘Corruption of Religion and the Establishment Clause’ (2009) 50 *Wm & Mary L Rev* 1831.

¹¹ Daphne Barak-Erez, *Outlawed Pigs: Law, Religion, and Culture in Israel* (University of Wisconsin Press 2008). Nahshon Perez, ‘The Privatization of Jewishness in Israel (or: on Economic Post Zionism)’ (2013) 19 *Israel Affairs* 273.

¹² Michael Walzer, ‘Liberalism and the Art of Separation’ (1984) 12 *Pol Theor* 315.

¹³ Ruth Gavison and Nahshon Perez, ‘Days of Rest in Multicultural Societies: Public, Private, Separate?’ in Peter Cane, Carolyn Evans, and Zoe Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press 2008) 186.

¹⁴ [1984] *Lynch v Donnelly* 465 US 668.

¹⁵ ‘Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall—A Comment on *Lynch v. Donnelly*’ (1984) 33 *Duke Law J* 770.

¹⁶ Barry (n 6) ch 2.

¹⁷ Kent Greenawalt, ‘Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy’ (2007) *Wm & Mary L Rev* 1605.

¹⁸ Nussbaum (n 2); Richard Epstein, *Simple Rules for a Complex World* (Harvard University Press 1995) pt 1, chs 1 and 2.

¹⁹ One of the best descriptions of the American model known to us, on which the privatization model is based, is from Philip Hamburger, *Separation of Church and State* (Harvard University Press 2004). This approach also has roots in European secularization (Charles Taylor, ‘The Dynamics of Democratic Exclusion’ (1998) 9(4) *J Democr* 143–56). A long-standing dispute within the privatization approach is how conflicts between universally applicable laws and religious practices can be resolved; we cannot enter this debate here. (But see Barry (n 6) ch 2; Simon Caney, ‘Equal Treatment, Exceptions and Cultural Diversity’ in Paul Kelly (ed), *Multiculturalism Reconsidered* (Polity 2002) 81; Nahshon Perez, ‘Cultural Requests and Cost Internalization: A Left Liberal Proposal’ (2009) 35 *Soc Theor Pract* 201; Steven Gey, ‘Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools’ (2005) 42 *Houston L Rev* 1; Stephen Macedo, ‘Liberal Civic Education and Religious Fundamentalism: The Case of *God v. John Rawls*?’ (1995) 105 *Ethics* 468.)

approach with regard to religion. Rather, governmental resources are allocated to different religious denominations and groups without showing preference to any one religious group, while the government and state themselves remain unaffiliated with any one denomination.

The guiding idea of evenhandedness, according to Joseph Carens who coined the term, 'is that what fairness entails is a sensitive balancing of competing claims for recognition and support in matters of culture and identity. Instead of trying to abstract from particularity, we should embrace it, but in a way that is fair to all the different particularities. Now being fair does not mean that every cultural claim and identity will be given equal weight, but rather that each will be given appropriate weight under the circumstances and given a commitment to equal respect for all. History matters, numbers matter, the relative importance of the claim to those who present it matters, and so do many other considerations.'²⁰

The nature of the request for resources proves important: Is it in tension with liberal values such as gender equality? Does it place a burden on the resources commanded by the state? Does it introduce burdensome requirements on other citizens? Carens seems to assume that treating people as equals, as argued by Dworkin,²¹ does not mean an exact equality of treatment, rather treatment that is adequate to the relevant variables that constitute a given situation. Now, deciding what is fair and evenhanded treatment in a given scenario proves to be a complex challenge as different groups will surely argue that a certain allocation policy affords a given variable too much (or too little) consideration. For our needs, it is the two basic aspects of the evenhanded approach that should be noted: the state does not identify with any one of the different religious denominations and groups that exist within a given society; and the state adopts a hands-on approach to the fair treatment of religions (usually via an allocation of resources and funding). What is 'fair', as eloquently explained by Carens, will depend on the context of each specific case.

To provide two straightforward examples of evenhanded policies, we succinctly point to two different policies adopted in different countries: in Germany, the tax code allows members of some denominations to pay their membership fees via a centralized tax system, and such fees are recognized deductibles from overall income²²; in Israel, the state pays the salary of clergy of various denominations, including for example, Jewish and Islamic judges in halakhic and sharia courts.²³

An evenhanded approach will encounter several potential difficulties: establishing satisfying definitions to determine which denominations qualify as a religion proves challenging; likewise, it is difficult to determine how the different variables mentioned by Carens can be measured in a precise manner that the different religious groups within the society can also accept as fair.²⁴

²⁰ Joseph Carens, 'Two Conceptions of Fairness: A Response to Veit Bader' (1997) 25 *Pol Theor* 814, 818.

²¹ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 266.

²² Claudia E Haupt, *Religion-State Relations in the United States and Germany* (Cambridge University Press 2012); Jonathan Fox, *An Introduction to Religion and Politics* (Routledge 2013) pt 2.

²³ Bernard Susser and Asher Cohen, *Israel and the Politics of Jewish Identity* (Johns Hopkins University Press 2000); Taylor (n 19); Aharon Layish, 'Adaptation of a Jurists' Law to Modern Times in an Alien Environment: The Case of the Shari'a in Israel' (2006) 46 *Die Welt des Islams* 168.

²⁴ Francis Raday, 'Religion, Multiculturalism and Equality: the Israeli Case' (1995) 25 *Israel YB Hum Rights* 193.

Evenhanded policies are sufficiently demanding and complex as to place a rather heavy burden on the state seeking to be fair and to satisfactorily execute such fine-tuned policies.

C. Dominant Culture View

The ‘dominant culture view’ (DCV) adopts the following claim as its point of departure: in some countries, there are substantial majorities that share cultural and religious understandings. Such majorities, the DCV argues, can legitimately use the acts of the government to advance their religion, as long as such policies do not violate the core liberties and rights of minority groups (or non-observant members of these majority groups).²⁵ The DCV view differs decisively from both the privatization and evenhanded approaches as it identifies the state with one denomination (to varying degrees), whereas the privatization and evenhanded approach avoid any such singular endorsement.

A well-known application (with several examples) of the DCV is the official established churches in various European countries (England, Greece, Sweden up to 2000, etc). In the recent controversy regarding the ban on building Minarets in Switzerland, David Miller argued for the adoption of the DCV as ‘[a] majority is entitled to ensure that the appearance of public space reflects its own cultural values, so that where those values reflect a Christian heritage, it can insist that Christian buildings and symbols should remain hegemonic.’²⁶ Miller does not fully advocate the DCV approach, but he argues that it is a permissible strategy for addressing immigrant groups’ requests, grounded in religion, vis-à-vis the public sphere. Another recent demonstration of the DCV strategy is the *Lautsi v Italy* (2011) decision of the European Court of Human Rights (ECtHR).²⁷ The court determined that the Italian law that requires the display of crucifixes in state school classrooms does not violate the European Convention of Human Rights. This controversial decision gained important support from legal scholar Joseph Weiler, who asks the reader to shift her/his point of view from the member of a minority, forced to acknowledge her/his lesser status compared to the majority to which the state ‘belongs’, to the many members of a majority asked (or forced) to abolish the symbols of their collective identity from the public sphere. It is noteworthy that many European states joined Italy (and therefore support the DCV approach) in arguing to the ECtHR Grand Chamber that the strict separation of the American model is legitimate for the USA, but is unsuitable for many European states.²⁸

The DCV, however, faces five immediate difficulties. First, it is uncertain how to draw the line between a ‘modest’ preference towards one given religion that does not violate basic liberties and rights of minorities, and more substantial biases prohibited by liberal–democratic principles. Second, how can

²⁵ Michael Walzer, *Spheres of Justice* (Basic Books 1983) 313.

²⁶ David Miller, ‘Majorities and Minarets: Religious Freedom and Public Space’ (2014) *Brit Polit Sci*, doi:10.1017/S0007123414000131.

²⁷ [2011] *Lautsi vs. Italy*, Application no 30814/06.

²⁸ Joseph Weiler, ‘State and Nation; Church, Mosque and Synagogue – On Religious Freedom and Religious Symbols in Public Places’ in Mary Ann Glendon and Hans Zacher (eds), *Universal Rights in a World of Diversity, The Case of Religious Freedom* (The Pontifical Academy of Social Sciences 2011) 578.

the state avoid factionalism and hostility between members of different religious groups once favouritism is established? Third, the DCV approach requires substantial government entanglement with religious beliefs as the government, to use an American phrase, ‘will pick winners’ among the different religions or between different strands within a given religion. This is a complex exercise, to put it mildly. Fourth, the DCV approach requires that the dominant religion substantially agrees on what should be demanded in specific cases. When such an agreement does not exist and different strands within a given religion sharply disagree, the DCV will face a problematic indeterminacy that forces the government to ‘pick winners’ among different schools within one denomination—a troubling and unfortunate position for a liberal democratic government to find itself. Finally, the DCV seems to serve conservative views that aim to protect established views and customs, making it vulnerable to questions of why this particular aspiration should be a part of a theory of justice. Certainly not all customs and past traditions can legitimately continue under modern conditions and norms, and constituencies legitimately question what aspects of a given tradition need to be revised or abandoned, a process that usually involves argumentation external to a mere conservative stance.²⁹ The DCV view, succinctly put, encounters the same problems faced by conservative views, and it is not clear, especially in cases in which the DCV view will collide with important liberal commitments (say, gender equality), what merits this basically conservative view offers.³⁰

2. *Women of the Wall: a Brief Description of a Very Complex Sequence of Events*

This section will present a succinct description of the struggle of the WoW to pray collectively, while wearing *Tallitot*, at the Western Wall. As was discussed above, our goal is to use this case as a lens to examine how liberal countries can appropriately respond to the different demands that religious groups make in the public sphere, and to use a contextual approach to carefully examine the WoW case. To do so, we will describe the principal developments in this complex case. Since the WoW’s struggle for state recognition has been conducted primarily through judiciary means, and our goal is to examine normative strategies as they may confirm or clarify an adequate state response to the WoW’s request, we shall organize this short survey around the three rulings the Israeli Supreme Court has issued on the matter (which were given in 1994, 2000, and 2003).³¹ The survey concludes with the dramatic developments in the case during 2013–14.³²

²⁹ Menachem Lorberbaum, ‘Religion and State in Israel: The Social Covenant’ in Menachem Mautner, Avi Sagi, and Ronen Shamir (eds), *Multiculturalism in a Democratic Jewish State* (Ramat 1998) 279 (Heb).

³⁰ GA Cohen, ‘Rescuing Conservatism’ in Michael Otsuka (ed), *Finding Oneself in the Other* (Princeton University Press 2012) 143; Leo Strauss, *Natural Rights and History* (Chicago University Press 1999) ch 6, pt 2.

³¹ [1994] HCJ 257/89 and HCJ 2410/90 *Anat Hoffman v Western Wall Commissioner*, 48(2) PD 265; [2000] HCJ 3358/95 *Anat Hoffman v Prime Minister Office*, Tak-Al 2000(2) 846; [2003] HCJ 4128/00 *Prime Minister Office v Anat Hoffman*, PD 57(3), 289.

³² The WoW are a fascinating social phenomenon that involves, and represents, various important developments in Israeli society. As such, the WoW have attracted the attention of several important scholars, some who have been supportive in their interpretations (Lahav, Raday), some who have been critical (Hirschl),

A. *The First Ruling of the Supreme Court*

The WoW's struggle began in 1988 following the decision of a group of women to pray every *Rosh Hodesh* (the day of the new moon), and on special events, in the women's section (*Ezrat Nashim*) at the Wall, wearing prayer shawls traditionally worn by men (*Tallitot*) and reading out loud from the *Torah*. Each *Rosh Hodesh* prayer takes about an hour, thus the WoW request, in effect, involved very few hours *annually*. When they first tried to do this, the women encountered violent opposition from other worshippers and were removed from the premises by the police on the grounds that they were disturbing public order. In 1989, women from Jerusalem submitted the first petition to the Supreme Court (257/89); in 1990, an additional petition (2410/90) was submitted by women from the USA whose attempt to pray at the wall had also been frustrated. Prior to the second petition, the Minister of Religion published an addition to the 'Regulations for the Protection of Holy Places for Jews' (1981) that prohibited the 'holding of a religious ceremony that is not according to the custom of the place, and that offends the sensitivities of the worshipping public towards the place (2(a) (1a))'. This amendment allowed the rabbi appointed to the Wall (a public servant) to forbid the entrance of the WoW to the women's section of the Wall.³³

Justices Elon, Levine, and Shamgar made a joint ruling on the two petitions. Initially, they attempted to find a compromise between the two sides; when this proved beyond their reach, a court ruling was made in 1994. All three Justices agreed that the WoW were entitled to freedom of religious practice which, in this case, meant they could pray as they wish within their communities and synagogues. However, they disagreed on whether freedom of religious practice should extend to their fashion of prayer at the Western Wall. Elon, the Justice who occupied the seat in the Supreme Court traditionally designated for a scholar in Jewish Law, rejected the WoW petition. In a long and encyclopedic ruling, Elon claimed that though the custom of the WoW did not necessarily

and some who attempted to locate the WoW in various specific social contexts (Shakdiel). These investigations are all interesting, though with interests that differ from that of the current essay's explicit interest in locating a normative response to the WoW struggle through the noted approaches to religion-state relations. See Pnina Lahav, 'The Woes of WoW: The Women of the Wall as a Religious Social Movement and as Metaphor' in John Berthrong (ed), *Religion, Conflict & Peace Making: Seeking Wisdom in Interdisciplinary Dialogue* (forthcoming); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007) 67; Leah Shakdiel, 'Women of the Wall: Radical Feminism as an Opportunity for a New Discourse in Israel' (2002) 21:1-2 *J Israeli Hist* 126; and Francis Raday, 'Claiming Equal Religious Personhood: Women of the Wall's Constitutional Saga' in Winfried Brugger and Michael Karayanni (eds), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Springer 2007) 255.

³³ Religion-state relations in Israel follow, by and large, the Ottoman millet system, in which religious denominations are recognized and funded by the state and enjoy exclusive jurisdiction on issues of personal law (there are no civil marriages in Israel). The millet system is problematic since it locks individuals into their religious communities. Toleration, by the state, exists towards communities, not individuals. Members have no rights of conscience or of association, and everyone has to be a member of some community (Michael Walzer, *On Toleration* (Yale University Press 1997) 17). Within the Jewish sector, the system is heavily biased towards Ultra-Orthodox and Orthodox denominations; reform and conservative Jewish groups are only slowly and gradually entering the allocation system as legitimate Jewish denominational groups. This system is in the centre of a struggle between secular and religious Israeli Jews (Daphne Barak-Erez, 'Law and Religion Under the Status Quo Model: Between Past Compromises and Constant Change' (2009) 30 *Cardozo L Rev* 2495). Though glib definitions can place a scholar in a potential mine field, here we will state that we consider the state of Israel to belong to the DCV 'camp' with touches of the evenhanded approach.

contradict or oppose Jewish law (*Halakha*) formally, it was not accepted in Orthodox synagogues and thus it certainly should not be permitted at the Western Wall, a site which functions as the holiest synagogue in the Jewish world. According to Elon, the following considerations decisively explain why it should not be allowed: the WoW's prayer practice opposes 'the custom of the place' at the Wall, offends the sensibilities of a majority of worshippers there, and prevents them from fulfilling their own prayer according to Jewish law. Additionally, Elon refused to acquiesce to the WoW's demands because, according to his claim, such consent would lead to violence and turmoil that would endanger the peace and security of the public (making a 'backlash' argument; ie that a foreseen violent response to a given act, such as a WoW prayer at the Wall, is a sufficient justification for banning this given act).

Levine claimed that the WoW had the right to pray according to their manner. He rejected Elon's ruling, which was anchored in Jewish law, with a dual consideration. First, the law for safeguarding holy sites is a distinctly secular law that is not subordinate to religious law, even though the secular law brings the religious law into consideration. Second, the site of the Wall has a broad national significance that differs from its religious meaning, and the fact that it serves as a prayer site does not grant it the status of a 'synagogue'. Therefore, according to Levine, the court should take into consideration the sensitivities of all worshippers as well as those who visit the site for other purposes in good faith. Similarly, the notion of 'custom of the place' should be understood in an open and dynamic sense that reflects the full breadth of beliefs and customs of those who come to worship at the site of the Wall. Additionally, Levine rejected the backlash argument, arguing that the likely results of a 'backlash' scenario are not a justification for banning religious activities; rather such a danger places a duty on the government to ensure freedom of worship. Therefore, Levine ruled that authorities should formulate, within a year, the appropriate arrangements that will secure the full exercising of the rights of all worshippers and visitors to the site, including the WoW.

Shamgar recognized the abstract (or 'in principle') right of the WoW to pray as they wished at the site, but rejected their petition with the reasoning that the court was not the proper place to determine the issue. While indicating that the 'doors of the court are always open', he recommended that the government form a committee that would examine possible solutions.

In summary, the Supreme Court rejected the WoW's petitions according to the majority opinion of Elon and Shamgar (although Shamgar did recognize their abstract right to pray at the Wall and, in that, agreed with Levine), and recommended that a governmental committee be convened to settle the matter.

B. The Second Ruling of the Supreme Court

Following the Supreme Court's recommendation, the government convened three committees whose conclusions and activities were unable to successfully resolve the matter. The first committee was made up of directors of various government Ministries. This committee surveyed four alternative prayer sites

near the Wall: the square at the foot of Robinson's Arch (see below), the area in front of Hulda Gates, the southeast corner of the wall of the Temple Mount, and the 'Small Wall (*Kotel*)' area. After two years of deliberations, and in consideration of police opinion, the committee recommended that the WoW's prayer take place at the southeast corner of the wall of the Temple Mount, far from the Wall itself.

The second committee was also a Ministerial Committee. After a year of consultations with different security and law enforcement authorities, the committee recommended that the WoW's prayer would not be permitted, either at the Wall or at any of the four alternative sites suggested by the first committee, due to the risk of endangering public order.

A third committee recommended, in 1998, that the WoW's prayer be held at the archaeological site named 'Robinson's Arch' which is, in fact, a segment of the Western Wall itself. This site is adjacent to the Wall on the south side, though a bridge that ascends to the Temple Mount separates it from the main plaza and keeps it out of sight of those praying within the Wall Plaza. It is important to note that 'Robinson's Arch', an important archaeological site, cannot easily be transformed into a prayer site and that traditional Jewish prayer in front of the Wall has never been conducted at this site, thus it lacks the deep symbolic meaning attached to the Wall Plaza.

In response to the first committee's suggestions, the WoW again appealed to the Supreme Court (3358/95). In this (second) court ruling, given in 2000, Justices Mazza, Strasberg-Cohen, and Beinisch determined that the right of the petitioners to pray at the Wall as they wished had, in fact, already been recognized within the framework of the first ruling (noting the 'in principle' consideration of Shamgar and the full support of Levine). Therefore, the recommendations of the different governmental committees for alternative sites of WoW prayer opposed the earlier ruling of the Supreme Court. Moreover, the Justices rejected the different sites suggested by the various committees; following a tour of the proposed sites, the Justices concluded that the sites are either not satisfactory or ill-prepared for prayer services. As a result, the Justices uniformly ruled that the government was to make, within six months, the appropriate arrangements to enable the WoW to pray in their manner at the Wall Plaza.

C. The Third Ruling of the Supreme Court

The Supreme Court's second ruling caused public outcry and political turmoil that led the government to request an additional discussion on the matter at the Supreme Court (4128/00). The state claimed that Robinson's Arch provided a fair and feasible solution that responded to the two conditions set out in the Supreme Court's first ruling. First, since the site of Robinson's Arch is a segment of the Western Wall, this solution maintained the WoW's freedom of access. Second, the WoW's prayer at this site would prevent unnecessary offence to and friction with the sensibilities of other worshippers.

The third Supreme Court ruling was delivered in 2003 by an expanded panel of nine Justices. The Justices upheld the right of the WoW to pray as they

wished at the Wall Plaza, though they pointed out that this was not an unlimited right and that any offence to other worshippers should be minimized as much as possible. They, therefore, ruled that the government should prepare the site of Robinson's Arch for the WoW's use within a year. If the site was not ready within a year, the WoW would have the right to pray at the Wall Plaza according to their manner. The ruling also noted that, in its current condition, Robinson's Arch also served as an archaeological park under the auspices of the Antiques Authority, and that this authority strongly opposed the preparations necessary to transform the site to a prayer site. The ruling was made in accordance with the majority opinions of President Barak and Justices Or, Cheshin, Terkal, and England, and in opposition to Vice President Levine as well as justices Mazza, Strassberg-Cohen, and Beinisch.

D. Recent Developments

Since the Supreme Court ruling in 2003, the WoW have been arriving to the Wall Plaza to pray on each *Rosh Hodesh*, in opposition to the Justice Department's 2005 instructions to the police according to which the preparations of the Robinson's Arch site were declared complete, and it was thus the only location at which the WoW would be able to pray. The WoW oppose this as, though they accept the Supreme Court's ruling, they claim that the site is not yet prepared as necessary. During the subsequent years, several worshippers of the WoW were arrested on the basis of 'behaviour in a public place in a way that was liable to disturb the peace', 'the violation of a legal ruling', and 'a prohibited act in a holy site'; some of these women were banned from the Wall for varying amounts of time as a result.

Following the recent arrests of five women from the group in April 2013, however, a dramatic turn has occurred. In a discussion before the Jerusalem Magistrates Court, Justice Larry-Bavly decided to release the detained WoW members without stipulation and rejected the state's request to bar their entry to the Wall for the following three *Rosh Hodesh* prayer services.³⁴ The state appealed the ruling before the Jerusalem District Court, but the appeal was rejected by Justice Sobel.³⁵ Judge Sobel argued that the third and final ruling of the Supreme Court was worded as a recommendation with stipulations. There is no legal ruling confirming that the government had fulfilled the appropriate preparation of Robinson's Arch site as stipulated. Therefore, it is not possible to view the Supreme Court's ruling as definitive grounds for assigning criminal liability in the case of its violation. In addition, Judge Sobel argued that the WoW's prayer does not oppose the 'custom of the place' according to the broadest interpretation given to that term by the majority ruling in the first Supreme Court decision. Finally, given that the WoW do not employ physical or verbal violence of any kind, they cannot be blamed for endangering the safety of the public or any person present at the Western Wall Plaza. The legal situation, therefore, changed and the WoW, as of September 2013, have

³⁴ [2013] 21352-04-13 *State of Israel v BR Ras and others*.

³⁵ [2013] 43832-42-33 *State of Israel v BR Ras and others*.

complete legal backing to pray at the Wall's Plaza according to their custom in every *Rosh Hodesh*.³⁶

Parallel to these developments, a renewed attempt to reach a compromise has begun under the leadership of the head of the Jewish Agency for Israel, Natan Sharansky. These efforts are directed by a committee headed by the government secretary, Avichai Mandelblit. This plan designates a large area next to Robinson's Arch as a 'third plaza'. According to the plan, the new plaza will be an egalitarian prayer space and serve non-orthodox Jews and others interested in visiting the Western Wall for different purposes without separation of men and women. This plaza will be raised and will be at the same height and level as the men's and the women's section at the central Plaza, and will be continuous with the Western Wall Plaza. The current Plaza will remain as it was prior to Sobel's decision and WoW prayer there will be banned.

On October 2013, the WoW presented a list of conditions (pertaining to the section's name, size, budget, status, management, and accessibility) under which they would accept this latest proposal. Taken together, the conditions mandate that the egalitarian Plaza will have equal funding and status (as compared to the central Plaza) and that the authority of the Western Wall Heritage Foundation, and that of the Rabbi of the Wall (an Ultra-Orthodox (UO) person) which now administer the central Plaza, will be restricted only to the existing men's and women's sections. A new body, with equal women's representation (including WoW), would run the 'third plaza'. They also demand that women who wish to pray together, and not as part of a mixed service, will have the means to do so (a Torah scroll and a temporary partition to surround women's groups during prayer will be accessible at all times at the new plaza).³⁷

It remains to be seen whether this compromise will succeed, as these conditions are yet to be met and, equally important, some members of the WoW, among them some of the founding members of the WoW, reject the compromise offer. This segment of the WoW argues that Robinson's Arch does not have equal standing with the Wall's central Plaza, that the compromise is in tension with the long-standing goal of the WoW to pray at the central Plaza, and that governmental policies are motivated by fear of UO violence, an illegitimate consideration. Indeed, this segment has declared that it will ignore the compromise and will continue to pray at the central Plaza, *de facto* creating a split within the WoW.³⁸

Amidst these legal and political developments, the social struggle continues and, in recent months (for example, *Rosh Hodesh Av*—July 2013), the WoW

³⁶ It is important to note, that the presence and prayer of the WoW at the women's section of the Wall in each Rosh Hodesh never stopped since 1988. However, prior to Judge Sobel's decision, the WoW were placed under limitations, for example, they were forbidden from wearing Talitot or from reading out loud from the Torah.

³⁷ Women of the Wall Vote to Lead the Jewish People towards Change: Three Equal Sections at the Western Wall <<http://womenofthewall.org.il/2013/10/women-of-the-wall-vote-to-lead-the-jewish-people-towards-change-three-equal-sections-at-the-western-wall/>> accessed 17 October 2013.

³⁸ See Judy Maltz, 'Women of the Wall divided as dissenters refuse to budge from women's section' <<http://www.haaretz.com/jewish-world/jewish-world-news/.premium-1.555238>> accessed 30 October 2013; Judy Maltz, 'Orthodox feminist group breaks ranks with Women of the Wall: Joins other dissenters in opposing move to new mixed prayer section' <<http://www.haaretz.com/news/national/.premium-1.572443>> accessed 4 February 2014.

met considerable difficulties in their prayer, as UO leaders called upon UO women to fill the women's section of the plaza on *Rosh Hodesh* and to disrupt WoW prayer at the Wall (although recent prayers, as in January 2014, passed with less commotion). This social struggle upon its many twists and turns, and the continued political search for solutions, signals that the WoW case is far from conclusion.

3. *Privatization, Evenhandedness, or DCV? Thinking Normatively on the WoW*

In this section, our analysis will point to the merits of the privatization approach, the permissibility of the evenhanded approach, and important considerations for rejecting the DCV strategy. Before proceeding, one important preliminary comment is in order. The WoW case does not float in thin air: it is located within a particular legal system, political context, and social reality. A reader legitimately might ask what value a normative analysis has if it introduces foreign considerations and arguments into the local understandings and legal system. We think that there are three answers to this objection. First, there is value in normative analysis, even if it is partially foreign to the local tradition. Indeed, it is arguably one of the central goals of normative analysis to reflect on existing norms, legal rules, and social realities at a certain distance.³⁹ Second, it is unclear what the Israeli 'shared understandings' are, exactly. Israel is a divided and constantly changing society, especially in matters pertaining to religion–state relations that are reflected in the long struggle of the WoW.⁴⁰ Finally, while not limiting our analysis to the local norms, we are sensitive to the context in which the WoW function; this is one reason we surveyed the particulars of the case above. Being sensitive to context does not mean accepting that context; however, it may serve to protect the observer from potential interpretative errors.

A. *Privatization*

The strategy of privatization in the WoW case requires, unsurprisingly, that the state retreat from the religious dispute over the WoW's prayer. The state, in this approach, will maintain peace and order at the Wall and nothing more. As the entire state–religion system in Israel is not privatized (although economic liberalism, highly prevalent in Israel, has penetrated the religious sphere⁴¹), it is admittedly difficult to disconnect the WoW's case from the rest of the relevant system. Nonetheless, some steps in the privatization approach can be taken (and were, for example, by Judge Sobel's rejection of the 'offending religious feelings category'; see below). The privatization approach would recommend that the state eliminate all particular laws, regulations, positions, etc that are

³⁹ Thomas Nagel, *Equality and Partiality* (Oxford University Press 1991) 10.

⁴⁰ The literature on the complex and ongoing social struggle over issues of religion and state in Israel is vast. See, for example, Guy Ben-Porat, *Between State and Synagogue: The Secularization of Contemporary Israel* (Cambridge University Press 2013); Menachem Mautner, *Law and the Culture of Israel* (Oxford University Press 2011); Susser and Cohen (n 23).

⁴¹ See Perez (n 11).

particular to the Western Wall location. For example, the state position of the Rabbi of the Western Wall would be abolished and the Western Wall Heritage Foundation would cease to exist;⁴² the permanent divider that separates men and women in the Wall Plaza would be removed (though men and women would remain free to arrange themselves according to their preferences); all legal rules specific to the Wall would be abolished.

Indeed, anything that is prohibited in, for example, a street in Tel-Aviv (violence, littering, etc), will also be banned at the Western Wall, but *nothing further*. However, the legal strictures concerned with the ‘protection of holy places law’ in Israel (1967, 1981) prohibit acts such as the wearing of immodest outfits, smoking, selling of food, the entrance of animals. The privatization approach can, arguably, accommodate such prohibitions based on the special importance of a given place. However, in this law, the prohibition against ‘holding of a religious ceremony that is not according to the custom of the place, and that offends the sensitivities of the worshipping public towards the place (2(a) (1a))’ cannot be accepted in the privatization model.

The ‘custom of the place’ stipulation leads us to one of the main objections raised against the WoW: that they offend the religious feelings of other worshippers.⁴³ Could a state that adopts the privatization model accept a law banning ‘offences to religious feelings’ as legitimate and generally applicable? The current bylaw (as quoted above) does not allow a religious ceremony that ‘offends the sensitivities of the worshipping public’ (this follows section 173 of the Israeli penal code, although there the bylaw is worded against actions that ‘crudely offend’). The privatization approach would probably be as follows: ‘Offences to religious feelings’ constitute a rather opaque category. Hate speech—deliberately demeaning and/or insulting speech, aimed at a vulnerable minority, which aims to stir, or create hate against this minority—is one thing;⁴⁴ the category of offences to religious feelings, in comparison, covers extensive ground and limits speech and behaviours that are not demeaning or humiliating, nor does this category necessarily protect a vulnerable minority. The privatization strategy must oppose this ‘offending religious feelings’ category, as explained by three main considerations.

First, the privatization approach retreats from religious affairs and thus moves in the opposite direction of the ‘offending’ category that entangles the state with religious affairs. At minimum, the state will need sufficient knowledge of religious affairs in order to decide if the different parties’ activities, the UO and the WoW in our case, are authentic religious manifestations of their core beliefs (in late Latin the verb *manifestare* means ‘make public’), and if the claims of offence and agony are real or a fabrication.

⁴² This entity, which manages the Wall, has been dominated by an Ultra-Orthodox influence. A petition against its non-egalitarian choice of members and policies has been brought before the Supreme Court (145/13).

⁴³ According to a radical version of the ‘offending’ argument, suggested by Judge Elon (see Section 2), the WoW’s prayer practices not only offend the sensitivities of UO worshippers but also prevents them from fulfilling their own prayer according to Jewish law. However, numerous pre-1948 photos and clips showing UO men and women praying next to each other with no divider at the Plaza of the Western Wall do not support this argument (see, for example, this 1918 footage <www.youtube.com/watch?v=8k82Fgf8VZk> accessed 12 December 2013; see also Margalit Shilo, *Princess or Prisoner? Jewish Women in Jerusalem, 1840 – 1914* (Brandeis University Press 2005).

⁴⁴ Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press 2012).

Furthermore, in a case with authentic offence, the state will have to respond to the specific religious sensibilities of individual citizens and measure their pain. The state will also have to decide which feelings are crucial enough to a given religion to justify limiting the speech or behaviour of other citizens. Acquiring such knowledge and making such judgments in modern states that exhibit plurality of religions are a complex and demanding endeavour and such actions will likely only increase factionalism.

Second, it is quite likely that different religions will be offended by different, and occasionally opposing, activities. In some cases, *all* possible relevant behaviours will offend some party; for example, while the UO are offended by the WoW's prayer practice, there are WoW who are offended by the gender segregation of the UO's prayer practice in the first place.⁴⁵ In such cases, whatever action the state take, some party will be offended. Governmental regulation aimed to avoid religious offence can be rejected, therefore, by a '*reductio ad absurdum*'.

Third, the 'offence' category applies far beyond the 'hate speech' category mentioned above. The 'offence' is likely, therefore, to be caused by many banal behaviours of law-abiding citizens, whether non-observant persons or members of other denominations, and the 'offence' will be an incidental by-product of normal behaviour. Thus, the 'offence' category must suggest that the state regulate normal behaviour to avoid offending members of a given religion. This is far reaching regulation that the liberal privatization approach will simply dismiss. As Joel Feinberg argues, regarding extremely susceptible persons, 'the more fragile our sensitive sufferer's psyche, the less protection he can expect from the criminal law... If a mere sneeze causes a glass window to break, we should blame the weakness or brittleness of the glass and not the sneeze.'⁴⁶ Instead of obtaining state protection, the offended person may write an op-ed or a book, upload a video explaining her/his view to YouTube—the various methods individuals have at their disposals in a democratic state to express their opinions.⁴⁷

The privatization model would lead the state to refrain from regulating prayer in the Western Wall Plaza. Each individual and group would pray according to their own beliefs and preferences and the state would simply maintain peace and order. In such an arrangement, the UO would be able to pray according to their own customs; what they are denied is control over the behaviour of other people's customs—a classic example of a preference regarding the behaviour of the others that should not be supported by the state.⁴⁸

Following this succinct clarification of the meaning of the privatization approach to the WoW case, we shall turn now to explore three main advantages and one potential disadvantage of the privatization model. The first advantage

⁴⁵ Phyllis Chesler and Rivka Haut (eds), *Women of the Wall: Claiming Sacred Ground at Judaism's Holy Site* (Jewish Lights Publishing 2003) 3.

⁴⁶ Joel Feinberg, *Offense to Others* (Oxford University Press 1985) 34.

⁴⁷ Ronald Dworkin, 'The Right to Ridicule' (2006) 5 *The New York Review of Books* 44; Meital Pinto, 'What are Offences to Feelings Really about?' (2010) 30 *Oxford J Legal Stud* 695.

⁴⁸ John Stuart Mill, 'On Liberty' in Alan Ryan (ed), *Mill, Texts and Commentaries* (Norton 1997) 106; Dworkin (n 21) 259–65.

of the privatization model is that it distances the government from a complex argument it cannot easily resolve: the government does not have to entangle itself with religion, pick winners, or offer complex political-religious solutions. Following the privatization strategy, the government does not waste resources and reduces the risk of factionalism and alienation by those disappointed with the solutions offered by the state.

Second, the hands-off approach adopted by the privatization model follows the important historical lesson of the European wars of religion: the solution to such disagreements was for the government to withdraw from the religious sphere. By removing the option of using government regulation to advance particular religious agendas, governments reduced much of the force of the religious struggles. 'Deprived of the trappings of public office and the coercive power of the state', as Smith puts it, 'religion would be privatized, left to the conscience or the inner light of the individual believer.'⁴⁹ As such, the privatization model was (historically) the proper solution to cases of fierce religious struggles and tensions. There is no reason to think that applying this solution to the WoW case would bring about a different result.

Third, by avoiding an association with one given religion, the privatization model helps democratic governments keep their commitment to treat their citizens with equal respect and concern. The endorsement of a religion, as Justice O'Connor of the US Supreme Court put it, 'sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community'.⁵⁰ Thus, this approach helps governments meet a strong requirement for the democratic representation of their citizens, as famously articulated by Dworkin.^{51,52}

We are well aware, however, of the critical claim that the privatization approach favours those beliefs that are better suited to liberal individualism.⁵³ An in-depth examination of this objection lies beyond the scope of the current discussion. However, we shall simply note that this objection can be answered to in the WoW case, via the following consideration. The privatization approach does not rule out forms of prayer that are non-individualistic; rather, it prevents the complete exclusion of the WoW. There is no symmetry between the grievance of the UO regarding their loss of complete domination of the Wall, and the grievance of the WoW faced with their complete exclusion from the Wall.⁵⁴

As a continuation of the aforementioned objection to the privatization approach, it might be further argued that Judaism, specifically, is a collective-oriented religion with demands vis-à-vis the public sphere, and that these

⁴⁹ Steven Smith, *Spinoza, Liberalism, and the Question of Jewish Identity* (Yale University Press 1997) 3.

⁵⁰ [1984] *Lynch v Donnelly* 465 US 668, 688 (O'Connor J, concurring).

⁵¹ Dworkin (n 3); see also John Rawls, *Political Liberalism* (Columbia University Press 1993) 195; Gerald Gaus, *The Order of Public Reason* (Cambridge University Press 2011) 534.

⁵² We cannot enter here into the difficult issue of whether Israel qualifies as democratic or not; it suffices for our needs to note that at least parts of Israel's legal system are democratic and liberal (see Amnon Rubinstein and Alexander Jakobson, *Israel and the Family of Nations* (Routledge 2008)).

⁵³ Charles Taylor, 'Modes of Secularism' in Rajeev Bhargava (ed), *Secularism and Its Critics* (Oxford University Press 1998) 31; Kent Greenawalt, 'Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy' (2007) 48 *Wm & Mary L Rev* 1605.

⁵⁴ Macedo (n 19).

demands can hardly be served by, and indeed are foreign to, the privatization model that was brought about and made possible via Protestant individualism.⁵⁵ In response to this challenge, beyond our scepticism towards the allegedly tight linkage of the privatization approach with Protestantism,⁵⁶ we argue that Jewishness in Israel is a highly diverse phenomenon. Some versions of Judaism in Israel lend themselves to a 'private' interpretation, whereas others are explicitly 'public' in nature. There is no 'one' accepted interpretation of Jewishness in Israel⁵⁷ as such, the best governmental response is a retreat of the state from this heated disagreement.

A short note may be added here regarding the backlash argument which is particularly relevant vis-à-vis the privatization approach. Since the decision of the district court in April 2013,⁵⁸ the WoW have prayed according to their manner at the Western Wall and while, on some occasions, the UO opposition to the WoW has been vehement, the police have been able to handle the situation. The feared fierce backlash did not materialize, largely invalidating one of the strongest arguments against adopting the privatization approach in the WoW's case.⁵⁹

The privatization model does pose an interesting disadvantage in that this approach is not well tailored to the wishes of the WoW, or at least to the Orthodox women in the group who wish to pray separately, and not as a part of a mixed service.⁶⁰ The privatization approach is much more radical in its egalitarian consequences since it calls for a removal of the gender-divider which the Orthodox women in the WoW wish to maintain. The rigidity of the privatization approach, and its resulting lack of sensitivity to the particulars of the case, will have to be balanced against the advantages of this approach.⁶¹

B. *Evenhandedness*

What would the evenhanded approach suggest in the WoW case? It seems that it would argue the following: both the UO and the WoW should receive adequate praying space at the Wall. It would recommend the recognition of both the UO and the WoW manner of prayer, and attempt to find solutions that would allow both groups to pray at the Wall. As the WoW, at this point, only ask for 11 hours per year (one hour each month excluding *Rosh Hashana* [the Jewish New Year holiday]), such a solution should be feasible. Such a solution can be made possible, for example, by allowing and protecting the WoW prayer at the existing plaza at the Wall, or at a new, 'third', plaza (see the

⁵⁵ Bernard Susser and Eliezer Don Yehiya, 'Israel and the Decline of the Nation-State in the West' (1994) 14(2) *Modern Judaism* 187.

⁵⁶ Rainer Forst, *Tolerance in Conflict* (Cambridge University Press 2013) ch 3, 117.

⁵⁷ Moshe Halbertal, 'Who is a Jew' in Avi Sagi and Nahum Ilan (eds), *Jewish Culture in the Eye of the Storm* (Hakibutz Hameuhad 2002) 233 (Heb.); Yuval Jobani, 'Three Basic Models of Secular Jewish Culture' (2008) 13:3 *Israel Stud* 160.

⁵⁸ [2013] 43832-42-33 *State of Israel v BR Ras and others*.

⁵⁹ It goes without saying that the backlash argument is not a trump argument, as Rawls famously wrote: 'To each according to his threat advantage is not a principle of justice.' John Rawls, *A Theory of Justice, Revised Edition* (Oxford University Press (1971) 1999) 122.

⁶⁰ See Raday, 'Claiming Equal Religious Personhood' (n 32).

⁶¹ We return to this issue at the closing of this article. Note that a voluntary placement of a divider is consistent with the privatization approach.

compromise proposal in Section 2). Like the privatization approach, the evenhanded approach disregards the ‘offence to religious feelings’ argument and aspires to achieve equal standing for all concerned religious groups (including groups not discussed in this article).

A current attempt to apply the evenhanded approach is found in a standing petition, put forward by the Israel Religious Action Center to the Israeli Supreme Court, that requests that the Western Wall Heritage Foundation—the governmental entity in charge of all activities at the Wall—would be run by an evenhanded representation of Reform, Conservative, Secular Jews, and also women rather than exclusively by the UO.⁶² This petition provides an illustrative contrast to the privatization approach, which would simply call for the abolishing of this entity.

The evenhanded approach is permissible in liberal democracies as it would not violate any basic rights of individuals, and would attempt to treat citizens of various denominations with equal concern and respect. The application of this strategy, however, will encounter great difficulties, some of them foreseen in Section 1. The government would take upon itself the task of providing adequate prayer conditions for all those interested. This hands-on approach, rather than hands-off approach, places a significant burden on the government. Now, in the WoW’s case two main options seem to present themselves.

The *first option* is to emulate, de facto, the privatization solution by allowing all to pray at the Wall according to their beliefs and customs. However, variables such as the time demanded and the size of the relevant communities become key issues that will have to be ‘calculated’ in some fashion within an ‘evenhanded’ formula.

Another option is to create separate areas in the Wall Plaza so that different denominations will each have their own small ‘area’ in which to pray according to their customs (similar to the latest compromise, described in Section 2 above). The evenhanded approach, if we aim to differentiate it from the privatization option, will tilt towards this latter solution. The difficulty here is that such a solution will have to be fair and, preferably, deemed legitimate by the participating parties, first and foremost the WoW. This would require the government to assess intangibles such as the strength of the WoW’s wish to pray at the Wall, the nature of the Wall’s centrality in Jewish tradition, and whether Robinson’s Arch is an adequate substitute (especially in light of Judge Sobel’s recent decision and the noted WoW faction opposed to this location). Note that even the WoW’s recent (majority) consent to the Robinson’s Arch solution depends on several conditions (adequacy of location, funding, etc) that are not easily satisfied. Furthermore, following the split that occurred in the WoW (see Section 2), the evenhanded solution needs to satisfy yet another group, a challenge the privatization approach will not have to face. A thought-provoking idea for adherents of the ‘separate areas’ version of the evenhanded approach is to designate different sections of the Wall and periodically to switch which denominations pray at each section. This would solve the perceived inadequacy of Robinson’s Arch in an elegant way, but other challenges would

⁶² [2013] HCJ 145/13 *Israel Religious Action Center v Western Wall Heritage Foundation*.

likely arise both from the difficulty of assessing the variables controlling the execution of this arrangement (size, strength of religious preferences, etc) and from obvious political difficulties.

C. *Dominant Culture View*

The dominant culture view will argue that the current custom at the Western Wall Plaza should remain unchallenged, at least as long as the status quo does not violate the fundamental rights of any given citizen in Israel. In order to defend this view, indeed to make it meaningful, the two following points will have to be validated.

First, that it is possible to identify and follow, within reasonable contours, current traditions and customs that have been transmitted from generation to generation and that are reasonably shared. As Shils points out, ‘at the minimum, two transmissions over three generations are required for a pattern of belief or action to be considered a tradition.’⁶³

Second, that no core rights are violated as the WoW can pray as individuals at the Wall and collectively elsewhere, thus the prohibition against collective prayer at the Wall is not fundamentally illiberal.

Both arguments have been advanced by UO leaders, opinion columnists, and media commentators in Israel,⁶⁴ though both claims must address important, and to our opinion decisive, counter-arguments.

First, identifying the relevant customs of the Wall is complex; the current custom dates back only to 1967, as Jordan held the Wall between 1948 and 1967 and denied access to Jewish worshippers. Before that, Jerusalem was under British rule, and before that Ottoman rule. In the pre-1948 era, Jews were not at liberty to pray according to their preferences. In fact, severe limits were placed on the Jews’ choices regarding prayer methods and conduct.

Furthermore, the UO’s claim that their manner of prayer follows a specific tradition that is rooted in the past and has been transmitted from generation to generation does not match documented history.⁶⁵ As mentioned earlier, there are numerous documents and even footage and films showing men and women praying next to each other at the Wall, with no divider, dating back to the early 20th century. In the pre-1948 era, there was a ban on a gender-divider at the Wall. In that era, the UO could decide either not to pray at the Wall at all or to divide ‘time slices’ between men and women; the evidence demonstrates, however, that the UO men and women chose to pray side-by-side without a gender-divider at the Plaza of the Western Wall.

Moreover, as Margalit Shilo demonstrated, the ban on placing a cloth partition to separate the genders (in effect during the Ottoman era) enabled a

⁶³ Edward Shils, *Tradition* (The University of Chicago Press 1981) 15.

⁶⁴ Among these views, the new NGO *Women for the Wall*, a mix of Orthodox and non-observant Jewish women advocating roughly the DCV view, is of special interest. See their website <<http://womenforthewall.org/>>; see also Ronit Kampf, ‘Seeking Breakthrough in the Wall: Interaction of Women’s Protest Group and Israeli News Coverage’ (1996) 3 *Patu’ah* 4 (Heb).

⁶⁵ For a survey of invented religious traditions, see Lewis, 2007. On invented traditions in the context of the UO request to win an exemption from mandatory military conscription in Israel, see Yuval Jobani and Nahshon Perez, ‘Toleration and Illiberal Groups in Context: Israel’s Ultra-Orthodox “Society of Learners”’ (2014) 19(1) *J Pol Ideol* 78.

dominant female presence at the Wall. Shilo notes that '[a]t the Western Wall women were granted a degree of autonomy: it was they who determined the times of assembly, the style of prayer, and the care for the site.'⁶⁶ Finally, 19th-century UO women even anticipated the WoW when, in 1887, they organized a special 'women service' at the Wall to celebrate Queen Victoria's jubilee and to express their appreciation of the British monarch.⁶⁷

Rather than construct an alternative 'tradition' from these sources, however, we wish to argue only that it is difficult to construct any singular 'custom' from such evidence (as the UO insist they have successfully done). We find no particular reason to give special importance to the customs that have been in place since 1967 since these are simply too recent to connect with an established and well-known heritage. Furthermore, the WoW started their struggle in 1988 and at that point, *their custom* of praying became a part of the noted 'varied history' of the Wall (or, 'custom'). Indeed, why should the brief period from 1967 to 1988 be the focal point from which other customs are examined and evaluated? It seems that there is a great difficulty in pinpointing what the local custom is, and that this difficulty is sufficient in scope to make the application of the DCV highly problematic.

In this context, in his in-depth study of the political transformation of the gender traditions at the Wall in the past two centuries, Stuart Charmé has demonstrated that the UO adopt the same arguments, rhetoric, and strategies as have been used against them by Ottomans, Arabs, and British. In the pre-1948 era, fear of loss of power to the growing Jewish community was the primary concern; whereas after 1967, it was the fear of losing power to liberal and feminist Jews that posed the greatest threat. 'The categories of tradition, custom, and their legal correlative in Israel – "the status quo" – were deployed and manipulated to undermine both the Jewish demands for rights in the 1920s and Jewish women's demands for the same rights sixty years later.'⁶⁸

Second, the observation that the WoW do not have to pray at the Wall is technically correct: they can pray in other locations following their customs and beliefs. However, this observation does not take into account the special importance of the Wall and its centrality in the Jewish tradition.⁶⁹ Furthermore, it is very important (Orthodox teachings included) for women to pray, specifically during *Rosh Hodesh*.⁷⁰ Therefore, excluding the WoW from prayer at *the* Wall is qualitatively different from, for example, establishing an Ultra-Orthodox synagogue that excludes the WoW (which might be legitimate if freedom of association is to be kept and WoW are at liberty to form their own houses of prayer).

⁶⁶ Shilo (n 43) 24.

⁶⁷ Shilo (n 43) 22.

⁶⁸ Stuart L. Charmé, 'The Political Transformation of Gender Traditions at the Western Wall in Jerusalem' (2005) 21(1) *Journal of Feminist Studies in Religion* 5, 7. In addition to Charmé (2005), many excellent analyses of the history of the Wall are available, including Meir Ben-Dov, Mordechai Naor, and Zeev Aner, *The Western Wall* (Raphael Posner tr, Israel Ministry of Defense 1983) and Gabriel Barkay and Eli Schiller (eds), *The Western Wall* (a special issue of *Ariel: Journal for Knowledge of the Land of Israel*) (181) [Heb] (2007).

⁶⁹ See Oleg Grabar and Benjamin Kedar, *Heaven and Earth Meet: Jerusalem's Sacred Esplanade* (Yad Ben-Zvi Press and Texas University Press 2009).

⁷⁰ Shakkdiel (n 32) 128.

The disadvantages of the DCV, it seems, are sufficient enough in scope that we can reject this option even without delving into complex normative debates about the value of maintaining tradition. Before addressing such important topics, it should be clear that a tradition exists and provides clear guidelines for how that tradition ought to be followed. This situation simply does not exist in the case of prayer traditions at the Wall.

In summary, it is obvious that the privatization approach has some attractive qualities: it respects the status of all worshipers as equally entitled to respect and concern; it is comparatively easy to implement; it does not encourage factionalism; and it does not burden the government with complex decisions stemming from entanglement with religious beliefs. Nevertheless, applying the privatization approach to the WoW case might require some creative flexibility to address the special demands of the WoW (and other Orthodox factions at the Wall). For example, it may be necessary to allow a temporary gender-divider so as to not (among other considerations) alienate Orthodox members of the WoW themselves. Here, in order not to violate the core principles of the privatization approach, specific details are required: such a divider would have to be put by the praying party, and not by the state, nor will its presence be enforced by the government.

Admittedly, the political chances of applying the privatization strategy are slim. However, what is just (and also stable in the long run) is not always feasible at present; the goal of normative analysis is, at times, to point to considerations a bit removed from the troubles of day-to-day politics. We should also note that in 1988 the idea of establishing a third plaza for the WoW seemed like science fiction, and what is feasible derives, in many cases, from the persistence of the relevant parties.

Evenhandedness is a legitimate strategy as it respects the status of all worshippers in a manner similar to the privatization approach. However, it is a far more complex approach as it requires the creation of alternatives that would be fair and (preferably) seen as legitimate by the adversaries in the WoW struggle (and further groups not discussed here). This is not a trivial task as it involves, for example, evaluating different locations, giving adequate weight to variables such as number of adherents of each sub-denomination, etc. Our scepticism towards the even-handed approach applies to the latest compromise as well: it is yet to be seen if the conditions stipulated by the WoW will be fulfilled and, just as important, how the recent spilt within the WoW will affect their struggle. Arguably, the simplicity of the privatization approach constitutes a major advantage.

Lastly, the interpretive difficulties of the DCV approach are arguably sufficient to rule against it even without entertaining complex questions of how gender equality challenges tradition, or whether majorities are entitled to shape the public sphere according to their values.

4. *Conclusion*

The goal of this article was to examine the applicability of three major normative frameworks for state–religion relations to the difficult and complex

case of the WoW. As the previous section concluded this attempt, a final, brief comment on the applicability of this analysis to other cases is in order. It seems that the key consideration leading to the conclusion that the privatization approach offers the greatest advantages is the plurality of beliefs among those who wish to visit, pray at, and simply be at the Wall. Once this plurality is recognized as a permanent aspect of social life in Israel (assuming that the government remains committed to treating all of its citizens with equal concern and respect), there is little alternative to separating the government's concern with the individual citizen from the religious beliefs of any given citizen, ie the privatization approach (evenhandedness meets the same standard, but the burden it places on the government to continually assess the demands of different denominations seems to require unjustifiable optimism with regard to the abilities of the government; the DCV view requires a robust 'tradition' not easily reconstructed from various past norms and customs). This lesson is arguably valid even for a country in which Orthodox and Ultra-Orthodox Judaism are dominant and place well-documented demands on the public sphere. However, the privatization approach is a normative-political response to such demands and it does not require that a given religious tradition adopt an attitude of indifference towards what is done at the public sphere. This is the central conclusion we draw from our analysis: once plurality of beliefs is accepted as a permanent social condition, we see no better alternative than the privatization approach.