

# SEPARATION OF SYNAGOGUE AND STATE IN ISRAEL

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*“Accordingly we, members of the People’s Council, Representatives of the Jewish community of Eretz-Israel and of the Zionist movement, are here assembled on the day of the termination of the British Mandate over Eretz-Israel and, by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly, hereby declare the establishment of a Jewish State in Eretz-Israel, to be known as the State of Israel.”*<sup>1</sup>

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<sup>1</sup> THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (May 14, 1948), <https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx> [hereinafter DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL].

## I. INTRODUCTION

David Ben-Gurion, the primary founder and, later, first Prime Minister of Israel, uttered these historic words on May 14, 1948.<sup>2</sup> On that day, the British Mandate of Palestine expired, and the Jewish People's Council gathered to declare the establishment of the State of Israel.<sup>3</sup> Ben-Gurion declared the State of Israel at the Tel Aviv Museum beneath a large portrait of Theodor Herzl, the father of modern political Zionism.<sup>4</sup> Herzl's dream had finally been realized, and, for the first time in nearly two thousand years, Jews regained sovereignty in the land of Israel.<sup>5</sup>

While the declaration was explicit that this new State would “ensure complete equality of social and political rights to all its inhabitants irrespective of religion,”<sup>6</sup> it also referred to the fledgling country as a “Jewish State.”<sup>7</sup> The tension between Israel's insistence on full democratic rights alongside a uniquely Jewish character to the State has been around since its beginning.<sup>8</sup> The signatories to the declaration placed their faith in the “Rock of Israel.”<sup>9</sup> Religious signers believed this phrase was a thinly veiled reference to God, while the secular signers believed the term symbolized the heritage of the Jewish people.<sup>10</sup>

The balance between Israel's religious and democratic natures has led to a variety of societal issues. There are instances of governmental and legal discrimination against non-Jews and non-Orthodox Jewish denominations.<sup>11</sup> There is no secular marriage in Israel.<sup>12</sup> Most people that wish to marry in Israel

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<sup>2</sup> DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, *supra* note 1.

<sup>3</sup> SHIMON PERES & DAVID LANDAU, BEN-GURION: A POLITICAL LIFE 220 (2011).

<sup>4</sup> Zionism is a nationalist and political movement of Jews and Jewish culture that supports the reestablishment of a Jewish homeland in the territory defined as the historic Land of Israel. *See* 2 ENCYCLOPEDIA OF NATIONALISM: LEADERS, MOVEMENTS, AND CONCEPTS 604 (Alexander J. Motyl et al. eds., 2001).

<sup>5</sup> Jewish autonomy in the Land of Israel was crushed after the Third Jewish Revolt against the Roman Empire in 136 CE and had been ruled by Non-Jews until the establishment of the State of Israel. *See* Werner Eck, *The Bar Kokhba Revolt: The Roman Point of View*, 89 J. ROMAN STUD. 76, 87–88 (1999).

<sup>6</sup> *See* DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, *supra* note 1.

<sup>7</sup> *See id.*

<sup>8</sup> STEVEN V. MAZIE, ISRAEL'S HIGHER LAW: RELIGION AND LIBERAL DEMOCRACY IN THE JEWISH STATE 25 (2006).

<sup>9</sup> *See* DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, *supra* note 1.

<sup>10</sup> *See* MAZIE, *supra* note 8, at 41.

<sup>11</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, ISRAEL AND THE OCCUPIED TERRITORIES: INTERNATIONAL RELIGIOUS FREEDOM REPORT 2009 (2009) [hereinafter ISRAEL AND THE OCCUPIED TERRITORIES].

<sup>12</sup> *See Information and Resources on Marriage in Israel: Freedom of Choice in Marriage*, JEWISH FED'N OF N. AM. <http://www.jewishfederations.org/Marriage-in-Israel.aspx> (last updated May 10, 2015) [hereinafter *Information and Resources on Marriage in Israel: Freedom of Choice in Marriage*].

must do so through a religious ceremony, even non-religious couples.<sup>13</sup> The fact that many aspects of Israeli life are governed by religious law allows for certain types of discrimination against women. Women must yield to traditional Orthodox interpretation of religious law in the public sphere.<sup>14</sup> However, the biggest religion and state issue in Israel involves the Chief Rabbinate. The Chief Rabbinate of Israel is legally recognized as the supreme religious and spiritual authority for the Jewish people in Israel.<sup>15</sup> The Chief Rabbinate has jurisdiction over many aspects of religious life for Jews in the State of Israel.<sup>16</sup> The problem with the Chief Rabbinate is that it does not represent all of Israeli Jewry.<sup>17</sup> It does not even represent a majority of the Israeli Jewish population.<sup>18</sup> Nearly half of all Israeli Jews identify as secular, and only a minority identify as religious in any form.<sup>19</sup>

The recent nation-state bill controversy has brought these tensions between Israel's democratic and Jewish identity to the forefront.<sup>20</sup> On November 19, 2014, the Israeli cabinet decided to support a Jewish nation-state bill in a preliminary vote in the Knesset (Israel's parliament).<sup>21</sup> On May 10, 2017, the Knesset approved a preliminary reading of the bill which was then reviewed by the Knesset's Constitution, Law, and Justice Committee in preparation for a first reading vote in the Knesset.<sup>22</sup> On July 19, 2018, Israel passed the Jewish nation-state bill into law.<sup>23</sup> The law states that Israel is the nation-state of the Jewish people in an attempt to enshrine the Jewish character of the State into law.<sup>24</sup> Critics fear that the legislation will advance Israel's Jewish character over its democratic character.<sup>25</sup> However, the solution to Israel's religion and state issues is not to advance one over the other. The answer lies in the complete separation between religion and state while Israel still maintains its Jewish character.

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<sup>13</sup> *Information and Resources on Marriage in Israel: Freedom of Choice in Marriage*, *supra* note 12.

<sup>14</sup> *See ISRAEL AND THE OCCUPIED TERRITORIES*, *supra* note 11.

<sup>15</sup> *See generally* Chief Rabbinate of Israel Law, 5740–1980 (1980) [hereinafter Chief Rabbinate of Israel Law].

<sup>16</sup> *Id.* ¶ 2.

<sup>17</sup> *Israel 2010: 42% of Jews are Secular*, YNETNEWS.COM (May 18, 2010), <http://www.ynetnews.com/articles/0,7340,L-3890330,00.html> [hereinafter *Israel 2010*].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See infra* Part II, Sections E–F.

<sup>21</sup> *See infra* Part II, Sections E–F.

<sup>22</sup> *See infra* Part II, Sections E–F.

<sup>23</sup> *See infra* Part II, Sections E–F.

<sup>24</sup> *See infra* Part II, Sections E–F.

<sup>25</sup> *See infra* Part II, Sections E–F.

Western notions of human dignity, equality, and freedom can trace their origins to ancient Biblical laws.<sup>26</sup> The Hebrew Bible and later Jewish writings were revolutionary in terms of their insistence on personal autonomy and individual liberties.<sup>27</sup> In fact, the Israeli declaration pays homage to the Jewish people's ancestral contribution to human rights when it states that Israel "will be based on freedom, justice and peace as envisaged by the prophets of Israel."<sup>28</sup>

Although the foundations of modern human rights are religious in origin, today these rights should not be legislated or implemented under a religious legal code. Individual rights, as understood from a dogmatic perspective, would set these basic freedoms back to an age of subjectivity and religious fervor ripe for fundamentalism. The State of Israel has every right to characterize itself as a "Jewish State." However, Israel should not legislate and enforce laws based on religious interpretations contrary to the belief and practice of individual citizens. Israel should aim to legislate from a secular and democratic perspective to ensure the fundamental rights of all of its citizens.

This Article discusses the legal framework of intermingling religion and state in Israel and argues that Israel should adopt complete separation of religion and state while maintaining its unique Jewish character. Part II provides the legal and political background to religion and state in Israel. The Status Quo Agreement established the religious services that would be governed by the fledgling secular state. The Chief Rabbinate is a governmental body that supervises a variety of religious services and has jurisdiction over many matters of personal status regardless of a citizen's religious affiliation. The Foundation of Law statute provides that when there is a lacuna in the law, the legislature can decide the issue, "in light of the principles of freedom, justice, equity and peace of Israel's heritage."<sup>29</sup> The State of Israel's identity as a "Jewish and democratic state" in several key pieces of legislation remains ambiguous and could prove detrimental to the goals of a modern democratic society. Lastly, the recent nation-state bill controversy exists as the culmination of these tensions between Israel's Jewish and democratic natures. These legal and political frameworks seek to entrench religious Jewish law in secular Israeli lives.

Part III identifies a number of specific religious and state issues that are the most pressing in the State of Israel. This section discusses issues of freedom of religion, marriage and divorce, women's rights, and the Law of Return. These

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<sup>26</sup> See G.E. Gorman, *Foreword* to S. DANIEL BRESLAUER, *JUDAISM AND HUMAN RIGHTS IN CONTEMPORARY THOUGHT: A BIBLIOGRAPHICAL SURVEY* (G.E. Gorman ed., 1993) ("Our Western practice of human rights has its origins largely in the Jewish tradition . . . . There is . . . a long and important tradition of Jewish attention to human rights in theory and in practice.")

<sup>27</sup> See generally MORITZ LAZARUS, *THE ETHICS OF JUDAISM* (Henrietta Szold trans., 1900).

<sup>28</sup> See DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, *supra* note 1.

<sup>29</sup> See Foundations of Law, 5740–1980, § 1, 72 (1980) (Isr.).

issues aim to highlight the types of problems that Israel faces as both a Jewish and democratic state.

Part IV examines the broader historical framework of certain democratic values to appreciate Israel's determination to identify as both a Jewish and democratic state. Modern democratic principles have their roots in ancient Jewish religious values.<sup>30</sup> Concepts such as "love thy neighbor" and "God's image" were instrumental in constructing a religious moral ethic.<sup>31</sup> However, these innovative religious teachings could not have evolved in their original religious settings. Religious intolerance and warfare obstructed any chance of achieving our current understanding of equality. It wasn't until the Enlightenment period, and with it the secularization of these teachings, that these rights could be cultivated.

Part V deals with the philosophical relationship with legal rights from both a religious and secular perspective. Legal rights understood through religious law are commanded by a deity and exist as a religious obligation binding upon the individual. Legal rights understood through secular law recognize mankind's inherent rights and liberties. The distinction between a religious obligation and a secular right has profound implications, such as the ability to waive one's own rights as opposed to obligations. Israeli case law shows that the State of Israel conceives of morality as a religious obligation rather than a secular right. This conceptualization of morality can be detrimental in a modern civil society dedicated to equality under the law.

Part VI introduces the concept of separation of church and state and seeks to establish a sustainable vision for separation of religion and state in Israel. This vision advocates for the privatization of the Chief Rabbinate and its affairs, new legislation allowing for civil marriage and divorce, and the Government's non-preference for any single faith or denomination.

Part VII concludes that Israel should adopt complete separation of religion and state comparable to other Western democracies without undermining the Jewish character to the state. Specifically, the Chief Rabbinate of Israel and other governmental organizations that perpetuate religion should be privatized to ensure Israel's democratic and Jewish natures in equal measure.

## II. LEGAL BACKGROUND TO RELIGION AND STATE IN ISRAEL

### **A. Status Quo Agreement**

Israel has intertwined religious and state affairs since ancient times. On the issue of religion and state in the Hebrew Bible, John Locke wrote in his *Letter Concerning Toleration*:

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<sup>30</sup> See *infra* Part IV.

<sup>31</sup> *Infra* Part IV.

For the Common-wealth of the *Jews*, different in that from all others, was an absolute *Theocracy*; nor was there, or could there be, any difference between that Commonwealth and the Church. The Laws established there concerning the Worship of One Invisible Deity were the Civil Laws of that people, and a part of their Political Government; in which God himself was the legislator.<sup>32</sup>

Locke notes that religion constituted the political order in ancient Israel.<sup>33</sup> Biblical metaphors involving willful rebellion involved treason and betrayal no less than sin.<sup>34</sup> Biblical law involves the establishment of political structures such as the monarchy and the judiciary.<sup>35</sup> The Hebrew Bible contains law necessary for the establishment of a political nation-state.<sup>36</sup> Scripture never considered religion and state as separate domains, the two were always inextricably linked.

The ancient Israelite precedent to combine the affairs of both religion and state continued before the founding of the State of Israel. Before there was even a Jewish state, religious leaders were concerned about what rights religious Jews would be given in a secular state. These leaders convinced early Israeli politicians to sign a Status Quo Agreement ensuring certain protections.<sup>37</sup> The Agreement stemmed from legal arrangements that previously existed during the Ottoman and British periods (religious courts with exclusive jurisdiction over matters of personal status),<sup>38</sup> and arrangements created by early Zionist institutions.<sup>39</sup>

The Agreement guaranteed that many religious institutions would remain intact under the auspices of the new government.<sup>40</sup> Israel's day of rest would coincide with the Jewish Sabbath.<sup>41</sup> Religious dietary laws would be observed in the public sphere.<sup>42</sup> There would be no form of civil marriage.<sup>43</sup> Marriage and

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<sup>32</sup> JOHN LOCKE, A LETTER CONCERNING TOLERATION 42 (Mark Goldie ed., 2010).

<sup>33</sup> *Id.*

<sup>34</sup> Suzanne Last Stone, *Religion and State: Models of Separation from Within Jewish Law*, 6 INT'L J. CONST. L. 631, 635 (2008).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See ISRAEL IN THE MIDDLE EAST: DOCUMENTS AND READINGS ON SOCIETY, POLITICS, AND FOREIGN RELATIONS 1948 TO THE PRESENT 51 (Itamar Rabinovich & Jehuda Reinharz eds., 2007) [hereinafter ISRAEL IN THE MIDDLE EAST].

<sup>38</sup> See Amnon Rubinstein, *Law and Religion in Israel*, 2 ISR. L. REV. 380, 385 (1967).

<sup>39</sup> See CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL 31 (1984).

<sup>40</sup> See ISRAEL IN THE MIDDLE EAST, *supra* note 37, at 58–59.

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

<sup>42</sup> See generally Festival of *Matzot* (Prohibition of Leaven) Law, 5746–1986, 40 LSI 231 (1986) (Isr.); see generally Pig-Raising Prohibition Law, 5722–1962, 16 LSI 93

divorce would be conducted by Orthodox rabbinical courts for Jews and by the relevant religious authorities for peoples of other faiths.<sup>44</sup> The Government would respect the right of religious Jews to educate their children and would establish religious Jewish schools alongside secular schools.<sup>45</sup> This Agreement has become the foundation for establishing the relationship between religion and state in Israel.<sup>46</sup>

## **B. Chief Rabbinate of Israel**

The institution of the Chief Rabbi of Israel existed before the founding of the State during the British mandate period, with roots dating back to the Ottoman Empire.<sup>47</sup> After independence, later Chief Rabbis were officially sanctioned by the State of Israel.<sup>48</sup> The Chief Rabbinate of Israel is legally recognized as the supreme religious and spiritual authority for the Jewish people in Israel tasked with opining on matters of religious law and conferring upon religious judges and rabbis their eligibility to serve as judges and rabbis.<sup>49</sup> The Chief Rabbinate has jurisdiction over many aspects of religious life for Jews in the State of Israel including: marriage, divorce, burials, conversion, Jewish dietary laws and certification, Jewish identification for immigration purposes, supervision of Jewish holy sites, working with various ritual bath houses and religious seminaries, and overseeing Israeli Rabbinical courts.<sup>50</sup>

These Rabbinical courts are part of Israel's judicial system and are managed by the Ministry of Religious Services.<sup>51</sup> The courts have sole jurisdiction over marriage and divorce and “have parallel competence with district courts in matters of personal status, alimony, child support, custody, and inheritance.”<sup>52</sup>

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(1961-62) (Isr.) (providing exemptions for scientific research, zoological gardens, and specified localities).

<sup>43</sup> See ISRAEL IN THE MIDDLE EAST, *supra* note 37, at 58–59.

<sup>44</sup> *Id.*

<sup>45</sup> See State Education Law, 5713–1953, ¶ 1, 7 LSI 113 (1953) (Isr.); see also Stephen Goldstein, *The Teaching of Religion in Government Funded Schools in Israel*, 26 ISR. L. REV. 36, 41–42 (1992).

<sup>46</sup> See LIEBMAN & DON-YEHIYA, *supra* note 39.

<sup>47</sup> See generally Shulamit Eliash, *The Political Role of the Chief Rabbinate of Palestine during the Mandate: Its Character and Nature*, 47 JEWISH SOC. STUD. 33 (1985).

<sup>48</sup> See Chief Rabbinate of Israel Law, *supra* note 15.

<sup>49</sup> *Id.*

<sup>50</sup> *Chief Rabbinate of Israel*, ISR, GOV'T SERV. & INFO. WEBSITE, [https://www.gov.il/he/departments/chief\\_rabbinate\\_of\\_israel](https://www.gov.il/he/departments/chief_rabbinate_of_israel) (last visited Mar. 2, 2019).

<sup>51</sup> *Israel Cabinet Ministries: Ministry of Religious Services*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/Politics/relig.html> (last visited Mar. 2, 2019).

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

The problem with the Chief Rabbinate is that it does not represent all of Israeli Jewry. The Chief Rabbinate is entirely comprised of Orthodox Rabbis and conducts all religious ceremonies and proceedings according to Orthodox interpretation of Jewish law.<sup>53</sup> It does not allow non-Orthodox converts or rabbis to participate in any capacity.<sup>54</sup> Thousands of Israelis every year travel abroad to get married because under the Chief Rabbinate the State of Israel does not allow civil marriages.<sup>55</sup> The Chief Rabbinate does not even represent a majority of the Israeli population.<sup>56</sup> Nearly half of all Israeli Jews identify as secular, and only a minority identify as religious in any form.<sup>57</sup>

### **C. Foundations of Law Statute**

The integration of Jewish law in Israeli public life increased in 1980 with the establishment of The Foundations of Law.<sup>58</sup> This statute states that, “where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in light of the principles of freedom, justice, equity and peace of Israel's heritage.”<sup>59</sup> This statute officially recognizes Jewish law as one of the main sources of precedent and could potentially be used to impose religious obligations based on Jewish law principles upon secular Israelis.<sup>60</sup>

### **D. Jewish Law in Israel's Supreme Court**

There are several issues regarding the use of Jewish law in Israeli cases.<sup>61</sup> Jewish law is a religious legal tradition that was created with certain theological assumptions. A person's moral obligation would overrule that same person's inherent natural rights.<sup>62</sup> Furthermore, jurists must remain attentive to evaluate issues in Jewish law in their proper legal and historical context. Taken out of

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<sup>53</sup> Uri Regev, *Why Is It So Difficult for Jews to Marry in Israel?*, July 1, 2013, HUFFINGTON POST, [https://www.huffingtonpost.com/rabbi-uri-regev/why-is-it-so-difficult-for-jews-to-marry-in-israel\\_b\\_3196200.html](https://www.huffingtonpost.com/rabbi-uri-regev/why-is-it-so-difficult-for-jews-to-marry-in-israel_b_3196200.html).

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See Israel 2010, supra* note 17.

<sup>57</sup> *Id.*

<sup>58</sup> *See generally* Foundations of Law.

<sup>59</sup> *Id.* § 1.

<sup>60</sup> Menachem Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. INT'L L. & POL. 221, 240 (1985).

<sup>61</sup> *See generally* Steven F. Friedell, *Some Observations about Jewish Law in Israel's Supreme Court*, 8 WASH. U. GLOBAL STUD. L. REV. 659 (2009).

<sup>62</sup> *See* Tullberg, *infra* note 150.



context, a rule in Jewish law that might have served Jewish communities well for centuries may prove impractical to implement in a modern setting.

In *Gali v. State of Israel*, the defendant stole a box of diamonds from the foreman of a diamond polishing plant.<sup>63</sup> The foreman was taken by surprise and did not resist, although he and another chased the defendant to no avail.<sup>64</sup> The issue was whether the defendant should be charged with robbery or with theft, which would have been a significantly lighter sentence.<sup>65</sup> According to a 1977 statute:

[A] person who steals a thing, and at the time of the act or immediately before or immediately thereafter, carries out or threatens to carry out an act of violence to any person or property in order to obtain or retain the thing . . . is said to commit robbery . . .<sup>66</sup>

Israeli cases had interpreted the statute to mean that merely grabbing an object is theft, but if the owner put up any form of active resistance, then it is a crime of robbery.<sup>67</sup> Justice Menachem Elon upheld Gali's initial robbery conviction, stating that the conviction was in line with Jewish law. Justice Elon quoted Maimonides's distinction between a thief and a robber:

Who is a thief? One who takes someone's money secretly, without the knowledge of the owner . . . . But if he takes it openly and publicly by force, then he is considered not a thief but a robber. Who is a robber? One who takes someone's money by force, such as snatching an object from his hand.<sup>68</sup>

However, Justice Elon's reliance on Jewish law was misplaced. Jewish law separately notes that the difference between theft and robbery is whether it was committed in secret or out in the open.<sup>69</sup> While Maimonides refers to the element of violence, he lists it as just one example of stealing in a brazen manner.<sup>70</sup> The main criterion is that the act be done publicly.<sup>71</sup> This distinction

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<sup>63</sup> See Friedell, *supra* note 61, at 674.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See *id.* at 674–75 (citing Penal Law, 5737–1977, Special Volume LSI 8, §402(a) (Isr.)).

<sup>67</sup> See *id.* at 675.

<sup>68</sup> See Friedell, *supra* note 61, at 675 (citing *Laws Concerning Robbery and Lost Property*, in CODE OF MAIMONIDES 1:3).

<sup>69</sup> See *id.* at 676.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

between stealing privately versus publicly serves a profound religious goal. Someone who steals in private demonstrates a greater fear of man than he does of God, thinking that God is less powerful.<sup>72</sup> The defendant's crime of robbery under Jewish law was predicated on drastically different policy goals than the Israeli statute. Therefore, Justice Elon's reliance on Jewish law in that instance, to bolster his claim that the defendant deserved a robbery conviction, was improper.<sup>73</sup>

However, not all uses of Jewish law are inappropriate in Israeli decisions. Jewish law is one of the richest legal traditions in world history. The bedrock of western civilization owes a debt to Jewish philosophical and legal thought.<sup>74</sup> These texts should not be discarded lightly. They are part of the national heritage of all Jews, whether they are religious or not. Provided that judges make sure to historically contextualize the law at hand and remain cognizant of the theological assumptions underlying certain laws, Jewish law could prove invaluable. In general, judges should always feel free to make use of any source that will make their decision more persuasive. In the past, judges have quoted sources from Shakespeare, T.S. Elliot, Yiddish sayings, and the Talmud.<sup>75</sup> Separation between religion and state does not mean that governments can never refer to anything remotely religious in nature. If that were the case, most history and philosophy could not be taught in public school systems. Separation between religion and state means that religious beliefs or practice should not play a role in state legislation. Therefore, Jewish law should be used as part of a grand cultural legacy inherited by Western civilization in Israeli legal decisions.

### **E. Israel as a Jewish and Democratic State**

As the modern reincarnation of ancient Israel, the State of Israel engages its historically religious nature by characterizing itself as both a Jewish and democratic State. The "Jewish" nature of the State was first mentioned in the *Israeli Declaration of Independence* of 1948.<sup>76</sup> The document describes Israel as a "Jewish State."<sup>77</sup> Although the Declaration does not state that Israel is democratic, it does mention that Israel will "ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex."<sup>78</sup> The need to explicitly define Israel as a democratic state did not arise until the parliamentary elections of 1984, when certain ideas were aimed to undermine the

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<sup>72</sup> See Friedell, *supra* note 61, at 677.

<sup>73</sup> *Id.*

<sup>74</sup> See *Preface to RELIGIOUS FOUNDATIONS OF WESTERN CIVILIZATION: JUDAISM, CHRISTIANITY, AND ISLAM* (Jacob Neusner ed., 2006).

<sup>75</sup> See Friedell, *supra* note 61, at 700.

<sup>76</sup> See *DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL*, *supra* note 1.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

democratic nature of the state.<sup>79</sup> At that point, the Knesset enacted an amendment declaring that a candidate shall not participate in elections if their goal includes “negation of the existence of the State of Israel as a Jewish and democratic state.”<sup>80</sup> Since then, several other Basic Laws refer to Israel explicitly as a Jewish and democratic State.<sup>81</sup>

There have been many interpretations regarding Israel’s legal characterization as both a Jewish and democratic state. However, one of the most notable explanations of this phrase is ascribed to Justice Elon. Justice Elon describes the judicial process that jurists must undergo when uncovering the Jewish and democratic sources necessary to interpret a dispute:

In addressing the fundamental values of the Jewish heritage with regard to the fundamental rights in *The Basic Law: Human Dignity and Freedom*,<sup>82</sup> the legislator must relate to the body and content of these values. He must deliberate and examine their philosophical underpinnings and examine the rulings and responsa in the remarkable Jewish legal and philosophical heritage throughout the ages, just as the legislator’s relation to the fundamental values of democracy must consist of his examining and analyzing their body and content, sources and rulings. . . . The resulting synthesis, from the standpoint of the State of Israel being a Jewish and democratic state, is reached by the judge in accordance with his approach, understanding and interpretation.<sup>83</sup>

The most striking application of Justice Elon’s interpretation of Israel’s characterization as a Jewish and democratic state occurred in the *Shefer* case

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<sup>79</sup> See *Overview: The Eleventh Knesset*, THE KNESSET, <https://www.knesset.gov.il/review/ReviewPage2.aspx?kns=11&lng=3> (last visited Mar. 2, 2019) (“The entry of Kach party chairman Meir Kahane to the Knesset, after three unsuccessful tries, led to legislative adjustments prohibiting ‘lists that incite racism’ from participating in the elections. Further amendments ruled the same on parties denying Israel’s democratic or Jewish nature.”).

<sup>80</sup> Basic Law: The Knesset 5718–1958, SH No. 224 p.69 (1958) (Isr.).

<sup>81</sup> See Basic Law: Human Dignity and Liberty, 5754–1994, SH no. 1454 p. 90 (1992) (Isr.) (“The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel *as a Jewish and democratic state.*”); see also Basic Law: Freedom of Occupation, 5754–1994, SH no. 1545 p. 90 (1994) (Isr.) [hereinafter Basic Law: Freedom of Occupation] (“The purpose of this Basic Law if to protect freedom of occupation, in order to establish in a Basic Law the values of the State of Israel *as a Jewish and democratic state.*”).

<sup>82</sup> See generally Basic Law: Human Dignity and Liberty.

<sup>83</sup> *Values of a Jewish and Democratic State*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/values-of-a-jewish-and-democratic-state> (last visited Mar. 27, 2019) (citing MENACHEM ELON, IYYUNEI MISHPAT 670 (1992)).

which adjudicated the question of active euthanasia.<sup>84</sup> Justice Elon first approached the issue through an analysis of Jewish text and tradition, arguing that the supreme value of the sanctity of human life is paramount and “actively hastening death, actively shortening a man's life, even if it be labeled ‘mercy killing,’ is absolutely forbidden, even if performed at the patient’s request. Our great duty under the circumstances is to ease the patient’s pain and suffering in every possible way.”<sup>85</sup> Justice Elon then continued to approach the question in light of various democratic traditions, noting that euthanasia is illegal in US law but permitted in the Dutch legal system.<sup>86</sup>

Nonetheless, Justice Elon went so far as to claim that:

[E]ven if in actual fact not one democratic legal system forbade active euthanasia. . . . since active euthanasia contradicts the essence of the State of Israel as a Jewish State, as we emphasized above, synthesizing the two concepts—“Jewish and democratic”—would mean preferring the conclusion necessitated by the values of a Jewish State and interpreting “democratic state” accordingly.<sup>87</sup>

According to Justice Elon, the Jewish nature of the state reigns supreme and can only remain under its democratic nature so long as there is no contradiction.<sup>88</sup> The religious obligation to preserve the sanctity of life will always overcome the ability to waive one’s secular right to life. The Israeli legal system has largely adopted this approach concerning issues between religion and state, and it has allowed religious Jewish law to dominate many aspects of Israeli civilian life.<sup>89</sup>

## **F. Israel’s Jewish Nation-State Bill**

The tension Israel has experienced between its Jewish and democratic nature since its inception has recently caused political turmoil. On November 19, 2014, Israeli Prime Minister Benjamin Netanyahu’s cabinet approved 14 principles for a new nation-state bill based on the pre-existing versions of the bill,

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<sup>84</sup> *Values of a Jewish and Democratic State*, *supra* note 83 (citing to 506/88 Shefer v. the State of Israel PD 48(1) (1993)).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See infra* Part III.

which would enshrine the Jewish character of the state as a Basic Law.<sup>90</sup> Critics feared that the proposed legislation would advance Israel's Jewish character over its democratic character.<sup>91</sup> The Nation-State Bill controversy contributed to the dissolution of the Knesset soon afterwards.<sup>92</sup> On May 10, 2017, the Knesset approved a preliminary reading of the bill which was then reviewed by the Knesset's Constitution, Law, and Justice Committee in preparation for a first reading vote in the Knesset.<sup>93</sup> On July 19, 2018, Israel officially passed the Jewish Nation-State Bill known as Basic Law: Israel as the Nation-State of the Jewish People.<sup>94</sup>

The law states that Israel is the nation-state of the Jewish people in an attempt to enshrine the Jewish character of the State into law.<sup>95</sup> The law declares that Israel is the nation-state of the Jewish people and lists a number of specific instances in which Israel's Jewish character is reflected, including its flag, anthem, calendar, days of rest, and relationship with the Jewish diaspora.<sup>96</sup>

The Nation-State Bill controversy is the culmination of Israel's identity crisis between its Jewish and democratic natures. While the law recognizes the values of the Declaration of Independence, it never mentions the word "equality."<sup>97</sup> The High Court has established equality as a basic tenet of Israeli law by finding that it is a presumption contained in the promise of "dignity" in the Basic Law: Human Dignity and Freedom, which stipulates that "none may harm the life, body or dignity of a person inasmuch as they are a person."<sup>98</sup> In fact, the term "equality" is never explicitly mentioned in any single piece of Israeli legislation.<sup>99</sup>

The omission is conscious and deliberate. For decades, ultra-Orthodox parties were afraid that using the term in a constitutional Basic Law would give

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<sup>90</sup> Haviv Rettig Gur, *An Idiot's Guide to the Nation-State Controversy*, TIMES OF ISR., Dec. 1, 2014, <http://www.timesofisrael.com/the-idiots-guide-to-the-nation-state-controversy/>.

<sup>91</sup> *Id.*

<sup>92</sup> Jodi Rudoren, *Bill on Status as Jewish State Fuels an Israeli Identity Crisis*, N.Y. TIMES, Dec. 9, 2014, <https://www.nytimes.com/2014/12/09/world/middleeast/israels-nationality-bill-stirs-debate-over-religious-and-democratic-identity.html>.

<sup>93</sup> Moran Azulay, *Nationality Bill Passes Preliminary Knesset Reading*, YNETNEWS.COM, May 10, 2017, <https://www.ynetnews.com/articles/0,7340,L-4960200,00.html>.

<sup>94</sup> *Israel Passes 'Home' Law, Stirring Anger*, N.Y. TIMES, July 19, 2018, <https://www.nytimes.com/2018/07/18/world/middleeast/israel-passes-national-home-law.html>.

<sup>95</sup> See Basic Law: Israel as the Nation State of the Jewish People, 5778–2018 (2018).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See Rettig Gur, *supra* note 90.

<sup>99</sup> *Id.*

courts the necessary framework to negate Israel's state-sponsored religious institutions.<sup>100</sup> If the state were required to advance "equality," Israel's judiciary would further override religious legal rulings that do not take into account gender equality or other principles of modernity missing in religious legal systems.<sup>101</sup>

The long-term effects of the law will depend on the extent to which Israeli courts will interpret the balance between Israel's Jewish and democratic natures. Every citizen throughout the State of Israel should have full political and democratic rights as envisioned in the Declaration of Independence. Ultra-Orthodox Judaism should not maintain its state-sponsored religious supremacy. At the same time, Israel has every right to characterize itself as a "Jewish State" as it did in the Declaration of Independence. The flag, symbol, anthem, and other aspects of national identity should not be problematic simply because they refer to the cultural legacy of the Jewish people. In fact, one-third of the world's countries have national flags that include Christian and Muslim religious symbols.<sup>102</sup> There are 40 Christian countries and 29 Muslim countries in the world.<sup>103</sup> That the State of Israel wishes to characterize itself as a "Jewish State" should not in itself prove troubling.

### III. RELIGION AND STATE ISSUES IN ISRAEL

#### A. Freedom of Religion

The combination of religion and state in Israel has led to a number of social issues which affect a majority of the Israeli population. Although there certainly is freedom of worship in Israel, there are instances of governmental and legal discrimination against non-Jews and non-Orthodox Jewish denominations.<sup>104</sup> According to a 2009 US Department of State report on Israel, "many Jewish citizens objected to exclusive Orthodox control over fundamental aspects of their personal lives."<sup>105</sup> Although the 1967 Protection of Holy Sites Law applies to holy sites of all religions within the country, the Government implements regulations only for Jewish sites.<sup>106</sup> Non-Jewish holy sites do not enjoy legal protection since they are not officially recognized.<sup>107</sup> By the end of 2008, all 137

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<sup>100</sup> Rettig Gur, *supra* note 90.

<sup>101</sup> *Id.*

<sup>102</sup> Jerold S. Auerbach, *Israel: A Democratic Jewish State*, THE JEWISH PRESS, Dec. 31, 2014, <http://www.jewishpress.com/indepth/front-page/israel-a-democratic-jewish-state/2014/12/31/0/>.

<sup>103</sup> Robert J. Barro & Rachel M. McCleary, *Which Countries Have State Religions*, 120 Q. J. ECON. 1331, 1339 (2005).

<sup>104</sup> See ISRAEL AND THE OCCUPIED TERRITORIES, *supra* note 11.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

designated holy sites were Jewish.<sup>108</sup> The Government has drafted regulations to identify, protect, and fund only Jewish holy sites, while many Muslim and Christian sites are neglected, inaccessible, or threatened by property developers and municipalities.<sup>109</sup>

## **B. Marriage and Divorce**

One of the biggest issues in Israel is the lack of civil marriage.<sup>110</sup> Most people that wish to marry in Israel must do so through a religious ceremony, even non-religious couples.<sup>111</sup> In 1953 the Knesset enacted the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, which states that “marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law.”<sup>112</sup> Therefore, couples of mixed religions cannot legally marry in Israeli synagogues. These couples would have to get married in religious institutions that permit inter-faith marriages. As a result of these laws, thousands of Israelis every year must travel abroad to get married.<sup>113</sup> Although Israel recently passed the Civil Union Law, which allows couples officially registered as not belonging to any religion to marry civilly, most Israelis are still forced to marry in religious ceremonies.<sup>114</sup> Those that support civil marriage have claimed that Israel’s current infrastructure violates the Universal Declaration of Human Rights, which states that “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.”<sup>115</sup>

## **C. Women’s Rights**

The fact that many aspects of Israeli life are governed by religious law allows for certain types of discrimination against women. In Israel, according to the:

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<sup>108</sup> ISRAEL AND THE OCCUPIED TERRITORIES, *supra* note 11.

<sup>109</sup> *See id.*

<sup>110</sup> *See Information and Resources on Marriage in Israel: Freedom of Choice in Marriage*, *supra* note 12.

<sup>111</sup> *Id.*

<sup>112</sup> Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713–1953, at 165, SH no. 134 (Isr.) (1953).

<sup>113</sup> *See Information and Resources on Marriage in Israel: Freedom of Choice in Marriage*, *supra* note 12.

<sup>114</sup> Law on Spousal Agreements for Persons Without a Religion, 5770–2010, at 428, SH No. 2235 (2010).

<sup>115</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art.16 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

Jewish religious court's interpretation of personal status law, a Jewish woman may not receive a final writ of divorce without her husband's consent.<sup>116</sup> Consequently, thousands of women, referred to as *agunot* or "chained women," are unable to remarry or have legitimate children because their husbands have either disappeared or refused to grant divorces.<sup>117</sup> Although rabbinical courts have the ability to impose sanctions on husbands who refuse to divorce their wives, they do not have the authority to grant religious divorces without the husband's consent.<sup>118</sup>

Furthermore, because marriage and divorce issues are under the sole purview of the rabbinical courts, women cannot seek redress in Israeli civil courts.<sup>119</sup>

Another major current political issue in Israel involves mixed gender prayer services at religious sites. At the moment, the Government prohibits such services in deference to the belief of most Orthodox Jews that these services would violate the precepts of Judaism.<sup>120</sup> At the Western Wall, the holiest site in Judaism, women are not allowed to pray while wearing prayer shawls or to read from Torah scrolls, both of which are traditionally done by Jewish men.<sup>121</sup>

The Women of the Wall is an organization that has been highlighting these issues for over twenty years.<sup>122</sup> The Women of the Wall organization has been advocating for non-traditional prayer services that would allow women to pray in a manner traditionally associated with male worship.<sup>123</sup> These women hold non-traditional prayer services at the Western Wall every month and are continually arrested.<sup>124</sup> According to Regulation 2(A)(1A) of the Regulations for the Protection of Holy Places to the Jews, individuals are prohibited from "conducting a religious ceremony that deviates from the traditional practice at the location, which is harmful to the feelings of the worshippers vis-a-vis the location."<sup>125</sup> Therefore, an ultra-Orthodox man that throws garbage at women praying in a manner that offends him is not in violation of this act, since he is not

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<sup>116</sup> See ISRAEL AND THE OCCUPIED TERRITORIES, *supra* note 11.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> ISRAEL AND THE OCCUPIED TERRITORIES, *supra* note 11.

<sup>122</sup> Anat Hoffman, *From the Back of the Bus to the Top of the Agenda*, ELMAD (Dec. 23, 2015), <https://elmad.pardes.org/2015/12/from-the-back-of-the-bus-to-the-top-of-the-agenda-anat-hoffman/>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Regulation for the Protection of Holy Places for Jews, 5741–1981, KT 4252 (Isr.) (1981) [hereinafter Regulation for the Protection of Holy Places for Jews].



performing a religious act. He would be guilty of assault and possibly other crimes, but not violating this regulation. In fact, this regulation was instituted by the Minister of Religion, as part of the struggle against Women of the Wall.<sup>126</sup> Women that pray according to non-traditional guidelines are the only ones that can violate this regulation.<sup>127</sup>

#### **D. Law of Return**

The Law of Return gives Jews the right of return, the right to live in Israel, and the right to gain citizenship.<sup>128</sup> A later amendment extended the right to those of Jewish ancestry or conversion, and their spouses.<sup>129</sup> The purpose of the law is to fulfill the Zionist national dream of establishing the State of Israel as a Jewish State.

That such a law exists in itself, should not prove troubling. The Jewish people have been persecuted since they began as a nation. After the events of the Holocaust, it became clear to the world that Jews needed a homeland like every other nation. The Law of Return is meant to establish a safe-haven for Jews world-wide. Every year, thousands of Jewish immigrants desperately take advantage of this law to escape ever-increasing outbursts of anti-Semitism and persecution.<sup>130</sup> The problem arises when over 300,000 citizens who immigrated to Israel under the Law of Return are not considered Jewish by the Orthodox Rabbinate and cannot be married, divorced, or buried in Jewish cemeteries within their own country.<sup>131</sup>

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<sup>126</sup> EITAY MACK, SELECTIVELY SACRED: HOLY SITES IN JERUSALEM AND ITS ENVIRONS 9 (2016), <http://alt-arch.org/en/wp-content/uploads/2016/04/28-Holy-places-Eng-WEB.pdf>.

<sup>127</sup> See Hoffman, *supra* note 122.

<sup>128</sup> *Israel: Armistice and Refugees*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/place/Israel/Armistice-and-refugees> (last visited Mar. 2, 2019).

<sup>129</sup> Law of Return (Amendment No. 2) Law, 5730–1970, at 34, SH No. 586 (Isr.) (1970) [hereinafter Law of Return].

<sup>130</sup> See *French Jews Migrate to Israel Citing Rising Anti-Semitism*, HUFFINGTON POST, Feb. 8, 2014; see also Shmuel Rosner, *Do France's Jews Have a Future*, N.Y. TIMES, Jan. 16, 2015, <https://www.nytimes.com/2015/01/16/opinion/shmuel-rosner-frances-jews-have-no-choice-but-israel.html>.

<sup>131</sup> See generally MAZIE, *supra* note 8, at 127–39.

#### IV. THE HISTORICAL FRAMEWORK TO ISRAEL'S IDENTITY AS BOTH JEWISH AND DEMOCRATIC

##### A. Jewish Origins of Modern Democratic Values

The problem with mixing an age-old religion with a modern nation-state is that sometimes the combination can negate certain democratic values. This section explores the Jewish origins of certain modern values including pluralism, liberty, and equality—the very foundation of human rights—to properly contextualize the State of Israel's proud identity as both a Jewish and democratic state.

The earliest known example of a reciprocal moral ethic can be traced back to Ancient Babylonia.<sup>132</sup> The Code of Hammurabi is the oldest surviving collection of laws ranging from how one should marry to establishing a doctor's fees.<sup>133</sup> The Code of Hammurabi also is infamous for its detailed descriptions of the various punishments for those that violate the law.<sup>134</sup> The Code of Hammurabi notably established the *lex talionis*, or the law of retaliation.<sup>135</sup> The famous articulation of “an eye for an eye” dates back to the Code of Hammurabi, which originally meant that if someone put out another's eye, he or she would lose an eye.<sup>136</sup> While this may seem barbaric to our modern sensibilities, at the time a proportionate response as legislated in the Code of Hammurabi was deemed fair and just.<sup>137</sup>

The laws of Ancient Israel share many similarities with the Code of Hammurabi. The Hebrew Bible also makes mention of the *lex talionis*, or the law of retaliation, and states “an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot.”<sup>138</sup> Although the Code of Hammurabi predates the Hebrew Bible by a few centuries, a number of notable parallels between the two legal codes have led historians to believe that they share a common origin.<sup>139</sup> Unlike the Code of Hammurabi, which literally was interpreted by courts to mean an eye for an eye, rabbinic writings have interpreted the Hebrew Bible to mean that the

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<sup>132</sup> *Talion*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/581485/talion> (last visited Mar. 2, 2019) [hereinafter *Talion*].

<sup>133</sup> MICHELINE ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 19 (2008).

<sup>134</sup> *Id.*

<sup>135</sup> *See Talion*, *supra* note 132.

<sup>136</sup> *See ISHAY*, *supra* note 133, at 28.

<sup>137</sup> *Id.*

<sup>138</sup> *Exodus* 21:24

<sup>139</sup> J. Dyneley Prince, *The Code of Hammurabi*, 8 AM. J. THEOLOGY 601, 609 (1904) (reviewing ROBERT FRANCIS HARPER, *THE CODE OF HAMMURABI, KING OF BABYLON ABOUT 2250 B. C.* (1903); HAMMURABI & L.W. KING, *THE LETTERS AND INSCRIPTIONS OF HAMMURABI* (1900); HAMMURABI & D. H. MÜLLER, *DIE GESETZE HAMMURABIS* (1903); HAMMURABI & HUGO WINCKLER, *DIE GESETZE HAMMURABIS* (1903)).

perpetrator should pay the monetary value of an eye.<sup>140</sup> There has never been any evidence that a court of Jewish law has ever inflicted physical injury as revenge or retribution for violating the law as required by a literal interpretation of Scripture. In contrast to the Code of Hammurabi, the Hebrew Bible seems to introduce a more humane interpretation of the law of retaliation which likely predated both of these legal codes.

Additionally, unlike the Code of Hammurabi which legislated separate punishments for those committed by free individuals and commoners, the Hebrew Bible had the same punishment for all wrongdoers regardless of social status.<sup>141</sup> The “eye for an eye” principle is immediately followed by the declaration “You are to have one law for the alien and the citizen.”<sup>142</sup> The Hebrew Bible was unique in the Ancient Near East for advocating complete equality before the law,<sup>143</sup> stating that God’s laws and decrees are for anyone that chooses to live by them.<sup>144</sup> In fact, God’s call for Jewish freedom is mentioned alongside the deliverance of other nations: “Are you not as much mine as the children of the Ethiopians, O children of Israel? Says the Lord. Have I not brought up Israel out of the land of Egypt, and the Philistines from Caphtor, and the Syrians from Kir?”<sup>145</sup> Although the Hebrew Bible is the unique story of a specific nation and their divine journey, it makes a point that God’s laws and love are accessible to everyone.

One form or another of the Golden Rule exists in almost every major religion and world culture.<sup>146</sup> This single teaching can be credited for establishing the basic foundation for later human rights innovations.<sup>147</sup> However, the earliest positive articulation of what would later become known as the Golden Rule, that one should love their neighbor as themselves, can be found in the Hebrew Bible.<sup>148</sup> The idea of a positive reciprocal ethic between man and his fellow man was revolutionary at the time.<sup>149</sup> Extant versions of this moral ethic had always been stated in the negative, “Do not do unto others what you would not have them

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<sup>140</sup> See Talmud Bava Kamma 83a–b.

<sup>141</sup> See ISHAY, *supra*, note 133, at 28.

<sup>142</sup> *Leviticus* 24:19–22

<sup>143</sup> The purpose of this equality was meant “to prevent people from taking the law into their own hands and exacting disproportionate vengeance for offenses committed against them.” See MICHAEL D. COOGAN, *A BRIEF INTRODUCTION TO THE OLD TESTAMENT: THE HEBREW BIBLE IN ITS CONTEXT* 112 (2009).

<sup>144</sup> *Leviticus* 18:5

<sup>145</sup> *Amos* 9:7

<sup>146</sup> See W.A. Spooner, *The Golden Rule*, in 6 *ENCYCLOPEDIA OF RELIGION AND ETHICS* 310–12 (James Hastings ed., 1914).

<sup>147</sup> See WILLIAM E. PADEN, *INTERPRETING THE SACRED: WAYS OF VIEWING RELIGION* 131–32 (2003).

<sup>148</sup> GUNTHER PLAUT, *THE TORAH—A MODERN COMMENTARY* 892 (1981).

<sup>149</sup> *Id.*

do unto you.”<sup>150</sup> The Hebrew Bible was the first to conceive that mankind should not only inhibit themselves from harming others, but that they should also proactively love one another.<sup>151</sup> The idea that human rights could be motivated through altruistic rather than selfish reasons was a radical break from traditional thought at the time.<sup>152</sup> Indeed, many rabbinic commentators, including Hillel the Elder and Rabbi Akiba, specifically chose the Golden Rule as the single most important message throughout the entirety of Jewish teaching.<sup>153</sup>

The underlying basis necessary to establish a universal conception of human rights can be traced to the idea that there exists a basic equality between all members of the human race.<sup>154</sup> The foundational text that introduced this concept can be found in the Hebrew Bible. In the first chapter of Genesis, the Hebrew Bible states that “God created humankind in His image, in God’s image, He created him, male and female He created them.”<sup>155</sup> This verse notably does not only establish racial equality by claiming that all human beings are created in God’s image, but also seems to advocate for gender equality. These verses do not simply promote equality, but actually elevate mankind’s status by characterizing his existence in relation to God. According to many commentators, “God’s image” is a reference to the fact that man is the only creation that exhibits a natural sense of morality, reason, and free will.<sup>156</sup> The divine image invested mankind with a sense of purpose and self-worth necessary to consider themselves partners with God entrusted to invent and create.<sup>157</sup>

Later in Genesis, the Hebrew Bible explicitly bridges the notion of God’s image with human rights. After the flood narrative, God attempts to rebuild a ruined world and establish a covenant with Noah.<sup>158</sup> God states that, “Whoever

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<sup>150</sup> Jan Tullberg, *The Golden Rule of Benevolence versus the Silver Rule of Reciprocity*, 3 J. RELIGION & BUS. ETHICS 1, 1 (2012).

<sup>151</sup> *See id.*

<sup>152</sup> *Id.*

<sup>153</sup> *See* Talmud, *Shabbat* 31a, *Genesis Rabbah* 24:7.

<sup>154</sup> *See* Michael Fishbane, *The Image of the Human and the Rights of the Individual in Jewish Tradition*, in HUMAN RIGHTS AND THE WORLD’S RELIGIONS 18 (Leroy S. Rouner ed., 1988) (“For at the core of the biblical system is the perception that the person is of absolute and inviolate worth: created in the divine image.”).

<sup>155</sup> *See* Genesis 1:27.

<sup>156</sup> *See* MOSES MAIMONIDES, GUIDE FOR THE PERPLEXED 15 (M. Friedländer trans., 1903), <http://www.sacred-texts.com/jud/gfp/index.htm> (“The intellect which was granted to man as the highest endowment, was bestowed on him before his disobedience. With reference to this gift the Bible states that “man was created in the form and likeness of God.”).

<sup>157</sup> Michael Novak, *Another Islam*, FIRST THINGS (Nov. 2002), <https://www.firstthings.com/article/2002/11/another-islam> (“The fact that the people of the West believed that all humans are made in the image of God meant that they understood themselves to be called to create, to invent, to discover, to figure out how all things work...For them, work was a vocation; it was to be, in some sense, God-like.”).

<sup>158</sup> *See* Genesis 9:6.

sheds the blood of man, by man shall his blood be shed; for in the image of God he made man.”<sup>159</sup> God declares that mankind’s likeness to God is the reason that capital punishment is the consequence for murder.<sup>160</sup>

The idea that mankind was created in God’s image had a profound effect on the philosophy of John Locke, enabling him to derive his understanding of human equality.<sup>161</sup> According to Locke, human equality necessitates that governments need the consent of the governed.<sup>162</sup> This idea had a direct influence on the US Constitution and the US Declaration of Independence which in turn became the foundational texts for many current political constitutions.<sup>163</sup> In fact, the preamble to the Universal Declaration of Human Rights echoes Biblical sentiment when it states that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the *human family* is the foundation of freedom, justice and peace in the world.”<sup>164</sup>

Courts throughout the world, and especially in Israel, have recognized the profound impact that the Hebrew Bible and other Jewish writings have had on modern interpretations of human rights. In fact, the Israeli Supreme Court frequently cites Jewish teachings in their decisions on various human rights issues. A beautiful expression of the legal relationship with ancient Jewish law occurs when Justice Elon writes that “our sages taught us ‘beloved is man in that he was created in [God’s] image’ (Avot 3:14). This fundamental value in the world of Judaism serves as the infrastructure, the very heart of the principle of man’s liberty.”<sup>165</sup> Additionally, the biblical reference to the creation of man in God’s image as both male and female pressed the Supreme Court to issue the obligation to provide equal opportunities to both sexes when entering<sup>166</sup> and retiring<sup>167</sup> from the workforce.

The Hebrew Bible even attempts to invigorate its adherents with a sense of empathy and moral responsibility through the collective memory of the Exodus: “You shall not oppress a stranger, for you know the feelings of the stranger, having yourselves been strangers in the land of Egypt.”<sup>168</sup> The

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<sup>159</sup> *Genesis* 9:6.

<sup>160</sup> *Id.*

<sup>161</sup> See JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE’S POLITICAL THOUGHT* 21–43, 136 (2002).

<sup>162</sup> *Id.* at 136.

<sup>163</sup> See generally GEORGE BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776–1989: A GLOBAL PERSPECTIVE* (2009).

<sup>164</sup> See generally Universal Declaration of Human Rights, pmb1 (emphasis added).

<sup>165</sup> *Human Rights*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/rights-human> (last visited Mar. 2, 2019) (citing to M. App. 1/87 Denenashvili et al. v. State of Israel, 41(2) PD 289; Cr. App. 2145/92 State of Israel v. Guetta, 46(5) PD 710–11).

<sup>166</sup> *Id.* (citing to HC 2671/98 The Israel Women’s Lobby v. Minister of Labor and Social Affairs, 52(3) PD 36).

<sup>167</sup> *Id.* (citing to HC 6845/00 Itana Niv et al. v. National Labor Court, 57(6) PD 663).

<sup>168</sup> *Exodus* 23:9 (Hebrew); cf. *Exodus* 22:20 (Hebrew).

traditional understanding of a “stranger” is one that is a convert to Judaism.<sup>169</sup> The Hebrew Bible understands the xenophobic origins of human rights abuses and tries to lay the groundwork for an empathetic response from the native Hebrews.

The command to respect the stranger living in the Israelite midst proves so important to the Hebrew Bible, that God describes himself in these terms:

For the Lord your God is God supreme and Lord supreme, the great, the mighty, and the awesome God, who shows no favor and takes no bribe, but upholds the cause of the fatherless and the widow, and loves the stranger, providing him with food and clothing. You too must love the stranger, for you were strangers in the land of Egypt.<sup>170</sup>

God chooses to describe His awesome might in terms of His dedication to fairness and empathy. God references the Exodus, yet chooses not to discuss the great might with which He liberated the Israelites. He references the Exodus solely to engender an empathetic relationship between the Israelites and the strangers that live amongst them.

Ancient Jewish law sought to produce a universal moral ethic to combat prejudice and promote human equality through concepts such as, “love your neighbor” and “God’s image.” These ideas were meant to instill a broad philosophical impetus to treat everyone equally and recognize the inherent humanity that we all share. However, Jewish thought remains the only attempt to motivate people to promote human rights from a personal perspective. For most of the Hebrew Bible’s existence, the narratives contained therein were believed to be historically accurate. Therefore, the effectiveness of the Biblical commandment to refrain from mistreating foreigners since the Israelites had been “strangers in a foreign land,” was quite remarkable. The use of national memory to inculcate a sense of obligation to those in need was creative and allowed people to use their imaginative faculty and empathize emotionally with the oppressed and the downtrodden. The combined philosophical and psychological means of stimulating an obligation towards basic civil liberties remains one of the reasons the Hebrew Bible has had the single greatest impact on modern human rights.

## **B. The Secularization of Human Rights**

Although the foundations for human rights were in place thousands of years ago, it was not until the European Enlightenment that these concepts took hold in Western consciousness. The reason these ideas were more successfully

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<sup>169</sup> Stuart Krauss, *The Word “Ger” in the Bible and its Implications*, 34 JEWISH BIBLE Q. 264, 264–70 (2006).

<sup>170</sup> *Deuteronomy* 10:17–19 (Hebrew).

implemented in the modern age lies in the nature of ancient Jewish law as a religious legal code. The theological infrastructure of the Hebrew Bible as the revealed word of God has historically led to sectarian clashes regarding the true interpretation of God's word. During the Second Temple period (530 BC–70 CE), the Jews were primarily divided between the Pharisees, Sadducees, and Essene sects.<sup>171</sup> Even today, Jews are ideologically split between the Reform, Conservative, and Orthodox movements.<sup>172</sup> Although no longer engaged in outright warfare, Protestants and Catholics are still fundamentally opposed to one another.<sup>173</sup> Meanwhile, certain Sunni and Shiite Muslim groups are currently engaged in violent military campaigns against one another.<sup>174</sup> Although religious in origin, human rights could never have emerged while associated with their religious context, because denominational disputes would have made implementing these teachings impossible.

It was not until the European Enlightenment that secularization was a possibility. Universal truths could now be enacted into law by virtue of their appeal to human reason rather than the insistence that they have been commanded by God. Modern notions of human rights developed due to the secularization of Judeo-Christian ethics during the Enlightenment period.<sup>175</sup> The notion that human beings were inherently invested with individual rights was unprecedented. In fact, there was no word for “right” in any language before 1400.<sup>176</sup>

Locke, among others, helped develop the concept of natural rights, the notion that people are naturally free and equal.<sup>177</sup> Locke identified these rights as being “life, liberty, and property,” and argued that such fundamental rights could not be surrendered.<sup>178</sup> Most scholars trace the phrase “life, liberty, and the pursuit of happiness,” in the United States Declaration of Independence, to Locke's theory of rights.<sup>179</sup>

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<sup>171</sup> *Ancient Jewish History: Pharisees, Sadducees & Essenes*, Jewish Virtual Libr., [http://www.jewishvirtuallibrary.org/jsource/History/sadducees\\_pharisees\\_essenes.html](http://www.jewishvirtuallibrary.org/jsource/History/sadducees_pharisees_essenes.html) (last visited Mar. 3, 2019).

<sup>172</sup> *Jewish Religion: Reform, Conservative and Orthodox*, HAARTEZ (July 1, 2013, 11:29 AM), <https://www.haaretz.com/jewish/.premium-the-denominations-of-judaism-1.5289642>.

<sup>173</sup> Ethan Cole, *What Divides Catholics and Protestants*, CHRISTIAN POST (Apr. 18, 2008), <https://www.christianpost.com/news/what-divides-catholics-and-protestants.html>.

<sup>174</sup> See FEBE ARMANIOS, CONG. RESEARCH SERV., RS21745, ISLAM: SUNNIS AND SHIITES 3 (2004).

<sup>175</sup> See ISHAY, *supra* note 133, at 64.

<sup>176</sup> MICHAEL FREEMAN, HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH 15–17 (2d ed. 2011).

<sup>177</sup> William Uzgalis, *John Locke*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 4.2 (Edward N. Zalta et al. eds., 2019), <https://plato.stanford.edu/entries/locke/>.

<sup>178</sup> *Id.*

<sup>179</sup> MICHAEL ZUCKERT, THE NATURAL RIGHTS REPUBLIC IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION 73–85 (1996).

However, European secularism did not develop in a vacuum. Secularism was initially forged over the course of theological debates and discussions.<sup>180</sup> Modern human rights were not a byproduct of secular liberalism; they were adapted from their deeply religious environment to form new conceptions of morality.<sup>181</sup> When Oliver Cromwell assaulted the institution of the “divine right of kings,” it was on the basis of a biblical covenant theology through which “the people” relate directly to God, making the role of the king redundant.<sup>182</sup> Locke himself believed that natural rights were derived from religion since humans were creations of God.<sup>183</sup> In fact, the precursor to modern natural rights ultimately stems from religious tradition and can even be traced back to the Hebrew Bible.<sup>184</sup> Scripture itself observed right and wrong from external natural observation<sup>185</sup> and human relationships.<sup>186</sup> The oracles to the non-Israelite nations in the Hebrew Bible are great examples of appeal to natural law.<sup>187</sup> These nations did not receive the Hebrew Bible, yet are castigated for violence, corruption, and injustice to the same degree as the Israelite nation.<sup>188</sup> Scripture thus alludes to a moral ethic that binds mankind even outside of revelation.<sup>189</sup>

## V. MORALITY: OBLIGATIONS VERSUS RIGHTS

The fact that the Enlightenment enabled religious values to become secularized had profound implications. Religious legal systems place “God” at the center and impose divinely mandated obligations. Before the Enlightenment, divine command theory<sup>190</sup> was considered the normative approach to morality.<sup>191</sup> Divine command theory still features today in the ethics of many modern religions.<sup>192</sup> The Enlightenment placed “Mankind” at the center and imbued him

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<sup>180</sup> See CHARLES TAYLOR, *A SECULAR AGE* 1–22 (2007).

<sup>181</sup> See generally GEOFFREY ROBERTSON, *THE STATUTE OF LIBERTY: HOW AUSTRALIANS CAN TAKE THEIR RIGHTS BACK* (2009).

<sup>182</sup> See LIAH GREENFELD, *NATIONALISM: FIVE ROADS TO MODERNITY* 75–76 (1992).

<sup>183</sup> See WALDRON, *supra* note 161, at 21–43.

<sup>184</sup> See SCOTT B. RAE, *MORAL CHOICES: AN INTRODUCTION TO ETHICS* 68–72 (3d ed. 2009).

<sup>185</sup> See, e.g., *Proverbs* 6:6–11; see also *Psalms* 19:1–6.

<sup>186</sup> See, e.g., *Proverbs* 24:30–34.

<sup>187</sup> See *Isaiah* 13–23; see also *Jeremiah* 46–51; see also *Ezekiel* 25–32.

<sup>188</sup> *Id.*

<sup>189</sup> See SCOTT B. RAE, *MORAL CHOICES: AN INTRODUCTION TO ETHICS* 48–49 (2009).

<sup>190</sup> This theory asserts that those good actions are morally good as a result of their being commanded by God, and many religious believers subscribe to some form of divine command theory. See ETHICAL THEORY: A CONCISE ANTHOLOGY 33–37 (Heimir Greirsson & Maragaret Holmgren eds., 2010).

<sup>191</sup> *Id.*

<sup>192</sup> See RAE, *supra* note 189, at 47–51.



with inherent rights.<sup>193</sup> Religious obligations not to kill and steal gave way to the right to life and property.<sup>194</sup>

The tension between morality as obligations commanded by God or universal rights invested in Man can best be described by examining the infamous philosophical paradox known as the Euthyphro dilemma. The original articulation of the paradox can be found in Plato's dialogue *Euthyphro*, in which Socrates asks Euthyphro, "[I]s the pious loved by the gods because it is pious, or is it pious because it is loved by the gods?" However, a modern expression of this concept would be phrased in the form, "[I]s what is morally good commanded by God because it is morally good, or is it morally good because it is commanded by God?" The question proves to be a paradox because either God's omnipotence is limited to command only that which is objectively moral, or morality itself is completely arbitrary, subject to the random whims of God. In traditional Jewish thought, the "paradox" is considered false.<sup>195</sup> God's nature is the standard for value. God embodies universal truth. Morality is both within and without, existing simultaneously because of God's commandments and outside of them.<sup>196</sup>

The evolution of conceptualizing morality from divinely mandated obligations to inherently universal human rights is indicative of the shift in human consciousness. Mankind developed and realized that "you shall not murder,"<sup>197</sup> was in fact commanded by virtue of mankind's inherent right to life. The ingenuity of the Enlightenment was that religious moral ethics could finally be understood outside of the theological narrative of revelation. People no longer needed to be obligated by a deity to preserve morality.

These differences are not merely semantic. There are substantive differences between these conceptions of morality. Modern human rights consider these values the interests of each individual. Every person can decide for themselves to what degree they wish to express these rights. People are even entitled to waive these rights altogether. In religious legal thought, the same is not true. These "rights" are in fact "obligations" imposed upon the individual and therefore not able to be waived.<sup>198</sup> This explains the reason why in most religious traditions one may not waive their "right to life" and commit suicide.

The religious conception of morality as an "obligation" rather than a "right" is demonstrated in the Israeli legal system. The Israeli Supreme Court

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<sup>193</sup> *Human Rights*, *supra* note 165.

<sup>194</sup> *Id.*

<sup>195</sup> See NORMAN H. SNAITH, *THE DISTINCTIVE IDEAS OF THE OLD TESTAMENT* 9, 187–88 (1944).

<sup>196</sup> JONATHAN SACKS, *TO HEAL A FRACTURED WORLD: THE ETHICS OF RESPONSIBILITY* 164 (2005) ("In Judaism, the Euthyphro dilemma does not exist. God commands the good because it is good . . . . God and humans are equally answerable to the claims of justice.")

<sup>197</sup> *Exodus* 20:13; *Deuteronomy* 5:17

<sup>198</sup> *Human Rights*, *supra* note 165.

ruled that a person could not waive his right to dignity and have a body search conducted in the streets of the town.<sup>199</sup> The Court denied the person's request arguing that "human dignity" results from man being created in God's image, and therefore is not only a right but an obligation which cannot be waived.<sup>200</sup>

Israel is a democratic country with strong ethno-religious ties with Judaism. The establishment of the State of Israel gave birth to a variety of issues involving the intersection between religious and state affairs including: personal status law, the Law of Return, religious legislation, the construction of an egalitarian civil society, the treatment of non-Jewish populations under Jewish governance, identification of religious groups, and the role of Jewish law in Israeli law.<sup>201</sup>

Many secular Israelis feel inhibited by the strict religious regulations imposed upon them. A majority of businesses close on Shabbat, including many forms of public transportation and restaurants.<sup>202</sup> For the majority of couples to be formally married or divorced in Israel, the proceedings must be conducted by an Orthodox Rabbi.<sup>203</sup> All food at army bases and in cafeterias of government buildings has to be Kosher, even though most Israelis do not follow these dietary laws.<sup>204</sup> These laws were enacted based on the underlying conception that these are religious obligations that must be fulfilled rather than rights to which private citizens can disown.

## VI. SEPARATION OF SYNAGOGUE AND STATE IN ISRAEL

Israel is not the only country plagued with the tension that occurs between the mixture of religious and state affairs. The intermingling of religion and state has existed since time immemorial. Ancient history has many examples of the commingling between religion and state. Socrates was put to death in part because he was found guilty of "not believing in the gods" of the state.<sup>205</sup> Ancient Judahite kings were believed to have had a mandate to rule from heaven.<sup>206</sup> The

<sup>199</sup> *Human Rights*, *supra* note 165 (citing Cr. App. 2145/92 State of Israel v. Guetta, 46(5) PD 704).

<sup>200</sup> *Id.*

<sup>201</sup> See Stone, *supra* note 34, at 632.

<sup>202</sup> Judith Shulevitz, *The Sabbath Debate in Israel*, SLATE (July 29, 2005, 6:39 AM), <https://slate.com/human-interest/2005/07/the-sabbath-debate-in-israel.html>; see also *Important information*, HOLIDAY TRAVEL, <http://holidaytravel.co.il/index.php/en/why-israel/important-information> (last visited Mar. 3, 2019) ("All public offices in Israel are closed on Shabbat, as are most private businesses. Public transportation (trains and buses in most cities) do not operate, and in many places it is not easy to find an open restaurant.")

<sup>203</sup> HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 213–14 (2011).

<sup>204</sup> See SAMMY SMOOHA, ISRAEL: PLURALISM AND CONFLICT 383 (1978).

<sup>205</sup> See PLATO, APOLOGY (Benjamin Jowett trans., 2011).

<sup>206</sup> See *Deuteronomy* 17:14–15.

Edict of Thessalonica made Nicene Christianity the official state religion of the Roman Empire.<sup>207</sup>

It was not until the Enlightenment era that a need for the separation between the affairs of religion and state began to emerge. The concept of separating religion and state is often credited to John Locke.<sup>208</sup> Locke argued that mankind is invested with the natural right to liberty of conscience, which must remain protected from any state or government authority.<sup>209</sup> This position was officially legislated in the Virginia Act for Establishing Religious Freedom in 1786, a statute that allowed citizens to follow the directives of their own conscience and demanded that the state tolerate all religions without favoring any one in particular.<sup>210</sup> Three years later, the separation between Church and State was officially enacted as part of the Bill of Rights.<sup>211</sup>

The phrase “separation between Church and State” originally comes from a letter written by Thomas Jefferson to the Danbury Baptist Association:

Believing with you that religion is a matter which lies solely between Man & his God...that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.<sup>212</sup>

Jefferson was explaining to the Baptists that the US Bill of Rights prevents the establishment of a national church.<sup>213</sup> Therefore, the Baptists had no reason to fear government interference with their religious lifestyle. Jefferson's phrase of a wall of separation has been frequently cited by the US Supreme Court. In *Reynolds v. United States*, the Court wrote that Jefferson's comments “may be accepted almost as an authoritative declaration of the scope and effect of the [First] Amendment.”<sup>214</sup> Writing for the majority in *Everson v. Board of*

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<sup>207</sup> CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES 6–7 (Sidney Z. Ehler & John B. Morrall eds., 1967).

<sup>208</sup> See NOAH FELDMAN, *DIVIDED BY GOD* 29 (2005). (“It took John Locke to translate the demand for liberty of conscience into a systematic argument for distinguishing the realm of government from the realm of religion.”).

<sup>209</sup> *Id.* at 30–31.

<sup>210</sup> See ISHAY, *supra* note 133, at 80.

<sup>211</sup> *Id.*

<sup>212</sup> Letter from Thomas Jefferson, U.S. President, to Danbury Baptists (1802) (on file at the U.S. Library of Congress).

<sup>213</sup> *Id.*

<sup>214</sup> *Reynolds v. U.S.*, 98 U.S. 145, 164 (1879).

*Education*, Justice Black wrote, “in the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state.”<sup>215</sup> The State of Israel is not the only country confused about the proper balance between religion and state. The US Supreme Court has disagreed regarding the proper amount of separation, the extent of which remains controversial to this day.<sup>216</sup>

However, unlike the United States, the State of Israel gives outright preference to certain religious groups. The Israeli government has long supported the religious hegemony of the Orthodox Jewish establishment.<sup>217</sup> In response, the Israeli Supreme Court often pushes back and defends modern liberal values in order for Israel to remain Jewish and democratic.<sup>218</sup> Israel’s activist judiciary should not have to contend with a resentful legislature. In a pluralistic society, liberal values founded on equality should be readily enshrined in law and never need to be litigated. Israel should legislate and adopt complete separation between religion and state while still maintaining its Jewish character.<sup>219</sup> Under this regime, religion would be kept in the private sphere. The functions of the Chief Rabbinate should not be given a government budget and should be completely privatized.<sup>220</sup> Religious institutions and services would then be based on the interests of the religious community rather than imposed by a secular

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<sup>215</sup> ROBERT BOSTON, *WHY THE RELIGIOUS RIGHT IS WRONG ABOUT SEPARATION OF CHURCH & STATE* 221 (1993).

<sup>216</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“The concept of a ‘wall’ of separation is a useful figure of speech probably deriving from views of Thomas Jefferson . . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.”); see also *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973) (“Yet, despite Madison’s admonition and the ‘sweep of the absolute prohibitions’ of the Clauses, this Nation’s history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation.”); see also *Zorach v. Clauson*, 343 U.S. 306, 312 (U.S. 1952) (“The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.”); see also *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense.”).

<sup>217</sup> See Gila Stopler, *Religious Establishment, Pluralism and Equality in Israel—Can the Circle be Squared?*, 2 OXFORD J. L. & RELIGION 150, 151 (2013).

<sup>218</sup> *Id.*

<sup>219</sup> YESHAYAHU LEIBOWITZ, *JUDAISM, HUMAN VALUES AND THE JEWISH STATE* 174–85 (1995).

<sup>220</sup> David J. Martin, *Privatize the Chief Rabbinate*, JERUSALEM POST, May 6, 2013, <https://www.jpost.com/Opinion/Op-Ed-Contributors/Privatize-the-Chief-Rabbinate-312271>. For an alternative stance demanding that the Chief Rabbinate simply become more open-minded and cater to all Jewish denominations, see generally Rabbi Avi Weiss, *Rein in Israel’s Rabbinate*, N.Y. TIMES, Jan. 30, 2015 and *A Place Among the Jews*, JERUSALEM POST, Feb. 22, 2011, <https://www.jpost.com/Opinion/Editorials/A-place-among-the-Jews>.

authority.<sup>221</sup> Religious institutions would then be completely uninhibited and allowed to comment on all matters of Israeli society without being constrained by governmental concerns.<sup>222</sup> For the sake of both religion and state, the two should be separate.

To allow both freedoms of and from religion comparable to other liberal democracies, the State of Israel should allow its citizens to register for civil marriage and divorce. There are critics that claim that such an outcome would dissolve the Jewish people and facilitate widespread assimilation.<sup>223</sup> These critiques are widely mistaken. Religious Jews in the diaspora<sup>224</sup> have long been marrying and divorcing according to religious law in countries that have civil marriage and divorce.<sup>225</sup> Observant Jews will continue to marry and divorce religiously, even with the option to do so in a non-religious ceremony. Allowing civil marriage and divorce will simply allow those that wish to marry or divorce outside of religious law to do so.

Israel's Ministry of Religious Affairs itself is not necessarily problematic. Many other democratic countries have government positions that oversee the state's relationship with religious affairs, including France, Germany, Denmark, and Greece.<sup>226</sup> However, Israel's Ministry of Religious Affairs should either allocate equal budgets to all denominations within Judaism as well as other faiths represented in the State, or completely dismantle the cabinet position and privatize these functions.

These legislative recommendations are shared by most Israeli Jews.<sup>227</sup> The Israel Religion and State Index is the most comprehensive and systematic annual public opinion study of religion and state issues in Israel.<sup>228</sup> According to the 2014 Israel Religion and State Index, there remains growing public support for

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<sup>221</sup> Yeshayahu Lebowitz, *In Defense of "Separation" in Israel*, 2 TRADITION: J. ORTHODOX JEWISH THOUGHT 203, 208 (1960).

<sup>222</sup> *Id.*

<sup>223</sup> See Aviezer Ravitzky, *Is a Halakhic State Possible? The Paradox of Jewish Theocracy*, in ISRAELI DEMOCRACY AT THE CROSSROADS 158 (Raphael Cohen-Almagor ed., 2005).

<sup>224</sup> The Jewish diaspora refers to the modern descendants of the Jews that were exiled from the Kingdom of Israel and Judah in ancient times.

<sup>225</sup> See Lebowitz, *supra* note 221, at 211–12.

<sup>226</sup> France has a Minister of Worship, Germany has the Ministers of Religious Affairs, Denmark has the Minister for Ecclesiastical Affairs, and Greece has the Ministry of Education and Religious Affairs.

<sup>227</sup> *Hiddush Releases 2014 Israel Religion and State Index*, HIDDUSH: FOR RELIGIOUS FREEDOM & EQUAL. (Sept. 23, 2014), [http://hiddush.org/article-6662-0-Hiddush\\_Releases\\_2014\\_Israel\\_Religion\\_and\\_State\\_Index;\\_Strong\\_desire\\_for\\_involvement\\_of\\_world\\_Jewry\\_in\\_efforts\\_for\\_freedom\\_of\\_marriage.aspx](http://hiddush.org/article-6662-0-Hiddush_Releases_2014_Israel_Religion_and_State_Index;_Strong_desire_for_involvement_of_world_Jewry_in_efforts_for_freedom_of_marriage.aspx) [hereinafter HIDDUSH]

<sup>228</sup> *Id.*

freedom of religion and equality in Israel.<sup>229</sup> 66% of Israeli Jews support recognition of civil and non-Orthodox marriages.<sup>230</sup> 71% of Israeli Jews are not pleased with the Chief Rabbinate.<sup>231</sup> These statistics illustrate the Israeli public's desire for freedom of marriage and strong opposition to the coercive tactics of the Chief Rabbinate.<sup>232</sup>

The biggest critique against reforming Israel's relationship between religion and state is that such radical legislation will undermine both religious freedom and the Jewish character to the State of Israel. These accusations could not be further from the truth. If the State of Israel chooses to privatize the functions of the Chief Rabbinate, these services will still be available. They would just no longer be tax-funded and imposed upon an uninterested population. Religious courts, school systems, marriage and divorce kosher certifications, and a host of other religious services would still be widely available to a willing public. Privatizing the Chief Rabbinate would actually allow for religious freedom, by allowing non-religious Israeli citizens to opt out of these services.

These reforms would in no way undermine Israel's Jewish nature. The State of Israel is a country with a predominately ethnic majority of Jewish citizens.<sup>233</sup> The official language of the State of Israel is Hebrew, the revived West Semitic language of the Ancient Israelites.<sup>234</sup> The flag of the State of Israel proudly bears the Star of David, which has been used as a symbol of Judaism and Jewish identity since medieval times.<sup>235</sup> The emblem of the State of Israel is a menorah with an olive branch on each side with the word "Israel" in Hebrew written below.<sup>236</sup> The menorah was used in the ancient Temple in Jerusalem and has been a symbol of Judaism since ancient times.<sup>237</sup> In Israel, Friday is usually a short work day in honor of the Jewish Sabbath observed by Jews since ancient times on Saturday.<sup>238</sup> The Law of Return guarantees a homeland to a wandering nation that has not been able to return home in nearly two millennia.<sup>239</sup> In fact, the Israeli national anthem proudly declares that as long as the Jewish soul still stirs for Zion,

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<sup>229</sup> HIDDUSH, *supra* note 227.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Statistical Abstract of Israel 2009*, CBS, [https://www.cbs.gov.il/he/publications/DocLib/2009/2.Shnaton%20Population/st02\\_24x.pdf](https://www.cbs.gov.il/he/publications/DocLib/2009/2.Shnaton%20Population/st02_24x.pdf) (last visited Mar. 3, 2019).

<sup>234</sup> See generally ANGEL SÁENZ-BADILLOS, *A HISTORY OF THE HEBREW LANGUAGE* (1993).

<sup>235</sup> See Gershom Scholem, *The Curious History of the Six-Pointed Star: How the "Magen David" Became the Jewish Symbol*, COMMENTARY, Sept. 1949, at 243–51.

<sup>236</sup> Alec Mishory, *The Flag and the Emblem*, ISRAELI MINISTRY FOREIGN AFF. (Apr. 28, 2003), <http://www.mfa.gov.il/mfa/aboutisrael/israelat50/pages/the%20flag%20and%20the%20emblem.aspx>.

<sup>237</sup> *Id.*

<sup>238</sup> Ethan Bronner, *Which Way to Stretch the Weekend? Israel's Answer May Lie in Economics*, N.Y. Times, July 7, 2011, at A6.

<sup>239</sup> See Law of Return.

the two thousand year old hope “to be a free people in our land,” is not lost.<sup>240</sup> The Jewish character of the State of Israel is in no danger of being erased. However, the hope and dream that all Israeli citizens can be a free people in the land will only be realized once the Government adopts a more open-minded and tolerant approach to issues of religion and state.

## VII. CONCLUSION

The Jewish people are defined as an ethno-religious group and are not necessarily adherents to the Jewish religion. The State of Israel as a “Jewish State” essentially aims to ensure the perpetuation of the Jewish people in their ancestral homeland comparable to any other nation-state. The problem arises when the state promotes a certain interpretation of religion and imposes those values upon the entire populace. A country should not promote or condemn any religion. Religion is a private affair, and no state has any right to create laws pursuant to religious belief. Israel should adopt complete separation of religion and state comparable to other Western democracies without undermining the Jewish character to the state. In other words, religion should not play a theological role in Israeli legislation.

The Chief Rabbinate of Israel and other governmental organizations that perpetuate religion should be privatized. These services should continue to cater to a majority of the Jewish population, but they should not be done on the taxpayer’s dime. The intermingling of religion and state only serves to inhibit both religion and state. Separation is not only necessary to preserve Israel’s democratic nature, but it is essential to preserve Israel’s Jewish nature.

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<sup>240</sup> *Hatikva–National Anthem of the State of Israel*, KNESSET, [https://knesset.gov.il/holidays/eng/hatikva\\_eng.htm](https://knesset.gov.il/holidays/eng/hatikva_eng.htm) (last visited Feb. 20, 2019).

