Chapter 4

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Custom Drives Jewish Law on Women*

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The thesis of this article is that we err if we try to decide issues concerning the status of women in Jewish law on the basis of the texts and legal arguments that have come down to us because they were all post facto reflections of what was determined by custom in the first place. The Conservative Movement's commitment to be honest to the historical context of Jewish law in the past and present thus requires us, on the one hand, not to be too constrained by specific texts that limit the role of women, for they were only giving retroactive legal justification for what common practice was at the time. On the other hand, we must not take undue advantage of texts that might be interpreted as allowing for women as well as men to do certain things but that, in historical context, were undoubtedly never intended that way.

In our own day, then, we must pay much more attention to the continuing development of custom in these matters, allowing for diversity of expression without being too insistent on either the letter of Jewish law as it has come down to us on these issues or on the egalitarian agenda. We should instead, I pro-

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pose, be flexible, allowing some people to hold on to old and familiar customs, giving others time and support in getting used to new ones that have evolved over the last fifty years in many of our congregations, and simultaneously allowing those in our movement who are so inclined to shape further, new customs that will enable women to function even more fully within our community.

The Role of Customs on Women's Status in Biblical and Talmudic Times

When one studies biblical and talmudic sources on the role of women, it becomes clear very quickly that the legal status of women was not equal to that of men. Given the role of women in other ancient cultures, that should not be surprising. At the same time, one also does not find delineated a clear status for women subservient to that of men in all respects. Instead, one finds a patchwork of laws, in some of which women are indeed equal to men, while in others they are clearly at a legal disadvantage.

Examples of this abound, but a few will suffice to make this clear. None of the biblical stories or laws depict a woman proposing marriage to a man or instituting a divorce, and later rabbinic law specifies that only a man may institute those procedures.[1] That would argue for women's subservience. On the other hand, women are specifically included in Deuteronomy's command that all Israelites are to hear the Torah read every seven years,[2] and the Torah's rules about accidental homicide, which specify that they apply to "a man or a woman," are used by the rabbis to extend all of the Torah's tort laws to women perpetrators and victims as well.[3] Thus in some ways, women had a lesser, and in some ways an equal, status *vis-à-vis* men.

Moreover, there is a discrepancy between what the law says and what we read in our sources' reports of our history. On the one hand, when interpreting Deuteronomy's discussion of appointing a king over the people, the rabbis limited eligibility for sovereignty to men.[4] Deborah, however, had long before been the political and military leader of her people, and in times close to what was probably the era of that rabbinic ruling, Shelom-

ziyyon (Salome Alexandra), the Queen, ruled as well.[5] While our ancestors' political and military leaders were overwhelmingly men, these examples indicate that even in ancient times, women could serve in these very public and important roles, contrary to what Jewish law became. Conversely, a *baraita* permits women to be among the seven who go up to the Torah and read it in the synagogue on the Sabbath. While that was legally permissible for women to do, it was not open to them in practice, for, as the *baraita* itself explains, to have women read the Torah would dishonor the men in the congregation.[6] We certainly do not hear in later stories or rulings of many (any?) women who in fact read the Torah in the synagogue, despite the legal permission embedded in the sources for them to do so.[7]

These kinds of disparities between what the legal texts say and what the stories report become especially striking in the extended discussion in the tractate *Kiddushin* about the commandments from which women are exempt. The legal rationales for those exemptions are, to put it mildly, extremely suspect, for the very verses which are quoted to exempt women from given commandments could just as easily be read to include them. Most are dependent upon masculine forms of nouns or verbs which grammatically can just as easily include women as exclude them—a fact which the Rabbis surely knew as well as we do. One must conclude, then, that the choice of whether to use the masculine noun or verb in question to designate men alone or both men and women was not at all determined by the verses themselves but rather by what was pre-existing custom at the time.[8]

This discussion is based on the Mishnah's attempt to generalize over the commandments from which women are exempt. Its generalization, that women are exempt from positive, time-bound commandments, is very quickly challenged in the Talmud, which adduces quite a few practices which do not fit that rule. Women are obligated, for example, to light candles on Friday evening, even though that is a positive commandment which is most definitely tied to a specific time. On the other hand, women are freed from the commandment to wave the palm branch (*lulav*) on *Sukkot* even though that could be done at any time during the day—hardly much of a restriction on time.[8]

The Talmud's discussion and rulings, then, indicate clearly that neither a legal analysis of biblical verses nor even a rabbinic attempt to generalize over the practices of their time was the ground for determining what women may or may not do. That, instead, was decided on the basis of the multiple and inconsistent, but apparently well-established, customs of their community.

Medieval Texts vs. Practices Regarding Women

If custom ruled the day in governing the roles that women might have in society in biblical and rabbinic times, we should expect it to do so in medieval times as well, and it did. The clearest cases of this are in the laws governing the relationships between men and women. So, for example, although biblical, talmudic, and Muslim law all allow a man to marry more than one woman, Christian law does not, and so Ashkenazic Jewish men and women, who lived predominantly among Christians, were enjoined by Rabbeinu Gershom from polygyny while Sephardic Jews, who continued to live among Muslims, were not restricted in that way.[9] Similarly, Sephardic rabbis, living among Muslims who permitted and even encouraged husbands to beat their wives, generally allowed Jewish husbands to do so as well, whereas Ashkenazic rabbis, especially those in Germany who were influenced by both Christian and Jewish pietism, resoundingly condemned wife-beating.[10]

We do not, however, hear of women taking public roles in the synagogue, either among Ashkenazim or among Sephardim. That is important when we read medieval texts that say, for example, that "ten" are necessary for a prayer quorum, *minyan*, without specifying whether women may be counted toward that number.[12] It is certainly true that the authors of texts like that could have specified "ten men" if they meant to restrict those who count to males, but it is equally true that they could have specified "ten men or women" if they had meant that. It is a mistake, then, to read such texts as a justification for including women in the count, for that is reading the text totally divorced from the historical context from that it came and to that it undoubtedly referred. As a member of a Conservative syna-

gogue that has been egalitarian for some twenty years, I, for one, am sorely tempted to read such texts in that way, but I must be honest in pointing out that would be playing fast and loose with the plain meaning of the text when it is read, as it should be, in its historical context.

The same argument applies to solitary texts that seem to report that in some places women actually did what we do not want to allow them to do. The medieval text used to indicate that even in those times women could be counted for a prayer quorum *minyan* is a good example of this. It is a comment of the Mordecai (thirteenth century), who, in turn, is reporting what he "found" in the writings of an earlier Rabbi Simhah, possibly the compiler of the *Mahzor Vitri*.[13] Even if such texts are to be credited, and even if they mean what we take them to mean, we surely must admit that they represent exceptions to the rule, that the overwhelming practice in the synagogues of our medieval and early modern ancestors was to permit only men to count for the quorum and to lead the services. To say otherwise is simply not being honest.

The Nature of Custom

The fact that custom determined the role of women in synagogue services, in witnessing, and in marriage and divorce means, for me, that if we are going to be true to that historical precedent, we must give custom a much larger role in determining our own practices as well. To stick to specific formulations of what was communal custom in these matters as if they were determined by legal analysis in the first place is, in my view, to ignore history in an excessive exercise of legal formalism.

Custom, however, is a slippery animal. Customs are not established at a specific time and place by recognized rabbinic authorities. Many times, in fact, customs are not even acknowledged by the rabbis, let alone validated by them. Because customs are not clearly stated in a rabbinic ruling, others, especially those living at a different time and place, often cannot understand its scope. The very genre of custom, coming as it does as a "fact on the ground" rather than a proposal to be considered,

suggests that it is somehow illegitimate to evaluate its legal cogency. We are supposed to obey the custom just because that is the accepted practice. Customs are not, in a word, legally "neat," with explicit details specifying who and what is involved and with clearly stated rationales open to analysis, challenge, and change. Instead, custom emerges from the masses—in our case, from Schechter's "Catholic Israel." As such, its rationales, its demands, and the scope of the communities it governs are often unclear. Moreover, because it emerges from the populace in given times and places, it is likely to differ from one Jewish community to the next.

The ways in which custom remains or changes are also hard to grasp and even harder to control. Those customs that are never formalized in law but rather passed down in the form of "what we do around here" may become so entrenched that they cannot be uprooted despite compelling reasons to do so. Rabbis sometimes try, denouncing certain customs as stupid or foolhardy *(minhag shtut)*, but rabbinic opposition, even if unanimous and forcefully expressed, does not always succeed in uprooting objectionable customs. Indeed, in their time and place, customs may become every bit as binding as statutory laws or rabbinic rulings—so much so that after awhile rabbinic rulings may officially recognize a given custom and enforce it. Before a given custom becomes well established, however, practices will differ, and judges that have to base their rulings on what the parties could legitimately have expected will want to tear out their hair. This is especially problematic because customs can pass out of existence just as quickly and inexplicably as they appear.

Custom as a legal genre, then, is definitely not for the anal compulsive. It requires one to ride with the waves, as it were, being flexible enough to adjust to ill-defined and changing practices and expectations. In that way, it is like living languages as opposed to dead ones; the dead ones have the advantage of being set and determined, but the living ones, that can drive you crazy with their ever-changing words, nuances, and phrases, nevertheless have the distinct advantage of being alive.[14]

Lest I be misunderstood, I am *not* saying, à la Mordecai Kaplan, that custom should replace law in our time. Law, whether

in the form of legislation or judicial rulings, carries with it distinct advantages for any society. It specifies clearly what is expected of everyone. This enables people to live together. It also contributes a sense of security to all citizens: I know that for that I can hold others responsible and, in turn, that for that I myself can be called to account. Law thereby saves me from the threat of Kafkaesque trials, where I know neither the charges against me, nor the rules for determining my guilt or innocence, nor the penalties for my guilt. Law also enables society to articulate its sense of justice in concrete terms, thus giving a moral quality to social norms. Moreover, because law is open to public scrutiny, it enables people to criticize and improve the rules by that they live. Finally, because laws generally change less rapidly than popular tastes do, law contributes to society a sense of continuity and rootedness. Jews, who are spread out all over the world, need these aspects of law even more than more geographically concentrated societies do, and so I would be the last to argue for understanding Judaism in our day in ways that deprive it of its traditional footing in law.[15] For those who also believe that there is a divine component to Jewish law, as I do, the obligatory nature of it goes well beyond these prudential concerns. Even without that theological component, however, the benefits of law to any society should make anyone think twice before abandoning law for custom alone.

Living legal systems, though, incorporate not only law, but custom, and each exercises a claim on the members of the society. Sometimes these dual claims pose no problems. On the contrary, law and custom can actually reinforce one another, as, for example, when customs augment and even beautify observance of the law. Another type of symbiotic interaction between law and custom occurs when they complement one another by filling in gaps in the norm of a community where the other is absent.

Sometimes, however, custom and law oppose each other, and then the question of which one takes precedence over the other is not always clear. This is true not only in Jewish law, with its application to widespread communities and its lack of one central authority, but in virtually any living legal system. American law, for example, that governs a clearly identified group of people in a relatively coherent land mass (even counting Alaska

and Hawaii) with a clear chain of legal authority, nevertheless is subject to modification and even to veto by popular custom.

As a result, one must come to understand that the content of the law itself is always a product of the interaction between the dictates of those entrusted with interpreting and applying the law and the actual practices of those governed by it. Law and custom, *din* and *minhag*, may pull in opposite directions, but they ultimately must take account of one another because neither automatically supersedes the other. In the paragraphs below I will use American law to illustrate these multifaceted interactions so it is clear that custom has authority of its own and affects law even in fully functional and enforced legal systems.

Sometimes law overrules customs or creates new ones. In American law, one example of that process was *Brown v. Board of Education* (1954) and the subsequent Civil Rights Act of 1964. That Supreme Court decision and Congressional legislation not only changed many state laws and local ordinances, but also changed some of the social and commercial customs based on segregation. So, for example, before that time advertisements almost never depicted blacks and whites enjoying a given product together, but by the 1960s such pictures began to appear.

On the other hand, custom can undermine law and change it. The clearest example in American law is Prohibition. Most Americans—probably some eighty-five or ninety percent—abided by the law, but the refusal of the remainder to do so made it impossible to enforce even a law with the status of a constitutional amendment.

Conversely, custom can be the source of new laws. One clear example in American law is the Uniform Commercial Code, a version of that forty-nine states ultimately passed. This code specifically invokes the "usage of trade" as a criterion for judging cases.[16] A parallel development in Jewish law is the case of wine merchants putting their marker on kegs of wine, which, according to the Talmud, does not normally effect a legal transfer (*kinyan*), but it does do so if that is the custom among merchants.[17]

Periodically, every legal system has to catch up to the actual practices of the people it seeks to govern. Sometimes, as we have seen, the legal authorities will seek to uproot a custom that has emerged, and sometimes they will instead confirm it in law.

Sometimes, they will do neither, letting varying customs in different regions determine what the practice will be. The United States is probably more sensitive than most other nations to the need to allow local custom to govern, for the federalist system embodied in its constitution establishes the rights of states to determine many, many matters, ranging from education to welfare to zoning to criminal penalties.

In Jewish law, custom has interacted with law in all the same ways. Indeed, in light of the widespread nature of the Jewish people, one would expect custom to have an even greater effect in shaping the practices of the Jewish people than it has had in other communities. Because of the divine status ascribed to the Torah, however, rabbis have not allowed custom to countermand a prohibition of the Torah, especially in ritual matters *(issur v'heter)*, but even there one first has to define what is a rule with Torah status and what is instead rabbinic level of authority in order to decide whether this restriction applies. Most often, the Torah cannot be claimed as the basis for a custom, and rabbis must confront the custom on its merits, deciding whether to wage war with it, confirm it, or just let it remain as the custom of some but not necessarily of all.

Conservative Judaism

One thing that has characterized the Conservative Movement from its early history in North America is its evolving practices with regard to the role of women. Mixed seating in worship was established totally by the customs of the people affiliated with Conservative congregations; to my knowledge, that practice has never been justified and confirmed in a rabbinic ruling, but it is overwhelmingly accepted within our movement.[18] Bat mitzvah ceremonies, initiated first by Mordecai M. Kaplan in 1922,[19] varied widely in degree of acceptance and in form through the 1960s, with some congregations having girls do exactly what boys did for their Bar Mitzvah, and with others, at the other end of the spectrum, restricting the girls' ceremonies to Friday nights and to parts of the service not *halakhically* required. Here again custom ruled the day.

Custom and law, as I have mentioned, continually interact and affect each other. It should be no surprise, then, that some steps in this evolution of the status of women were initiated by rabbis, or, at least, confirmed by them in very early stages of the emergence of the practice. Specifically, calling women to the Torah was officially permitted by the committee on Jewish Law and Standards in 1954,[20] but it did not become widespread until the late 1970s or 1980s. Similarly, counting women for a *minyan* was approved as a majority decision of the Committee in June 1973, but that, too, did not become widespread until the 1980s and 1990s. The next year, a minority opinion approved by six members of the committee permitted women to serve as witnesses.[21] Only three votes were required under the committee's rules then to represent a valid option within the Conservative movement; the six votes in favor of' permitting women to serve as witnesses would even satisfy the more stringent requirements enacted in 1985 for that status. Even so, women did not serve as witnesses in any significant numbers until the 1980s, and it is probably still not the practice among the majority of rabbis and congregations to permit women to do so.

In what was probably the most public forum for deciding an issue, the Rabbinical Assembly asked the chancellor of the seminary to form a special commission to decide on the permissibility of ordaining women as rabbis. That commission voted in favor of women's ordination, leading ultimately to the first ordination of a woman by the seminary in 1985.[22] That decision was never officially confirmed by the committee, but several members of that committee now are themselves women rabbis, and so custom has ruled there as well! It has taken some time, however, for women rabbis to be eligible for appointment to congregational posts on an equal footing with men, and there is still some way to go in that regard. The existence of women rabbis in the various settings and capacities in that they now serve, though, has created a whole panoply of new customs, not only in creative, new rituals but also in the ways in that rabbis and lay Jews understand each other and interact with each other.

Other customs regarding women have emerged, or are emerging, from the masses, just as one would expect for this genre of legal norms. So, for example, some women put on *tefillin*,

others don only a *tallit*, and others use neither in their worship. Some women wear head covering during worship and study (or always), and some do not. Some congregations insert the matriarchs in the opening blessing of the *amidah*, some do not, and some make it a prerogative of the one leading services to decide.

Women Witnesses

This variation, I think, is even true for what is emerging as the most difficult issue in this area, namely, women witnesses. The *Sifre*, both Talmuds, and Maimonides all maintain that only men may serve as witnesses as a matter of biblical law.[23] That, however, is founded on reading the masculine plural word for witnesses (*edim*) in either Deuteronomy 19:15 or Deuteronomy 17:6 as exclusively male in reference, even though the text of the Torah itself can just as easily be read to include women as to exclude them, and even though the *Sifrei* itself interprets the masculine plural words for the litigants in these verses to include women. If historical records are to be believed, however, in the large majority of cases it was indeed only men who have, over the ages, served as witnesses.[24] The power of the practice of restricting witnesses to men, then, is not really the Torah or even the rabbis' interpretation of it, but rather the ongoing custom of Jewish communities over the centuries. This is Solomon Schechter's doctrine of Catholic Israel at its clearest and most compelling.

The customary roots of restricting witnessing to men do not automatically justify permitting women in our own time to serve as witnesses, for custom, as we have seen, has a continuity and an authority of its own, sometimes even surpassing that of law. Custom, though, is not changed as much by argumentation as it is by the emergence of new customs. Sometimes new customs can be motivated by a conscious need to address new situations, for example, the new level of Jewish education open to women in our society, but most often, it should be remembered, customs either endure or change as a result of the practice of the concerned Jewish community.

In the case of witnesses, if we look at the matter on its merits, although I myself would want some distinction of the roles

of men and women in synagogue and home rituals, as I will explain below, I simply cannot understand the grounds on that women should be denied the right to sign as witnesses. Rabbi Ben Zion Bergman has suggested that the traditional restriction of testimony to men was not based on a blanket devaluation of women or on an assessment of women as incorrigible liars, but rather on two specific factors that would undermine the accuracy of a women's testimony, namely, that women's lack of experience in the world at large would taint their understanding and memory of events in that world, and second, that women were generally dependent upon their fathers or husbands and therefore were too likely to be influenced by them for their testimony to be trusted as their own independent witnessing of the event. Rabbi Bergman then suggests that since these factors do not apply to the women of contemporary times, the restriction on women's testimony should be reversed.[25] Rabbis Joel Roth and Mayer Rabinowitz have argued in similar ways. Because I have deep respect for the law and the legal process, I am glad that several members of the Committee on Jewish Law and Standards are now doing research to see whether there are additional legal grounds to permit women to be witnesses. In addition to the changed perception and role of women in our time, the warrant for doing so will probably be based on a showing that the exclusion of women was not as categorical as it should have been if the source was really biblical. Even those who advance such arguments, though, will inevitably differ on the extent to that we can rely on them to overturn longstanding practice, as the conclusions of Rabbis Bergman, Rabinowitz, and Roth demonstrate.[26]

I would guess, then, that any changes in this matter will arise not primarily from legal argumentation but simply by an increasing number of rabbis recognizing women as valid witnesses in practice. This will occur when male rabbis agree to be part of a court *(bet din)* with female rabbis in matters of conversion or divorce, and it will occur more pervasively when rabbis increasingly permit couples they marry to have significant women in their lives sign their wedding contracts, if they so choose.

Such acts, of course, will officially not be in keeping with the law as it has come down to us. A minority opinion of the Com-

mittee on Jewish Law and Standards approves of permitting women to be witnesses, but it was not justified with a formal paper.[27] It is therefore important to note that, contrary to the claim that legal formalists might make, allowing women to serve as witnesses in practice is *not* civil disobedience or, worse, an abandonment of the law. It is, instead, a use of one of the sources of the law, namely custom, to lead the way. That source may not have the advantages of law delineated above, but it has reciprocal advantages, as also described above. Moreover, custom is a historically authentic source of the law and, in this case, the very one that produced the law on witnesses as it is in the first place. It thus seems to me to be exactly appropriate that this law, generated by custom, that limits witnessing to males, should ultimately be changed by custom as well.

Implications For Our Own Day

This sets the stage for my recommendations about how we should treat the status of women generally. All in all, we have a veritable patchwork of practices with regard to women within our movement. Some Conservative professionals and laypeople would advocate that we as a movement become egalitarian by fiat, enacting a *takanah* to make women fully equal to men in all privileges and obligations of Jewish law. On the other end of the spectrum, others regret the extent to that we have already gone, claiming that we have lost our claim to legitimacy as a *halakhic* movement by taking steps to enfranchise women without careful and closely reasoned rabbinic rulings justifying such action. Such people often feel downright attacked by any step to equalize women's status. In the meantime, some people have left the movement, either because we have moved too slowly and too narrowly on these issues or because we have moved too far and too fast.

I would suggest that we have all talked about these matters in the wrong way, although in practice we have done exactly what we should do. The task to be accomplished in justifying new roles for women in Jewish life, we have thought, is to find warrant in the codes and responsa literature for doing what we want to do.

That has led, frankly, to forced readings of texts and to conclusions that either ignore or distort what historically happened in Jewish communities and what motivates us today to act differently.

Some that have acknowledged this have argued that if we were really honest, we would institute a *takanah*, once and for all making women equal to men in all matters of Jewish law. There is even some precedent for that in the *takanah* enacted by the Chief Rabbinate of the Jewish community in Israel in 1943, which made daughters inherit equally with sons. Even without that specific ruling, Jewish legal history offers us the vehicle of *takanah* to make significant changes that cannot be made through less disruptive techniques.[28]

Until recently, I myself thought we should enact a *takanah* to equalize the status of women and men in Jewish law. I have had to face the fact, though, that more than a few women object to wearing *tefillin* because it seems to them to be a man's garment. More broadly, I have come to recognize that we all must take more seriously the clear unwillingness of some of our most observant women to take on the responsibilities of Jewish law from that they are traditionally exempt. More broadly still, we dare not just brush aside as antiquarian or reactionary the feelings of those men and women within our movement who object to the changes egalitarianism has brought. I myself will advance an argument below for maintaining at least some distinctions between males and females in our liturgy and law while yet affirming their equal status. Even that, though, may be much too intellectual a statement of the issue. For, in my view, many of the problems we are having in defining new liturgical and legal roles for men and women emerge from the differing levels of tolerance we individually have for trying out new customs as we also gain meaning and rootedness from the ones that shaped our past. Objections to new egalitarian practices on the part of religiously committed Jews of both genders make even more sense when we remember that Jewish laws differentiating women from men are rooted in the customs of the times in that they were formulated in the first place; they therefore are not open to change through rational analysis alone but must rather he replaced, if at all, by new customs that often seem strange at first but that gradually become acceptable and eventually even cherished.

Consequently, although we should certainly probe legal sources to discover what our ancestors actually did in these matters, we should recognize that the real foundation for the laws that have come down to us on the roles of women was custom and that therefore the most appropriate vehicle for changing those laws will also be custom. We therefore need to take a four-pronged approach:

(1) Some customs have led to laws that indisputably harm women. These include wife-beating (at least in some Jewish communities), legal institutions that chain a woman in Jewish law to a man from whom she has already been civilly divorced, and the exclusion of women from Jewish education. Such bad customs we must annul altogether, and the Conservative movement has already done so.[29] We should similarly declare both morally reprehensible and legally null and void the kind of extortion now going on in part of the Orthodox world in Israel in that fathers marry off their minor daughters to men they refuse to identify as a ploy to force their wives either to stay with them in marriage or to give them money or custody rights in divorce. In these and other cases where the harm to women engendered by Jewish law is undisputed, we have already done, and should continue to do, what we must to rid ourselves of such bad customs.

(2) Most of the customs that have come down to us are appreciated by some and opposed by others. In such cases, I would argue for tolerance on all sides. That is, we should allow a diversity of customs to take hold and develop as they may. That will require tolerance for diversity in these matters, but such diversity is in the very nature of custom.

Thus, even though I myself am an egalitarian in these matters, I would plead with my fellow egalitarians to respect the will of some synagogues, or some *minyanim* within those synagogues, to restrict some roles to men, and perhaps others to women. Conversely, those that want to maintain the traditional role differentiation in services should recognize the deep roots these matters have in communal custom, even those that ultimately found their way into codes or responsa, and that consequently, in our own day, citing a text to justify exclusion of

women from a give role will generally not suffice. We will instead need to confront the custom head-on, evaluating it in terms of its role in our community now.

That will not be easy. In 1984, I wrote an article for the University of Judaism's *University Papers* series in that I suggested that the proper stance was "equal but distinct."[30] That is, I would want to recognize that men and women as classes are equal in their legal status, and in their theological status as creatures of God are created in the divine image, but I would also want to have our rituals express the fact that men and women differ from one another in important ways linked to their respective genders. Some of these differences, of course, are socially engendered (if not determined), and then one must ask whether such differentiations are justifiable or desirable. Increasingly over the last fifteen years, though, we have discovered that a number of the factors that differentiate men and women are biologically based, including most recently, the study based on functional magnetic resonance imaging (MRI) of the brains of men and women as they respond to the same questions; this study demonstrated that men and women do think with different parts of their brains.[31] In any case, whether the result of nature or nurture or both, men and women are now demonstrably different from each other in the way they think, talk, reason morally, and respond to life in general, as indicated by studies carried out largely by women such as Carol Gilligan, Deborah Tannen, and Nel Noddings.[32] Moreover, as it has become politically acceptable to acknowledge these distinctions, men and women have dared to explore in women's and men's groups the meaning of their engendered states of being, as well as, and in denigration of, their common humanity and, in our case, their common Jewish identity.

I, for one, then, would like to repeat the suggestion that I made in 1984, but now with much more evidence. Specifically, I think that Jewish ritual life should incorporate many leadership roles are open to people of both genders. On the other hand, though, there should be, in my view, some elements of worship and rituals that specifically are performed by women, and others that are restricted to men. That would acknowledge in graphic, ritual terms that we are at once equal and different. If the slogan "separate but equal" had not had such bad press in American

history because of its abuse in justifying situations that were definitely not equal, I might use that to summarize my position. Perhaps the phrase I used, "equality with distinction," or as Rabbi Zion Bergman suggested to me, "equal but vive la difference!"captures the position better while simultaneously avoiding any association with applications of its policy that do not preserve both factors in their entirety.

My favorite example to justify this position is, appropriately, one based on custom. By law, both men and women are obligated to light Sabbath candles and to recite the kiddush on Friday nights.[33] When Jews of both genders are not present, then, indeed, people of only one gender are supposed to do both things. When Jews of both genders are in attendance, however, then, by custom, women generally light the candles and men recite the kiddush. The distinction retains equality because family members pay roughly the same amount of attention to both. When they do not, the factors that lead them to pay more attention to the one or the other vary according to the family custom, the age of the children, and so on; they are not a function of an inherently unequal degree of significance in the two ceremonies. This can serve as a good example, then, of how customs can emerge or even consciously be created to enable us to be equal but different in our religious life as Jews.

In that example, the choice of that would normally be done by men and that by women was not determined by anything inherently male in saying kiddush in the home or anything inherently female in lighting candles there. The choice evolved as common practice, but, from a rational or even a symbolic point of view, it was largely arbitrary. That, too, is something to note as we make our way into the new customs that are evolving. Although we should certainly seek to differentiate the roles of men and women in meaningful, symbolic ways if we can, that will not always be possible. In such circumstances, we may choose to let men and women serve on an equal basis, or, at least in some cases, we may decide to differentiate their roles arbitrarily. So, for example, individual congregations might designate one *Shabbat* a month in that only women will serve as cantors and another *Shabbat* in that only men do so, with the remaining ones open to members of both genders. That frankly seems

forced to me, and I probably would opt for leaving that open to both genders at all times on a totally random basis. I can imagine, though, that if designating specific Sabbaths each month in the way I described were the practice in my synagogue, I would not only get used to it, but actually prize it after awhile as a further way of distinguishing men and women without impugning their equality. Alternatively, a synagogue might designate one Sabbath a month in that there would be, at least as an option, separate minyanim for men and women in order to accomplish the same purpose.

(3) Along with this toleration of varying degrees of adaptation of the customs of our past, I hope that we will develop new customs now that express both the equality and the distinctiveness that I, for one, seek. We have already begun, whether intentionally or not, to do this. This is especially evident in our emerging life-cycle rites.

Parents justifiably feel that their joy is no less for having a girl than it would be if they had had a boy, and the community's joy ought not be any less either. Traditionally, the birth of a girl is marked by an *aliyah* for the father (and now often the mother), accompanied by a blessing for the mother's health and naming the newborn girl. Even if these ceremonies are done nicely and even if a festive kiddush is held in celebration of the newborn afterward, modern couples have increasingly felt that these rites are not enough. They have consequently created new ceremonies that usually take place at their home, just as a boy's *brit milah* (ritual circumcision) often does.

Sometimes the ceremony is called *brit banot*, "the covenant of the daughters," thereby emphasizing the parallelism between the new ceremonies for girls with the traditional one for boys. Sometimes they are called *simhat bat*, "the joy of a daughter," thereby indicating the differences between this rite and the one for boys. Under either title, the ceremony itself may incorporate some of the same elements and language as the one for boys and may even be scheduled for the eighth day after birth as a boy's circumcision would be; or it may veer markedly from the ritual for boys. The point is that both the equal significance and the distinctiveness of having a girl are being symbolized by these new ceremonies.

Similar experimentation is happening with bat mitzvah ceremonies—again, some emphasizing the sameness of the event marked by a bar mitzvah for boys and some stressing the differences—and with weddings are increasingly involving both the bride and the groom in a more active role in both planning the rite and in participating in it. So, for example, if the groom is going to be called to the Torah in honor of his forthcoming wedding in the synagogue in that he grew up (his *aufruf*), the bride should be likewise called up for that honor in her home synagogue, assuming that that synagogue calls women to the Torah. In each case, if the person having the *aufruf* normally gives a homily *(devar Torah)* as well, that should be true for both the bride and the groom. Alternatively, at the wedding itself it could be not only the groom who gives a word of Torah in advance of the ceremony (the *hatan's tisch*, the groom's table), but the bride could do so as well. Similarly, if the bride follows the custom of walking around the groom, the groom might then walk around his bride (usually three times each)—and then, for the seventh circuit, both together might walk around the wedding canopy, which symbolizes their new home.

Jewish rites of death and mourning are already egalitarian, in that there is only one thing that we do for men that we do not do for women; namely, we traditionally bury a man's cut *tallit* (prayer shawl) with him. Perhaps some ritual object connected with the deceased woman could be buried with her, such as the head covering or the candlesticks she used for lighting Sabbath candles. That men prepare a man's body for burial and women prepare a woman's is not only important for reasons of modesty, but also to symbolize the embodied and engendered nature of the deceased. The genders are equal but different even in death. I would also encourage women to say kaddish during the year after a parent's death; a daughter's relationship with her parents may be different from a son's, but it is no less close, and the law demands honor of parents from daughters just as much as it does from sons.[34]

As we continue to experiment with new customs, we must allow some to retain traditional practices without being attacked as somehow anti-women or reactionary, while we simultaneously permit others to try various forms of egalitarianism. The

latter may include, as I advocate, some role differentiation together with other roles open to both genders. This will require tolerance and good will on all sides as we feel our way into appropriate expressions of our new (and old) understandings of who we are as men and women, as Jews, and as people of the modern world.[35]

Although all the ferment in our time about the changing definitions of male and female roles has clearly generated much anxiety and even social upheaval, one distinctly positive result has been that both men and women are thinking much more carefully about Jewish liturgy and law. Rabbis working with families in preparing for a life-cycle ceremony should take advantage of that new consciousness. In addition to explaining the traditional rituals and their meanings, rabbis should point out that some families in our time are adding to those rituals or doing them in new ways. As Conservative Jews, we will insist that those elements of the ceremonies that are legally required be done, but we should at least inform families of the possibility of using some of the new rituals that have been developed to accompany the traditional ones—and of creating new rituals of their own. Some families will not want to take an active role in shaping the rituals of their life-cycle event, but some will, and all will minimally learn that these rituals are intended to express both what the Jewish tradition and what they themselves feel and hope for on this day. Some of the new rituals will, of course, succeed wonderfully, and some will fall flat; that is the nature of creativity. Ultimately, though, we will all be the richer as new customs emerge for any or all of us to use.

(4) Finally, cognizant as I am of the continual interaction between law and custom, I would urge that we continue to probe our legal sources for legitimation of our new practices, but only where that is honest to the historical context of the sources as well as their language. I am, after all, deeply interested in the continuity, the authority, and the rootedness that grounding in legal sources can supply. Where history must be ignored, though, or even where the practice in question was only practiced by a small minority of Jews in the past, I would prefer that we be honest in asserting that we are creating new practices in

response to the new sensitivities we have on these matters vis-à-vis the relation between the genders. In doing so, we should call attention to the factors that differentiate our age from times past in these matters—especially the new Jewish and general educational opportunities open to women—in order to explain our deviation from previous practices. We should also point out, as I have maintained in this paper, that many of the practices and laws of the past were themselves based on the customs of their times, that law and custom always influence each other, and that in our day, as well, the law must catch up to the new customs emerging in our communities.

At this time, though, we should *not* institute an amendment *(takkanah)* totally equalizing the status of the two genders. This should happen only in some future time, if ever, for it would be justified only if and when the customs of our community have totally, or at least overwhelmingly, become egalitarian. Delaying the institution of such an amendment will enable people of both genders to have some time to get used to women donning *tefillin*, for example, without prejudging the case from the outset to say that they must. We need to feel our way gradually into our new understandings of what it means to be a man or woman and how we are going to express those meanings in ritual and legal forms, and we must do this with mutual respect both for those of us who want to go more slowly in this process and for those of us who want to proceed more quickly.

When Israel stood at Sinai, the rabbis tell us, each Jew heard God's voice according to his or her own sensitivities and abilities.[36] That did not preclude our tradition from having laws that governed everyone, but it did establish the theological basis for a diversity of practice among our ancestors, at least within certain bounds. These practices sometimes served as the source of the law, as they did with regard to most matters concerning the legal distinctions between men and women. In our own day we must let custom evolve and determine these matters as it did in the past.

Notes

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1. Deuteronomy 24:1–4; *M. Yevamot* 14:1; *B. Yevamot* I 12b; B. *Gittin* 49b; *Yad, Hil. Gittin* 1:1–2; *Shulhan Arukh, Even Haezer*, 120:1; *Be'er Ha-golah*, there and 134:1–3.
2. Deuteronomy 31:12.
3. Numbers 5:6; *Mekhilta, Nezikin*, Ch. 6 on Exodus 21:18; *M. B. K.* 8:4; *Yad, Hil. Nezikin*, 4:21; *Shulhan Arukh, Hoshen Mishpat*, 424:9.
4. Deuteronomy 17:15; *Sifrei Deuteronomy, par.* 157 (Ed. Louis Finkelstein) New York, 1939, 208); *B. Berakhot* 49a.; *Yad, Hil. Melakhim* 1:5.
5. Deborah: Judges 4–5; Shelomziyyon was the wife of Aristobulus I and AlexanderYanai, upon whose death she alone ruled the Hasmonean kingdom during the years 76-67 B. C. E. See "Salome Alexandra," *Encyclopedia Judaica* 14:691-3.
6. B. Megillah 232; *Yad Hil. Tefilah* 12:17; *Tur, Shulhan Arukh Orah, Hayim* 282:3) that follow that version of the *baraita*. Note that *Megillah* 3:5 does not mention the honor of the community but rather says two separate, and apparently, contradictory things: (1) "Anyone may ascend for the seven honors, even a minor, even a woman; (2) One may not appoint (literally, bring) a woman to read in public." Maimonides, as is his style, tries to iron out the inconsistency; he says: "A woman may not read in public because of the honor of the community. A minor who can read and knows to Whom prayer is addressed may ascend." Alfas (1013–1103) the *Tur* (Jacob ben Asher, died before 1340), and the *Shulhan Arukh* (Joseph Karo, 1488–1575), however, retain the inconsistency in the original sources. Isserles, following the Ran and Rivash, says "They may be counted among the seven, but all of them may not be women or minors."
7. Even Rabbi Aaaron Blumenfeld, who in 1955 wrote a responsum to permit women to be called to the Torah, admits that "there is no recorded instance of a woman called to the Torah either in the Talmud or in the Gaonic literature. However, there is a medieval decision that *seems* (my italics) to be practical halachah." He then cites a responsum of Rabbi Meir of Rothenburg (1220–1293), who says this: "In a city whose men are all Kohanim and there is not even one Israelite among them, it *seems* (my italics) to me that one Kohen takes the first two *aliyot* and then women are to be called, for 'All may ascend ..." This is hardly, though, a clear indication of an actual case or of accepted practice. Rabbi Meir's very words indicate that he is thinking through a logical conundrum in the law rather than recording what his community actually did. Aaron Blumenthal, "An Aliyah for Women," *Proceedings of the Rabbinical Assembly*, 55:168–181; reprinted in Seymour Siegel, ed. *Conservative Judaism and Jewish Law*, New York, 1977, 266–280; the citation is on 275.
8. *M. Kiddushin* 1:7, *B.Kiddushin* 33b–36a; Rachel Biale interprets these texts in the same way, indicating that the general rule that in fact characterizes the

division between what women were required to do and what they were not is the home/community distinction—namely , that women were required to do everything that takes place in the home, but not that that takes place in the community, because the place of the woman was construed to be at home. Rachel Biale, *Women and Jewish Law*, New York, 1984, 17.

9. In the Bible, Abraham, Jacob, and a number of kings have more than one wife. The Talmud permits a man to marry more than one wife, provided that he fulfills all his obligations, including his sexual ones, to each of them: *B. Yevamot* 44a (where the recommended maximum is four!); *B. Kiddushin* 7a. Here again, though, there was apparently a discrepency between what the law allowed and what custom dictated, for no case is recorded in the Talmud of a rabbi or a plaintiff in a case who had more than one wife. See Biale, *Women and Jewish Law*, 49–51..
10. See Avraham Grossman, "Medieval Rabbinic Views on Wife Beating, 800–1300," *Jewish History*, 5:1,Spring 1991, 53–62, esp. pp. 57 and 59–60. I discuss these precedents and how we should read and apply them in our day at some length in my reponsum entitled "Family Violence," approved by the Conservative Movement's Committee on Jewish Law and Standards on September 13, 1995.
11. See n. 7 above regarding one such possible role, namely, being called to the Torah.
12. *M. Megillah* 4:3 and *Yad, Hil. Tefilah* 8:4 both mention only a requirement for ten. See, however, *Shulhan Arukh, Orah Hayim* 55:1, 4, that specifies that males are required and that a woman may not count when there are fewer than ten men.
13. Mordecai on *B. Berakhhot*, note 173. Rabbi Philip Sigal seems to put much weight on this text in justifying the counting of women for a prayer quorum, although he states other arguments as well. See Philip Sigal, "Women in a Prayer Quorum," *Judaism* 23:2 (1974); reprinted in Seymour Siegel, *Conservative Judaism and Jewish Law*, 281–292; see especially 287 and n. 20 on 292.
14. For a more thorough discussion of the functioning of custom in Jewish law, see Elliot N. Dorff and Arthur Rosett, *A Living Tree: The Roots and Growth of Jewish Law*, New York, 1988, 421–434.
15. Rabbi Eugene Borowitz specifically takes Rabbi Neil Gillman and me to task for our common commitment to Jewish law, and Rabbi Neil Gillman himself describes "the Dorff / Roth position" as "the classical Conservative ideology and rhetoric" which, he says, "has had minimal impact outside of our own rabbinic circles." Although Rabbi Roth and I do not always agree on specific issues, Rabbis Borowitz and Gillman are right: Rabbi Roth and I share a commitment to a form of contemporary Judaism that preserves Jewish law as a central, organizing feature, however much we may differ on its content in specific matters, and that common commitment differentiates us both sharply from both Kaplan and Borowitz. See Eugene Borowitz, *Renewing the Covenant: A Theology for the Postmodcrn Jew*, Philadelphia, 1991, 282; Neil Gilman, "A Conservative Theology for the Twenty First Century," *Proceedings of the Rabbinical Assembly* , New York 1993, 20f.
16. Uniform Commercial Code, see 1-205; reprinted in Dorff and Rosett, *Op. Cit.*, 434.

17. *B. B. M.* 74a. I would Iike to thank Rabbi Ben Zion Bergman for pointing out this parallel to me.
18. Indeed, the few mentions of this in the archives of The Rabbinical Assembly specifically describe mixed seating as a custom and therefore leave it to the rabbi of each congregation to determine; see *Summary Index: The Committee on Jewish Law and Standard*, New York, 1994, 9.14.
19. Pamela S. Nadell, *Conservative Judaism in America: A Biographical Dictionary and Source Book*, New York, 1988.
20. *The Proceedings of the Rabbinical Assembly*, 1955, New York, , 168–190; *Summary Index*, 10.1. The majority decision permitted it at any time The practice in many congregations in the 1980s and 1990s followed the minority decision at that time.
21. *Summary Index*, pp. 10.3 (*minyan*), 10.2 (witness).
22. See Gordon Tucker, "Final Report of the Commission for the Study of the Ordination of Women as Rabbis," in Simon Greenberg, ed., *The Ordination of Women as Rabbis: Studies and Responsa*, New York, 1988, 5–30.
23. *Sifrei Deuteronomy*, Piska 104, Section 190 (Ed. Finkelstein, 230), bases the restriction of testimony to men on a linking (*gezera sheva*) of the word *shenei* (two) in Deuteronomy 19:17 to Deuteronomy 19:15, claiming that the former clearly refers only to men and so the latter is too. The truth is that neither is necessarily referring to men, for *anashim* (men) in v.17 can just as easily be people, as the *Sifrei* itself interprets it! Cf. also the Jewish Publication Society translation, the two parties to the dispute. In *M. Shevuot* 4:1 women are excluded from testifying, and the Talmud (*B. Shevuot* 30a), in trying to justify that ruling, offers a variety of arguments to make *shenei ha-anashim* ("two men") in Deuteronomy 19:17 refer to witnesses rather than litigants, but all those efforts are disputed, and so it ultimately relies on the *Sifrei*'s linking of *shenei* ("two"—two witnesses and two men) in the two verses. Apparently dissatisfied with that proof, or possibly basing himself on J. Shevuot 4:1 (35b), Mai monides in *Yad Hil. Edut* 9:2 instead bases the restriction on "the mouth of two wit nesses" (Deuteronomy 17:6), where "witnesses" is the masculine form of the noun. Karo, however, in *Kesef Mishneh*, objects to this justification on the grounds that the masculine form of the noun there also does not necessarily mean men alone, and so, in *Shulhan Arukh Hoshen Mishpat* 35:1, 14, he just asserts the rule that women are barred from serving as witnesses without attributing the rule to the Bible.
24. An important exception was the ability granted to a woman to testify to her divorce or to the death of her husband so that she could remarry; *Yad Hil. Gittin* 12:1, 1–16.
25. Ben Zion Bergman, "A Conservative Approach to Halakhah," *Procedings of the Rabbinical Assembly*, New York, 1987, 52. In support of his thesis, he points out that Maimonides explains why we do accept the testimony of women when they claim that their husbands divorced them or died because ultimately we can determine whether she lied or not (*Yad Hil. Gittin* 13:29; 13:24 in some editions). This suggests that the reason why women were ineligible to testify in all other cases is not because they were suspected of being incorrigible liars, but rather because, given the circumstances under that they lived, they could not be trusted to give *accurate* testimony.

26. Compare, for example, the opinions of Rabbis Mayer Rabinowitz and Joel Roth on this. Rabbi Roth clearly wants to permit women to be witnesses, and he suggests several ways to justify doing so, but he worries about the effects on the rest of the Jewish community of doing so. Rabbi Rabinowitz, on the other hand, says categorically that "we must reclassify the status of women vis-a-vis *edut* (testimony) based on the realities of our era.." See their respective articles in Greenberg, The *Ordination of Women"*, 117–119 and 149–162.
27. There "'as a minority vote of the Committee to allow women to be witnesses ii, 1974, but it was not rationalized by formal papers. See *Summary Index*, 10.2.
28. For both a reference to that *takkana* of the Chief Rabbinate, and for a more general discussion of the role of *takkanot* in Jewish legal development, see Menachem Elon, *"Takkanah"* and *"Takkanot Ha- Kahal," Encyclopedia Judaica* 5:71 2–737, especially 727.
29. Making girls and women eligible for the same educational opportunities with the same curriculum as boys and men has been the practice of the Conservative Movement from its very inception, with the notable exception, until recently, of the rabbinical and cantorial schools. Our amendments of the *ketubah*, our pre-nuptial document of condition *(tenai-bekidushin)*, and, if all else fails, our willingness to annul a marriage retroactively, have together freed many women from remaining chained to their former husbands. For a description of these measures, see, Dorff and Rosett, *Op. Cit.*, 523–546. For our elimination of any Jewish legitimacy with regard to a child and spousal abuse, see my responsum, "Family Violence," on these issues, cited in n. 10 above.
30. "'Male and Female, He Created Them:' Equal with Distinction," University Papers, Los Angeles, 1984, 13–23.
31. *Discover*, June 1995, 36; *U.S. News and World Report*, February 27, 1998, 15. Cf. also a summary of earlier research indicating differences between the brain structures and functioning of men and women in "Sizing Up the Sexes," *Time*, January 20, 1992, 42–51.
32. Carol Gilligan, *In A Different Voice*, Cambridge, 1982 . N. Noddings, *Caring:A Feminine Approach to Ethics and Moral Education* , Berkeley, 1984; Deborah Tannen, *You Just Don't Understand* ,New York, 1990.
33. *B. Berakhot* 20b; *B. Shabbat* 31b; *Yad Hil. Avodah Zarah*, 12.3; *Hil. Shabbat* 5.3; *Shulhan Arukh, Orah Hayim* 263.2,3; 271.2.
34. *B. Kiddushin* 30b equals the Talmud's interpretation of *M. Kiddushin* 1:7 to require honor of parents by both sons and daughters.
35. The new book edited by Rabbi Debra Orenstein, *Lifecycles: Jewish Women on Life Passages and Personal Milestones*, Woodstock,1994, presents a rich treasury of new ideas to express women's life passages and personal milestones in meaningful, but distinctly Jewish, ways. A similar book needs to be written for men!
36. *Exodus Rabbab 5:9;* 29:1; *Pesikta DeRab Kahana, "Bahodesh Ha-Shelishi,"* on Exodus 20:2 (Ed. Mandelbaum), vol. 1, 224.