

# Harnessing Religious Arguments for The Benefit of Trans Advocacy: A New Approach

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## ABSTRACT

*The social category of religion is considered one of the primary mechanisms for the construction of gendered roles as well as the insertion of sexed subjects into those roles.<sup>1</sup> The masking of religious ideology as nature works perfectly to compose the ideology of sex as a natural, rigid hierarchy; an invisible political ideology packaged as ontology.<sup>2</sup> Thus, examining the role religion plays in structuring the categories of transsexuality and transgenderness might prove insightful for contemporary controversies surrounding religious anti-trans sentiment, discrimination, and freedom of religion.<sup>3</sup> In this Note, I juxtapose three legal cases: One of an Indian court, another of an Israeli court, a third of a rabbinic legal responsum, all dealing with transgender subjects and their regulation either by the state or the community. What emerges is an interesting possibility for how religious theory could assist the court in reaching conclusions based not only on progressive trans, feminist, or queer theory but on religious thought and context as well.*

INTRODUCTION . . . . .	396
I. SECULARISM AND TRANSGENDER THOUGHT . . . . .	399

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<sup>1</sup> Daniel Boyarin, *Gender, in* CRITICAL TERMS FOR RELIGIOUS STUDIES 117 (Mark C. Taylor, ed., 1998).

<sup>2</sup> CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237 (1991).

<sup>3</sup> My use of trans terminology derives from Julia Serano’s comprehensive glossary. Julia Serano, *Julia’s trans, gender, sexuality, & activism glossary!*, Julia Serano, <https://www.juliaserano.com/terminology.html#T> [https://perma.cc/AT2W-9F7T]. Serano, a trans-feminist author with an extensive background in biochemistry and molecular biophysics, is considered a meticulous and highly regarded author in the areas of trans terminology and theory. Serano defines *transsexual* as “a person who identifies and/or lives as a member of the sex other than the one they were assigned at birth.” She thus negates the common conception that transsexuals are necessarily those who undergo medical procedures, and favors definitions based on self-identity and “lived-sex (i.e., whether one currently navigates their way through the world as a woman or man)”. *Transgender* is defined by Serano as an umbrella term, which includes transsexuals as one sub-group alongside any other people who “transgress gender norms or defy traditional gender categories in some way”. Following these definitions, this Note does not dwell on questions such as when does a person fully transform from one sex to another, can people change their sex or only their gender, are medical procedures necessary for such transformations, which ones, etc. Rather, I trace the ways in which different religions relate to gender transgressions, terming these transsexualities, transgenderness, or third genders, in accordance with each religion’s inner terminology.

II. ON THE PRONOUNS OF THE SOUL: CONTEXTUALIZING RELIGIOUS THEORY ON TRANSNESS . . . . .	402
III. HINDU-LEGAL HIJRAS: THE CASE OF INDIA'S THIRD GENDER . . . . .	405
IV. ONE MAN'S PREGNANCY AND ANOTHER WOMAN'S FORESKIN: AN ISRAELI CASE AND AN AMERICAN HALAKHIC RESPONSUM . . . . .	408
A. <i>Israel's Ploni Case</i> . . . . .	408
B. <i>Rabbinic Responses to Transness</i> . . . . .	410
CONCLUSION . . . . .	413

## INTRODUCTION

If you ever happen to stumble upon the website of an American organization called the Alliance Defending Freedom (ADF), and by chance, you scroll down to their proposition to join their movement “to stand for freedom,” ask yourself how this deeply religious organization interprets its first proclaimed founding principle: “that all men are created equal with inalienable, God-given rights.”<sup>4</sup> Propagating “sincerely held religious beliefs,” the ADF was responsible for a widely-circulated legislative template banning trans students from using public school bathrooms in a manner not aligned with their “God-given” chromosomes.<sup>5</sup> In 2015, the organization drafted a proposed policy on bathrooms and distributed it to school boards across the country.<sup>6</sup> Some states, such as North Carolina, passed laws preventing transgender people from using the restroom consistent with their gender identity based on the ADF template.<sup>7</sup> Yet, while North Carolina’s 2016 “Public Facilities Privacy & Security Act” (later fully repealed) acknowledged one’s ability to change their sex via reassignment surgery, defining “sex” as “the physical condition of being male or female which is stated on a person’s birth certificate,” the ADF’s own language seemed to discredit sex alteration entirely.<sup>8</sup> With a definition of “gender” nowhere to be found, the ADF’s

<sup>4</sup> ALL. DEFENDING FREEDOM, <https://adfllegal.org/> (last visited Dec. 28, 2021) [perma.cc/AB7S-RGH5].

<sup>5</sup> See the ADF’s definition of “sex,” *infra* note 9, as based solely on one’s chromosomes at birth, thus inevitably unchangeable.

<sup>6</sup> Samantha Michaels, *We Tracked Down the Lawyers behind the Recent Wave of Anti-transgender Bills*, MOTHER JONES (Apr. 25, 2016), <https://www.motherjones.com/politics/2016/04/alliance-defending-freedom-lobbies-anti-lgbt-bathroom-bills/> [perma.cc/PT69-VFCQ].

<sup>7</sup> *Id.*

<sup>8</sup> North Carolina’s “Public Facilities Privacy & Security Act”, known as HB2, was fully repealed on December 1, 2020, after suffering nationwide criticism and causing the state economic damages. See, e.g., Colleen Jenkins & Daniel Trotta, *Seeking End to Boycott, North Carolina Rescinds Transgender Bathroom Law*, REUTERS (Mar. 30, 2017), <https://www.reuters.com/article/us-north-carolina-lgbt/seeking-end-to-boycott-north-carolina-rescinds-transgender-bathroom-law-idUSKBN1711V4> [perma.cc/4T9N-8QUL]; Joe Killian, *Local Governments Cautious, Deliberate as They Craft Non-discrimination Ordinances*, THE PULSE (Mar. 4, 2021), <https://pulse.ncpolicywatch.org/2021/03/04/local-governments-cau->

draft defined “sex” as “the physical condition of being male or female, which is determined by a person’s chromosomes, and is identified at birth by a person’s anatomy.”<sup>9</sup> On an imagined scale of essentialism, the ADF surely scores high points for promoting an inalienable sex theorem, alongside their proclaimed “inalienable God-given rights.”<sup>10</sup> One realization stemming from this encounter of inalienability could be that the categories of sex/gender and their treatment are manufactured and expressed by the mechanisms of the secular state just as “God-given” rights are. Theologically inalienable as they may be, both are expressed in the secularized language of modern law.<sup>11</sup>

How should we address the nexus between religion, law, and transness? In the American context, one approach has been to condone religious rhetoric whenever it arises in political and legal debates, pairing transphobia with the conservative, Christian “right.” As one 2019 study suggests, being Christian (and to a lesser degree, Muslim) is associated with increased trans-prejudice, relative to being nonreligious (and to a lesser extent, being Jewish).<sup>12</sup> Another approach is to unmask religious terminology for what it

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tious-deliberate-as-they-craft-non-discrimination-ordinances/  
#sthash.H0wvz1Mf.Ar5LLIpd.dpbs [perma.cc/BLR3-DXJU].

<sup>9</sup> *Protection of Physical Privacy in Sex-Segregated Locker Rooms: Hearing on H.B. 15-108* (2015) (Statement of Michael J Norton, Senior Couns., All. Defending Freedom), <http://www.leg.state.co.us/CLICS/CLICS2015A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/4f3a48ec0a54330687257de2005e3f8c/%24FILE/15HouseState0204AttachC.pdf#page=5> [perma.cc/ZG7J-Y56U].

<sup>10</sup> *Supra* note 4.

<sup>11</sup> See e.g., *Bostock v. Clayton County*, 590 U.S. \_\_\_ (2020) (ruling that gender identity (e.g., being transsexual) and sexual orientation (e.g., being gay) are both covered under the meaning of “sex” under Title VII of the Civil Rights Act of 1964 and hence are both protected against discrimination in employment). The court’s opinion, though largely lauded by the LGBTQ community, lacked a clear differentiation between the categories of gender and sex. Though one could claim this was done for the purposes of expanding the protection of vulnerable populations under Title VII (and textually derived from the original language of the 1964 legislatures who most likely did not distinguish between these categories), it should not be overlooked that this lack in differentiation replicates, to a large extent, the mindset of those who refuse to recognize any distinction between sex and gender, such as the ADF.

<sup>12</sup> Marianne Campbell, Jordan Hinton & Joel R. Anderson, *A Systematic Review of the Relationship Between Religion and Attitudes Toward Transgender and Gender-variant People*, 20 INTL’ J. OF TRANSGENDERISM 21 (2019). For more views pairing transphobia with the Evangelical Christian right, see CHARLOTTE CHUCKY TATE, ELLA BEN HAGAI, & FAYE J. CROSBY, UNDOING THE GENDER BINARY 60-61 (2020); James Esseks, *Think Religiously Motivated Discrimination Can’t Affect You? Guess Again*, ACLU (Oct. 4, 2017), <https://www.aclu.org/blog/lgbtq-rights/transgender-rights/think-religiously-motivated-discrimination-cant-affect-you> [perma.cc/YMF2-HGLP]. For more on the political “religious gap,” see JOHN C. GREEN & MATTHEW H. OLSON, BEYOND RED STATE, BLUE STATE: ELECTORAL GAPS IN THE TWENTY-FIRST CENTURY AMERICAN ELECTORATE 13-21 (John C. Green. & Laura R. Olson eds., 2017); Jeremiah Castle, *New Fronts in the Culture Wars? Religion, Partisanship, and Polarization on Religious Liberty and Transgender Rights in the United States*, 47 AMERICAN POL. RSCH. 650 (2019) (suggesting that the religious and partisan divides that fueled the culture wars over abortion remain an important factor in American politics); see also, ARNAUD VINCENT, THE RELIGIOUS RHETORIC OF U.S. PRESIDENTIAL CANDIDATES: A CORPUS LINGUISTICS APPROACH TO THE RHETORICAL GOD GAP (2020) (showing the heavy religious rhetoric deployed by the Democratic party at certain periods in U.S. history).

“truly is”—just another mode of misogyny or bigotry.<sup>13</sup> Under this view, religion is hijacked or manipulated to support ideologies that are loosely based on authentic religious content and are more commonly based on delegitimizing any category of “other” to gain political clout. A third approach, which I endorse here, acknowledges the fact that religious rhetoric and sentiment are and have been shaping the seemingly neutral language of the law. Under this approach, attempts to purify or neutralize the legal realm of any religious remnants end up ignoring a wealth of contexts and hermeneutics that could promote a richer legal discourse. The result is an abandonment of the religious public arena to be governed by particular religious voices, such as the ADF’s. As noted in the introduction to an issue of the *Transgender Studies Quarterly*, discussing the latest bathroom controversy: “The ADF is helping to write particular Christian evangelical theologies of the body and sexuality into law; theology has shaped legal debates over trans bodies.”<sup>14</sup>

Drawing on this third approach, I will focus on an understanding of the law and its operation as a religious phenomenon. This is not to say that law is *only* a religious phenomenon, nor that religion is the sole prism through which law can be fully understood. It is to say that the language of law is, a priori, a language steeped in religious connotations, one that shares theological roots, and a broad historical context. Based on this understanding I briefly propose adopting a perception of law as a legitimate space for debating religious beliefs via legal mechanisms. In short, I will argue that instead of dealing with deeply controversial issues according to a binary of secular vs. religious, a complex religious discourse should be allowed to develop in the public space regarding transgender rights.<sup>15</sup> Drawing on an interdisciplinary examination of trans studies and religious studies and focusing on recent study-cases from Indian, Israeli, and American-Rabbinic-case-law, I aim to show how a rich religious discourse holds the potential to benefit all sides of the controversy and, perhaps, advance theoretical notions of the relationship between Church and State in a largely “Christian Nation.”<sup>16</sup>

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<sup>13</sup> See e.g., Christian, *Let My Transgender People Go! (When Bigotry Uses the Bathroom)*, JOHN PAVLOVITZ: STUFF THAT NEEDS TO BE SAID (Feb. 24, 2016), <https://johnpavlovitz.com/2016/02/24/christian-let-my-transgender-people-go-when-bigotry-uses-the-bathroom/> [perma.cc/9H8G-R6MQ].

<sup>14</sup> Max Strassfeld & Robyn Henderson-Espinoza, *Introduction: Mapping Trans Studies in Religion*, 6 *TSQ: TRANSGENDER STUD. Q.* 283, 288 (2019). This issue was dedicated to the intersection of transness and religion.

<sup>15</sup> For a similar approach (outside the issue of transgender rights), see Jonathan Burnside, *Words of Wisdom, Words of Prophecy: Why and How Biblical Law Speaks in the Public Square*, 18 *POL. THEOLOGY* 560 (2017). For the interesting suggestion to adopt the “consistency test” for examining authenticity of religious belief in the context of “sex” under Title VII discrimination, see Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 *NW. UNIV. L. REV.* 1147 (2010).

<sup>16</sup> See e.g., Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 *UCLA L. REV.* 1 (2008) (examining a modern-day Christian claim that the United States was founded as a “Christian nation,” but that secularism skewed this vision, breaking from true U.S. traditions); see also, GEOFFREY R. STONE, *SEX AND THE CONSTITUTION* (2017). For an evangelical

A further goal of this Note is to suggest that the “master’s tools” are perfectly suitable for dismantling the “master’s house,” precisely because they are the ones that built it.<sup>17</sup> By this, I mean that a significant way in which change occurs is through methods of reexamination and reinterpretation of the existing ingredients that constitute human society. Practically speaking, creative interpretation or re-introduction of existing, age-old (religious) categories in new legal light could prove beneficial to an imagined post-gendered, un-gendered or multi-gendered sustainable future.

For these purposes I will, first, briefly situate us in the literature dedicated to a critical examination of the secular-religious binary, and pair it with contemporary trans and religious literature. Second, I will map several religious attitudes towards transness, showcasing the theoretical diversity and emphasizing their fluid approaches. Third, I will present three present-day legal cases involving trans rights from Indian, Israeli, and American-Rabbinic-perspectives. In so doing, I aim to show how the use and support of religious resources in the Indian and Rabbinic cases deeply furthered trans advocacy, thickening their legal claims and enriching their narratives. I will further suggest practical manners by which these religio-legal techniques could have assisted in the Israeli case. I will conclude by discussing the possibilities the pairing of trans and religious theory may hold for future legal thought and practice.

## I. SECULARISM AND TRANSGENDER THOUGHT

An examination of the intersection between religion and trans studies can prove meaningful not only on the theoretical level of academic discourse between two seemingly inherently differing fields of thought, but on a political level as well. The coupling of trans and religious studies undermines the premises of neutrality, secularism, and rationality that, in fact, often serves as the basis for transphobic claims. Arguments based on physical abilities; biological Female/Male attributes; and performances in sports, workplaces, military arenas, and public bathrooms have all been raised in attempts to dress anti-trans advocacy in scientifically neutral, legal attire. Simultaneously, addressing transness as a secular phenomenon coincides with a de-

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criticism of the interpretation of the U.S. as a “Christian Nation,” see GREGORY A. BOYD, *THE MYTH OF A CHRISTIAN NATION: HOW THE QUEST FOR POLITICAL POWER IS DESTROYING THE CHURCH* (2005)

<sup>17</sup> I am of course referring to Audre Lorde’s famous metaphor “the master’s tools will never dismantle the master’s house” in an essay from 1984 by that same title, *see in SISTER OUTSIDER: ESSAYS AND SPEECHES* 110-14 (2007). Though I agree with Lorde’s assertion that systems of oppression often contain structures (tools) meant to preserve and safeguard various forms of inequality (e.g., how different feminisms maintain forms of racism and homophobia), I disagree with her assumption that the master’s tools may only allow us to “. . . temporarily beat him at his own game, but they will never enable us to bring about genuine change.” *Id.* In lieu of attempts at creating brand-new or idyllic “anti-mastery tools,” I favor a view deeming all tools fair game, regardless of their origin or previous ownership.

scriptive tendency of the modern West to tell its stories in a (U.S.-centric) secularized manner.

The criticism of secularism, as a sub-genre of religious studies, is perhaps best characterized by the works of Talal Asad.<sup>18</sup> Refuting the secular-religious binary, Asad's skepticism of the post-Enlightenment, neo-liberal, and individuated project of the "secular state" depicted secularism not as an attempt to abolish religion or eradicate it, but as an ongoing process of presupposing the very notion of religion in ways that reconfigure and regulate religious content and practices.<sup>19</sup> Asad's ideas brought forward an intricate definition of the secular state, one that "is not characterized by religious indifference, or rational ethics—or political toleration. It is a complex arrangement of legal reasoning, moral practice, and political authority. This arrangement is not the simple outcome of the struggle of secular reason against the despotism of religious authority."<sup>20</sup> From an American legal perspective, secularism functions as unacknowledged white Protestantism disciplining religious practices and relegating them to the private, irrational, unenlightened sphere, thus "purifying" the public legal sphere.<sup>21</sup>

Take for example the story of H. Adam Ackley, a trans professor at an evangelical university who, in 2013, preached a pro-trans, Christian sermon and was later asked to leave his position as the university's Chair of Theology and Philosophy.<sup>22</sup> The abovementioned introduction in *Transgender Studies Quarterly* had this to say of Ackley's case: "To offer political critiques of secular neoliberal constructions of gender, trans studies must engage with religious studies. Otherwise, in our silence, we risk colluding with the constitution of trans as secular. It was the *secularization* of transgender that conditioned the (evangelical) firing of H. Adam Ackley."<sup>23</sup> Interestingly, while the university itself had no clear policy regarding trans people, apart from stating that "humans were created as gendered beings," Ackley him-

<sup>18</sup> See TALAL ASAD, *FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY* (2003).

<sup>19</sup> *Id.* at 227-31.

<sup>20</sup> *Id.*, at 255.

<sup>21</sup> See *e.g.*, JANET JAKOBSEN & ANN PELLEGRINI, *LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE* 19-23 (2003) ("In the United States, religion—Protestantism, that is—works to supply the moral foundation all the more thoroughly because its specific religious lineage is often forgotten"); see also Orit Avishai, Jafar Afshan & Rachel Rinaldo, *A Gender Lens on Religion*, 29 *GENDER & SOCIETY* 5 (2015). On how the prediction that religion would decline with the rise of modernity did not materialize, see JOSE CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994); Jose Casanova, *Secularization Revisited: A Reply to Talal Asad*, in *POWERS OF THE SECULAR MODERN: TALAL ASAD AND HIS INTERLOCUTORS* 12, 13 (Davit Scott et al. eds., 2006), in which Casanova mentions that this was truer of the American case than the western European one.

<sup>22</sup> *H. Adam Ackley, Transgender Theology Professor, Asked To Leave California's Azusa Pacific University*, HUFFPOST (Feb. 2, 2016), [https://www.huffpost.com/entry/transgender-professor-azusa-pacific-\\_n\\_3977109](https://www.huffpost.com/entry/transgender-professor-azusa-pacific-_n_3977109) [perma.cc/328S-BM5F].

<sup>23</sup> Strassfeld & Henderson-Espinoza *supra* note 14, at 285 (emphasis added).

self sought to characterize his status under the religious-laden category of a “male eunuch.”<sup>24</sup>

That there is a deep connection between gender performance and religious practice can be inferred from the “father” of American Evangelisms, George Whitefield. Whitefield was notoriously depicted as a “gender deceiver” for his theatrical sermons, often combining feminine-quality performances, calling the masses to become “brides of Christ” and feel themselves women and mothers.<sup>25</sup> Ackley’s story also resonates with a recent qualitative study of transgender Christian leaders, in which the participants viewed their transgender identities as integral to their spiritual practice and faith.<sup>26</sup> With religious adherence not going away in the foreseeable future,<sup>27</sup> and with the understanding that the secular state regulates religion for its own purposes, it makes sense to examine religious theory as it crosses paths with current transgender realities and feminist thought.

Do religions oppose transness? Do they support transgender people? Or are they indifferent? Is asking these questions an anachronistic attempt to squeeze a modern phenomenon into archaic terminologies and mindsets? Scholarly works regarding these and similar questions have been conducted on a variety of religious systems, from Islamic, Hindu, Buddhist, Christian, and Jewish strands.<sup>28</sup> The emerging bottom line is simplistically trivial—different religions create different cultural mechanisms of understanding, describing, and regulating trans appearances and activities. Yet one conclusion appears across-the-board—all religions share a history of thinking on issues of transitioning genders and gender nonconformity. Nothing about these topics is new, neither modern nor secular.

As the next chapter will show, a survey of various religious approaches towards sexual diversity reveals historic commonalities of acknowledging the phenomenon of transness, be it in a metaphysical, eschatological, or incredibly practical manner.

<sup>24</sup> *Supra* note 22.

<sup>25</sup> Scott Larson, *Histrionics of the Pulpit: Trans Tonalities of Religious Enthusiasms*, 6 *TSQ: TRANSGENDER STUD. Q.* 315, 321-22 (2019). The article depicts a picture of early evangelism as a trans religious practice, incorporating shifting masculine and feminine performances in new radical ways. *See id.*

<sup>26</sup> Jae Bates, *(Trans)cribbing History: The Oral Histories of Transgender Clergy in America*, U. PUGET SOUND: SOUND IDEAS 1 (2016), [https://soundideas.pugetsound.edu/cgi/viewcontent.cgi?article=1469&context=summer\\_research](https://soundideas.pugetsound.edu/cgi/viewcontent.cgi?article=1469&context=summer_research) [perma.cc/TAW3-Z24T] (claiming that “participants faced more barriers to jobs than to ordination itself.”).

<sup>27</sup> *See* ASAD, *supra* note 18.

<sup>28</sup> *See e.g.*, J. Edward Sumerau, Ryan T. Cragun & Lain AB Mathers, *Contemporary Religion and the Cisgendering of Reality*, 3 *SOCIAL CURRENTS* 293 (2016); Christopher A. Thomason, *Organizations That Keep the Great Divide in Place*, in *GAY, LESBIAN, BISEXUAL, AND TRANSGENDER CIVIL RIGHTS: A PUBLIC POLICY AGENDA FOR UNITING A DIVIDED AMERICA* 51-73 (Wallace Swan ed., 2015); SCOTT SIRAJ AL-HAQQ KUGLE, *LIVING OUT ISLAM: VOICES OF GAY, LESBIAN, AND TRANSGENDER MUSLIMS* 17-9 (2013).

## II. ON THE PRONOUNS OF THE SOUL: CONTEXTUALIZING RELIGIOUS THEORY ON TRANSNESS

In *Woman Hating*, Andrea Dworkin scans various mythologies with a shared androgynous/hermaphroditical motif, in support of an androgynous sexual horizon and social model. By analyzing the Chinese holy *T'ai yuan* to Tibetan Buddhist *Yabyum*, Indian Hindu *Shiva* and *Shakti*, ancient Egyptian *Isis-Net*, the Greek *Eros* and *Artemis*, African and Melanesian bearded, breasted, and penised (as in, having a penis) ancestral images, to Kabbalistic traditions of the androgynous Godhead and the first human, finally to Christ's hinting at an eschatology of androgyny, Dworkin shows how documented human history has a shared symbolic, sacred, normative and significant notion of a male/female continuum and fluidity.<sup>29</sup> Taking these myths seriously, Dworkin suggests, will allow society to engage in a deconstruction of the limiting and subordinating Judeo-Christian binarized outlook and advance a sex model that will reshape transsexuality as we know it.<sup>30</sup> Before the final unpacking of this vision, Dworkin picks Christ, presumably with an air of irony, as her spiritual guide, in citing this verse from the Gospel to the Egyptians: "When ye trample upon the garment of shame; when the Two become One, and Male with Female, neither male nor female."<sup>31</sup>

Referring to Dworkin, the Talmudic scholar, Daniel Boyarin, has claimed that early Christianity indeed supported a notion of androgyny, but only in spirit. A "fallen" humanity, that is, a *sexual* humanity, necessarily reflects an ontology of twoness—male and female.<sup>32</sup> By this logic, virgins, those who escape the destruction by sex, escaped the category of "woman" altogether, at least according to early Christianity.<sup>33</sup> Sex equality does exist

<sup>29</sup> ANDREA DWORKIN, *WOMAN HATING: A RADICAL LOOK AT SEXUALITY* 155-73 (1974).

<sup>30</sup> *Id.* at 186-87. For the controversy over Dworkin's support/opposition to transgender people see *Andrea Dworkin Was Not Transphobic*, JOHN STOLTENBERG (Apr. 8, 2014), <https://johnstoltenberg.medium.com/andrea-dworkin-was-not-transphobic-6f4f94bdf4a1> [perma.cc/BR2Q-Y9FD]; Janice G. Raymond, *Andrea Dworkin: Biological Essentialism vs. Political Materialism*, WOMEN ARE HUM. (Nov. 2, 2021), <https://www.womenarehuman.com/andrea-dworkin-biological-essentialism-vs-political-materialism/> [perma.cc/FP6T-958Q]. It seems to me that the argument is not over the legitimacy of gender expression of transgender people, which Dworkin clearly did not oppose, but rather over the question of essentialism tethered to gendered identities. For an elaboration on this question see JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 261-79 (2006) ("...[H]ow would queer gender cope with the strong desire of many transsexuals to embody one gender or the other, *really*, and to consolidate themselves and their lovers as m or f all the way down?").

<sup>31</sup> DWORKIN, *supra* note 29, at 173.

<sup>32</sup> Boyarin, *supra* note 1, at 121 ("Spiritual androgyny is attained only by abjuring the body and its difference").

<sup>33</sup> *Id.* at 121-22. A corresponding practice, dying out in recent times, is that of "sworn virgins": cross-dressing females who held an institutionalized female-to-male role in parts of the pre- and post-Christian European Balkan. See ANTONIA YOUNG, *WOMEN WHO BECOME MEN: ALBANIAN SWORN VIRGINS* 61-2 (2000) (referencing their connections with the Catholic church and their "natural alliance" with the friars, who likewise were not considered fully men due to their commitment to celibacy); see also HASAN MUJTABA, STEPHEN O. MURRAY, WILL



under this framework, but only on the level of the soul. Once humanity fell, equality was imagined as analytically contradictory to the concept of sex.<sup>34</sup> Moreover, Boyarin asserts that Christianity's depiction of the pre-gendered, pre-social, disembodied soul is in fact ideally masculine.<sup>35</sup> Since Female is the body, the flesh, the sin, Male is the transcendent androgyne. The eschatological eradication of gender leaves an image of God which is a male one—as man was born in God's image.<sup>36</sup> Thus emerges a politics of equality in the spirit, hierarchy in the flesh. The “garment of shame” to be trampled, that Dworkin (and Christ) referred to, is the actual body—the trampling is of corporeality itself.<sup>37</sup>

Contrary to this framework, early Rabbinic Judaism, Boyarin suggests, had something else in mind: “For the Rabbis, sexuality belonged to the original created (and not fallen) state of humanity.”<sup>38</sup> Since the dominant exegetical interpretation of the book of Genesis insisted that the first human was simultaneously male-female (a physical hermaphrodite), Judaism differed from Christianity precisely by negating the narrative of oneness fallen into twoness, insisting on a twoness of humanity in the flesh from the very beginning. To the extent that there is a fall in the rabbinic imagination, Boyarin asserts that “it is a fall into sexual domination, a/k/a gender.”<sup>39</sup>

Nevertheless, or perhaps in accordance with this theory of *ab initio* twoness, Jewish mysticism, specifically the tradition of Kabbalah, was deeply occupied with the gender of the soul prior to the flesh. Kabbalistic thought, which is increasingly gaining in popularity, purports a view that has become commonplace, certainly in Jewish Orthodoxy, that the soul itself is gendered. Certain Kabbalistic interpretations to Biblical stories (such as the story of Yael who killed Sisera) and Talmudic texts (of women performing male commandments) suggest that these are stories of people born with bod-

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ROSCOE, ERIC ALLYN, LOUIS CROMPTON, MILDRED DICKERMANN & BADRUDDIN KHAN, ISLAMIC HOMOSEXUALITIES: CULTURE, HISTORY, AND LITERATURE (1997) (mentioning that some of these sworn virgins found employment with the Church, at 198). Today a few practicing “sworn virgins” can be found in rural Albania, as one article shows: Andrew Higgins, *With More Freedom, Young Women in Albania Shun Tradition of ‘Sworn Virgins*, N.Y. TIMES (Aug. 8, 2021), <https://www.nytimes.com/2021/08/08/world/europe/sworn-virgins-albania.html> [perma.cc/YD82-JXUU].

<sup>34</sup> Boyarin, *supra* note 1 at 125.

<sup>35</sup> *Id.* at 124-26. Later, Christianity actually began depicting the soul as feminine, a bride awaiting the marriage to Christ. See Larson, *supra* note 25 at 323.

<sup>36</sup> Boyarin, *supra* note 1 at 122-23.

<sup>37</sup> *Id.* at 127-28. Boyarin seems to think that Dworkin does not realize this and therefore misunderstands Christ's words as a basis for sexual equality and freedom. In reading Dworkin in full context, it does not seem that the actual meaning alluded her. Only that she referred to Christ for her needs and, as mentioned, with a hint of irony.

<sup>38</sup> *Id.* at 129.

<sup>39</sup> *Id.* For the claim that in early Jewish theology Gender is conceived around penetration and being penetrated, see also Daniel Boyarin, *Queer/fing Tradition, in QUEER THEOLOGY: RETHINKING THE WESTERN BODY* 131-43 (2007).

ies that do not match the gender of their soul.<sup>40</sup> Hillel Gray has examined texts of certain contemporary Israeli Orthodox Rabbis, to which I will return later, which utilize these Kabbalistic interpretations in addressing the halakhic validity of sex reassignment surgeries (SRS) and the status of transgender people. Gray notes that these texts “resonate with the ‘wrong body’ motif so common in secular discourse by and about transsexuals.”<sup>41</sup>

Contemporary Islam has produced a complex, and at times contradictory, treatment of transness, which draws from age-old manifestations of flexible gender performances. Claire Pamment has explored the status of *hijras* or *khwaja sira* in today’s Pakistan and their self-perception as incomplete women, having the soul (*ruh*) of a woman according to a Sufist differentiation between physical reality and an inner self or metaphysical soul.<sup>42</sup> Interestingly, Pamment shows how the Pakistani *hijra*’s legal classification as a “third gender” by means of Westernized human-rights doctrine, has led to a translational effort to re-describe the legal developments in distinct mystical Sufi and Shi’a lexicons.<sup>43</sup>

In Indonesia, Diego Garcia Rodriguez has conducted a study of Muslim *waria*—roughly translated as transgender women—and their conception of *jiwa perempuan*—a woman’s soul or spirit.<sup>44</sup> By showing these women’s sexual and religious identities as mutually-establishing, Rodriguez brings forward a depiction of Islamic potential for empowerment of “queer religious agentic processes,” challenging the “‘homosecular’ frameworks” that claim “queer [people can] only be ‘free’ within secular systems.”<sup>45</sup>

Afsaneh Najmabadi’s comprehensive work on transsexuality and homosexuality in contemporary Iran has led her to conclude that the regulation of permitted and subsidized full or partial SRS procedures, “far from eliminating gays and lesbians (if that is indeed what the Iranian authorities had hoped), has paradoxically created new social spaces. . . populated by a variety of ‘not-normal’ people.”<sup>46</sup> Najmabadi argues with the West’s coverage of the Iranian setting as a narrative of radical and regressive Islamism exploiting medical treatments to eradicate same-sex desires. In doing so, Najmabadi attempts to show that Islam’s treatment of these topics, in the Iranian setting, is far more nebulous and overlapping and results in new identity-categories that do not fit squarely within Americanized identity-

<sup>40</sup> Hillel Gray, *The Transitioning of Jewish Biomedical Law: Rhetorical and Practical Shifts in Halakhic Discourse on Sex-Change Surgery*, 29 NASHIM: J. JEWISH WOMEN’S STUD. AND GENDER ISSUES 81, 93 (2015).

<sup>41</sup> *Id.* at 95.

<sup>42</sup> See Claire Pamment, *Performing Piety in Pakistan’s Transgender Rights Movement*, 6 TSQ: TRANSGENDER STUD. Q. 297 (2019).

<sup>43</sup> See *id.* at 301, 308-10. For more on translational power see TALAL ASAD, *SECULAR TRANSLATIONS: NATION-STATE, MODERN SELF, AND CALCULATIVE REASON* (2018).

<sup>44</sup> Diego Garcia Rodriguez, *The Muslim Waria of Yogyakarta: Finding Agency within Submission*, 6 TSQ: TRANSGENDER STUD. Q. 368 (2019).

<sup>45</sup> *Id.* at 380-82.

<sup>46</sup> AFSANEH NAJMABADI, *PROFESSING SELVES: TRANSEXUALITY AND SAME-SEX DESIRE IN CONTEMPORARY IRAN* 4 (2013).

politics, which distinguish the categories of sexual desire; gender identity; biological sex; not to mention the separate category of religion.<sup>47</sup> One could perhaps challenge Najmabadi's thesis by emphasizing the breadth of limitations that are placed on Iranian spaces dedicated to developing identity, relative to restrictions placed on similar spaces in America. However, for the purposes of this Note, these studies are helpful in pointing out the varied cultural treatments of trans articulations *within* a framework of religious praxis, not squarely negating or opposing it.

Closer examination of a modern-day, Indian legal ruling regarding the transgender community, which I explore in the next chapter, assists in further mapping the relationship between religion and trans legal statuses. As this example will show, this relationship is not only marked by the absence of dogmatic opposition, but also by an active religio-legal embrace.

### III. HINDU-LEGAL HIJRAS: THE CASE OF INDIA'S THIRD GENDER

Seldom, our society realizes or cares to realize the trauma, agony[,] and pain which the members of [the] Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.<sup>48</sup>

Resembling a statement out of a progressive LGBTQ+ movement, these were the opening words to India's Supreme Court's ruling in *National Legal Services Authority v. Union of India*.<sup>49</sup> In 2014, the court made worldwide headlines when it declared that transgender people are fully entitled to equal fundamental rights granted under India's constitution.<sup>50</sup> Based on the self-identity of the petitioners, the Court legally classified trans people as a "Third Gender" eligible for affirmative action in education and the work-

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<sup>47</sup> *Id.* at 297-301.

<sup>48</sup> *National Legal Services Authority v. Union of India*, (2014) Writ Petition (Civil) No. 604 of 2013 (India), ¶1

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

<sup>50</sup> See Chapal Mehra, *Ending the Gender Binary*, THE HINDU (Apr. 22, 2014), <https://www.thehindu.com/opinion/op-ed/ending-the-gender-binary/article5934384.ece> [perma.cc/7VBD-NMSL]; Harmeet Shah Singh, *Transgender, Gay Indians Fight to Cast Off Taboos, Stereotypes*, CNN (Apr. 29, 2014), <https://edition.cnn.com/2014/04/29/world/asia/india-transgender-gay-rights/index.html> [perma.cc/QX5T-W66U]; *Transgender Rights in India*, N.Y. TIMES (Apr. 25, 2014), <https://www.nytimes.com/2014/04/26/opinion/transgender-rights-in-india.html> [perma.cc/8LM8-Q7HU].

place, similar to other Indian minorities.<sup>51</sup> Importantly, the court based its conclusions—in part—on Hindu mythology and other religious texts, as well as the “strong historical presence” trans people have had in the Indian landscape.<sup>52</sup> Reading through the several paragraphs dedicated to the religious context, one is exposed to the intimate and meaningful roles trans people have played in Indian traditions, from Hindu and Jain mythologies, Vedic and Puranic literatures, to the prominent roles they played in the royal courts of the Islamic world, under Ottoman rule and before, in Medieval Mughal India.<sup>53</sup>

Although the ruling clearly states it applies to all trans people (“*Hijras*, eunuchs, *Kothis*, *Aravanis*, *Jogappas*, *Shiv-Shakthis*, etc.”<sup>54</sup>), it focuses mainly on the *Hijra* community, consisting typically of phenotypic men who wear female clothing, who undergo a sacrificial emasculation (excising of the penis and testicles) in dedication to the Hindu goddess *Bedhraj Mata*.<sup>55</sup> The court details various mythological foundations for the *Hijra* status, such as the story of Lord Rama, from the ancient Sanskrit epic *Ramayana*, who

. . . [w]as leaving for the forest upon being banished from the kingdom for 14 years, turns around to his followers and asks all the ‘men and women’ to return to the city. Among his followers, the *hijras* alone do not feel bound by this direction and decide to stay with him. Impressed with their devotion, Rama sanctions them the power to confer blessings on people on auspicious occasions like childbirth and marriage, and also at inaugural functions

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<sup>51</sup> India maintains an expansive preferential treatment program, stemming from its constitution. Under Article 14 of the Indian constitution the state has a positive obligation to ensure equal protection of laws to every person by bringing in necessary social and economic change. BHARATIYA SA'VIDHANA [CONSTITUTION] art. xiv. (India). Article 15 details the state's ability to take affirmative action (“special provision”) for the advancement of “any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes”. *Id.* art. xv. Article 15 also articulates that the state shall not discriminate against any citizen on the ground of “sex”, *id.*, which the court interpreted as including gender bias and gender-based discrimination, *National Legal Services*, ¶56-9. The court further placed trans people in the category of “socially and educationally backward classes,” known as SEBC, thus assuring them access to affirmative educational and economic empowerment programs as well as due representation in public services. In matters of public employment, Article 16 of India's constitution imposes a duty on the state to ensure that all citizens are treated equally in matters of state employment, regardless of sex. *Id.* art. xvi. While these rights may seem extensive, it is important to note that over 40% of India's population falls under the category of SEBC citizens, with around 40% of the Hindu, Muslim, and Christian populations included in that demographic. Other religions or casts have lower SEBC figures, yet some, such as ~30% of Sikhs and ~90% of Buddhists, are included in a different minority category known as the Scheduled Castes and Tribes, considered among the most disadvantaged socio-economic groups in India. Census Tables, Off. Registrar Gen. & Census Comm'r, India Ministry Home Affairs, Gov't India, <https://censusindia.gov.in/census.website/data/census-tables> (last visited Jan. 31, 2023).

<sup>52</sup> *National Legal Services*, ¶12; See also SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA (2nd ed., 1999).

<sup>53</sup> *National Legal Services*, ¶12-15.

<sup>54</sup> *Id.* at ¶12.

<sup>55</sup> See AYATARI REDDY, WITH RESPECT TO SEX: NEGOTIATING HIJRA IDENTITY IN SOUTH INDIA 2-3 (2005).

which, it is believed set the stage for the custom of *badhai* in which *hijras* sing, dance and confer blessings.<sup>56</sup>

The ruling in *NLSA v. Union of India* goes on to pinpoint the turn against trans people in the eighteenth century, when the British colonial administration penalized any trans performances and the sacred practices of *hijras* and eunuchs while requiring that individuals who were suspect of perceived trans behavior, be that by dress, ornamentation, or musical and dance activities, would be registered with the authorities.<sup>57</sup> In a meaningful sense, by defining the trans people of India as a “distinct socio-religious and cultural group” entitled to preferential treatment for the sake of achieving social equality, *NLSA v. Union of India* narrates the equal status granted to various trans communities as a story of re-establishment. It is a re-establishment of a lost past, of a shared, recognized cultural praxis that was stripped away by foreign legal conceptions and is reinstated via legal interpretation.<sup>58</sup>

But what of this “third gender” business? By adopting the petitioners’ definitions of the term *Hijra* as neither male nor female, and by using it quite interchangeably with “transgender,” the Indian court constructed these terms as operating in a legal semantic field situated not only outside the M/F binary but also, in a sense, outside the realm of gender entirely.<sup>59</sup> Culturally associated with intrinsic ‘in-betweenness’, Rosalind Morris notes that *hijras* are often perceived either as an “interstitial gender occupying the liminal space between male and female” or as a “‘drag queen’, who [is] a hero(ine) in a global sexual resistance.”<sup>60</sup> It is due to this cultural and religious context that the Indian Supreme Court made such statements in its ruling as, “Since *Hijras* do not have reproduction capacities as either men or women, they are

<sup>56</sup> *National Legal Services*, ¶13.

<sup>57</sup> *Id.* ¶12-18. Note that although the colonial British act that criminalized transgender behavior (termed the Criminal Tribes Act, 1871) was repealed in 1949, section 377 of the Indian Penal Code, criminalizing “carnal intercourse against the order of nature,” remained a legislative mean to criminalize transgender people who were typically associated with “unnatural” sexual acts and homosexual activity. Notably, in 2018 the Indian Supreme Court, in *Navtej Singh Johar v. Union of India*, declared section 377 to be unconstitutional “in so far as it criminalizes consensual sexual conduct between adults of the same sex.” Indian Penal Code § 377 (1861).

<sup>58</sup> *National Legal Services*, ¶70.

<sup>59</sup> This is perhaps where the question of third gender meets feminist thought. In the U.S. context, Janet Halley describes “feminism” as owning three essential traits: (1) a core distinction between m and f, (2) a descriptive subordination of f to m ( $m > f$ ), and (3) an opposition to that subordination, which Halley terms “carrying a brief for f”. See HALLEY, *supra* note 30 at 17-20. Following Halley’s terminology and mapping, M/F could mean male/female, men/woman, masculine/feminine, however, they remain a set of *two*, whether opposing, constituting or orthogonal to each other, or even providing a continuum between each other, the system remains that of a pair. The question is, therefore, does the legal constitution of a third gender (and perhaps a fourth, fifth, . . . *n* gender) represents a break from (U.S.) feminism? And, importantly, are the rights of *hijras* actually promoted by virtue of this legal split or are they pushed outside the conformed m and f schemata, never getting to play *inside* the common schema? For more on this see *id.* at 106-86, 261-79.

<sup>60</sup> REDDY, *supra* note 55 at 2 (quoting Rosalind Morris).

neither men nor women.”<sup>61</sup> Under a western gaze, such statements are most likely to be read as lacking at best, and offensive at worst. In a cultural environment fighting over the right to be titled “woman” or “man” in an equally robust and authentic sense, being not fully-women nor men could rightfully be perceived as a problematic legal doctrine. However, in a cultural setting steeped in a markedly different interpretation of gendered behaviors, the idea of a third category can also be read as an important extension of the gendered space and a step towards an imagined annihilation of the binary. For the Indian trans community, the creation of a separate category indicated not that “trans women are women,” but rather that they own a place in Indian culture and society, no matter the matrix of gender performances and biological attributes they happen to possess.<sup>62</sup> In any case, this ruling provides another example of the potential of religious resources to serve as advocacy tools for a trans existence and, hopefully, trans prosperity.

#### IV. ONE MAN’S PREGNANCY AND ANOTHER WOMAN’S FORESKIN: AN ISRAELI CASE AND AN AMERICAN HALAKHIC RESPONSUM

Examining a recent court case issued in Israel — another country with a history of imperialism deeply rooted within its legal system and one that shares with India a continuous effort to intertwine and harmonize one particular religion with a democratic conception of law — might prove useful.<sup>63</sup> In examining the following Israeli case, I draw insights from an additional case, an American rabbinic responsum (a rabbinic authoritative written decision) for the sake of highlighting the dialogue between religious rhetoric and trans individuals, as this dialogue holds the potential of benefitting trans advocacy through legal rationale and outcomes.

##### A. *Israel’s Ploni Case*

Israeli law has an evolving history of incorporating Jewish law within its judicial rulings.<sup>64</sup> Based on the constitutional framework declaring the state of Israel as simultaneously “Jewish and democratic,” as well as a highly developed network of legislation and legal interpretation methods (primarily, purposive interpretation), a vast political and legal effort is dedi-

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<sup>61</sup> *National Legal Services*, ¶11.

<sup>62</sup> I am stating this is in contrast to the popular slogan “trans women are women” prevalent in elitist U.S. academic settings.

<sup>63</sup> On the effects of Mandatory British and earlier Ottoman law on the contemporary Israeli legal system see RONEN SHAMIR, *COLONIES OF LAW: COLONIALISM, ZIONISM AND LAW IN EARLY MANDATE PALESTINE* (2000).

<sup>64</sup> Menachem Elon, *Constitution by Legislation: The Values of a Jewish and Democratic State in Light of the Basic Law: Human Dignity and Personal Freedom*, 17 *IYUNEI MISHPAT – TEL-AVIV U. L. REV.* 659 (1993) (Heb.); Menachem Elon, *Basing the Legal System on Torah Law (Response to the Remarks)*, 8 *TCHUMIN* 304, 307 (1987) (Heb.).

cated to creating a dual use of Jewish law and modern “secular” law.<sup>65</sup> The following section does not detail another such dual engagement but rather the potential for one. Bringing together a recent case regarding transgender rights in Israel, and a Jewish law responsum regarding transgender rights in the U.S., I make the point that the two marry well together. In fact, adopting the rabbinic view might have assisted the Israeli court in further justifying its ruling in the *Ploni* case, which would have improved the potential for advancing trans rights in Israel.

On May 5, 2021, the Israeli Supreme Court, sitting as the High Court of Justice (HCJ), issued a ruling on the topic of birth certificate registration when the birthing parent is a transgender man.<sup>66</sup> The court ruled that in cases where a pregnant person is a trans man (FtM); is acknowledged by the state as such; and he submits a request in front of an official committee to reassess his gender status as “male,” then his child may receive a birth certificate detailing him simply as a “parent” (as opposed to mother or father), regardless of the committee’s final decision.<sup>67</sup> Prior to the court’s ruling, a pregnant transgender man was automatically registered as “mother” on the birth certificate, and his gender automatically changed back to “woman” on the national population registry.<sup>68</sup>

On the face of it, the court’s insistence on the neutral category of “parent” is worthy of praise.<sup>69</sup> It echoes an attitude that has already been recognized in Israeli law in the homosexual context, suggesting that the gender of parents should be irrelevant and undocumented.<sup>70</sup> On the other hand, two fairly straightforward criticisms of this ruling come to mind: First, why did the court leave the requirement of petitioning the committee in place, allowing a situation where the pregnant person must actively seek the committee’s re-acknowledgement of their gender as “[still] a man,” or otherwise face the state potentially defaulting him back to the status of “woman/female” due to the pregnancy? Second, why did the court opt for supporting the neutral category of “parent” instead of accepting the self-identification of the petitioners, a homosexual couple, who asked to be allowed to register both as “fathers” of the newborn child? Here, I do not rely on queer, trans, and feminist theory to answer these questions; instead, I rely on religious thought. I wish to suggest a consideration of a religious-legal analysis of these questions, borrowing from a recent ruling regarding transgender identity and its implication on another legal system, that of Jewish law (halakha).

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<sup>65</sup> See Basic-Law: Human Dignity and Liberty, SH 150 § 1A (1992); Basic-Law: Freedom of Occupation, SH 114 § 2 (1992); RUTH GAVISON, *CAN ISRAEL BE BOTH JEWISH AND DEMOCRATIC – TENSIONS AND PROSPECTS* (2006); Shachar Lifshitz & Uri Aaronson, “*Jewish and Democratic*” as A Methodology, 19 *DEMOCRATIC CULTURE* (2019) (Heb.).

<sup>66</sup> *Ploni v. Minister of Interior Affairs* (2021) HCJ 3148/18 (Isr.).

<sup>67</sup> *Id.* ¶11. 14-16.

<sup>68</sup> *Id.* ¶1-2.

<sup>69</sup> *Id.*

<sup>70</sup> *Ploni vs. Minister of Interior Affairs* (2018) HCJ 7344/17 (Isr.).

### B. Rabbinic Responses to Transness

A humorous tweet recently circulating on Twitter shows a picture of a picket sign reading: “Jews promote Homosexuality and Feminism.”<sup>71</sup> Commenting on the photo, one witty commentator writes, “which one of you told the goyim [the gentiles] our agenda?”<sup>72</sup> That Feminism and Homosexuality are a “Jewish agenda” is, of course, not accurate for all Jewish strands, but it is true of some. Historically, Jewish law’s early rabbinic discourse on gender did not necessarily hypothesize an essentialist view of femininity/masculinity nor did it necessarily conform with what would be considered today ontological or teleological essentialism.<sup>73</sup> It has been suggested that the notion of static, gendered hierarchies and the notion that women were created for the essential purpose of reproduction dates to a later period, of early medieval times, and rabbinic interpretations from that era.<sup>74</sup> Today, strict essentialist views are present in marginal communities of Hassidic Orthodox Jews, where the social phenomenon of transgender people is perceived as a modern plague, and their treatment is usually met with threats of a ban (*herem*) and forced expulsion from the community.<sup>75</sup> Mainstream Orthodoxy, however, seems to be going through some transitions itself.<sup>76</sup> With regards to gender-affirming operations, while the consensus remains that they are strictly prohibited by Jewish law, in the 1960s-70s some prominent Orthodox rabbis began to voice sympathetic views toward transgender people, pathologizing their condition as “tragic.”<sup>77</sup> Jumping to 2004, an Orthodox halakhic book titled *A Perverse Generation* has offered some elaborate new examinations of classical halakhic issues involving transness, such as the prohibitions on castration and cross-dressing, as well as the command to “be fruitful and multiply” (Genesis 1:28).<sup>78</sup> The work of a *Mizrahi* (Jew of Arab descent) rabbi, this book received approbations from prominent

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<sup>71</sup> aviva (@aviva\_kosher), TWITTER (Nov. 20, 2021, 11:43 am), [https://twitter.com/aviva\\_kosher/status/1462114270699831302](https://twitter.com/aviva_kosher/status/1462114270699831302) [perma.cc/N4EG-GBFQ].

<sup>72</sup> *Id.*

<sup>73</sup> Boyarin, *supra* note 1 at 130.

<sup>74</sup> Charlotte Elisheva Fonrobert, *Gender Identity in Halakhic Discourse*, in SHALVI/HY-MAN ENCYCLOPEDIA OF JEWISH WOMEN (1999), <https://jwa.org/encyclopedia/article/gender-identity-in-halakhic-discourse> [perma.cc/ZT33-NZEW] (last viewed Dec. 16, 2021).

<sup>75</sup> Gray, *supra* note 40 at 84; Monica Haider, *Closeted Hasidic trans woman inches closer to her ‘feminine dream’*, NBC NEWS (Sept. 6, 2020), <https://www.nbcnews.com/feature/nbc-out/closeted-hasidic-trans-woman-inches-closer-her-feminine-dream-n1239214> [perma.cc/PJJ6-K5HF].

<sup>76</sup> For a normative call to include transgender people in Orthodox communities, argued from a modern-Orthodox perspective see NOACH DZMURA, *BALANCING THE MECHITZA: TRANSGENDER IN JEWISH COMMUNITY* (2010).

<sup>77</sup> *See, e.g.*, Rabbi Judah David Bleich’s comment on Jan Morris’s CONUNDRUM, referring to her transsexuality as a “tragic condition.” Gray, *supra* note 40 at 83.

<sup>78</sup> *See* EDEN BEN-EPHRAIM, DOR TAHAPUKHOT (2004) (Heb.). The title is derived from a verse in Deuteronomy 32:20–21. Although the connotation is clearly negative, in the preface, the author suggests a positive meaning to the verse, in which the Lord does not punish Israel’s evil deeds, despite witnessing them.



*Ashkenazi* and *Mizrahi* Orthodox rabbis, thus safeguarding its legitimacy.<sup>79</sup> Although the book maintains rhetoric that denies any *ab initio* legitimization of sex-change operations, importantly, as Gray notes, the author manages to “dig up” or hint at many leniencies—as reasons why prohibitions might not apply to some or all types of sex-change operations.<sup>80</sup> Chipping away at the prohibitions, the book applies a mechanism of *ex post facto* legitimization in many trans cases. As Gray puts it: “In its own terms, perhaps traditionalist Judaism is also queering gender identities for Jewish law purposes. . .this emerging Orthodox discourse may have opened up interpretive spaces for sympathetic responses to transsexual persons.”<sup>81</sup>

Unlike the murkiness of Orthodox doctrine, Reform Judaism offers a much clearer view. This denomination, the largest in American Jewry, has gradually fully legitimized and accepted transgender people into their communities.<sup>82</sup> Utilizing the Talmudic categories of *androginos* (hermaphrodite), *tumtum* (whose genitalia are undeveloped, making the person’s sex unclear), and *aylonit* (a masculine woman), Ronit Irshai has shown that reform rabbis have managed to creatively interpret the biblical prohibitions and turned their focus to the importance of mental health, relationships, and enjoyment in religious life. Once the reform movement committed itself during the 20th century to full gender equality and began imposing the same ritualistic obligations on men and women alike, the question of sexual preference and gender identity became much less religiously important.<sup>83</sup> In other words, when gender as a religious category became effectively annulled, reform halakha had little use for the connection between sexual performance, sexual preference, gender identity, and biological sex.

A good example of this can be found in an American rabbinic response to the following question: Should a converted transgender woman (MtF) with male genitals undergo circumcision, given her new status as a woman? Interestingly, although the rabbis fully acknowledged the woman’s self-stated gender identity, they did not simply forgo the requirement to fulfill the ritual. Instead, they read the biblical source as applying to an individual “who possesses a foreskin [who] is therefore a member of that group of people who are subject to this ritual.”<sup>84</sup> By means of analytical deconstruc-

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<sup>79</sup> *Id.* (referring to the first eight (8) pages of the text). Generally speaking, Mizrahi and Sephardic (from Portugal and Spain) Jews have a tradition of more lenient halakhic rulings on certain topics, as well as a broader and more fluid incorporation of mystical (Kabbalistic) resources into their rulings. Despite these differences, the book received the approval of both Sephardic and Ashkenazi leading halakhic decisors (although nowadays, that is often the case). For more on this see Ronit Irshai, *The Contemporary Discourse on Sex-Reassignment Surgery in Orthodox Jewish Religious Law, as Reflected in Dor Tahapuchot (A Generation of Perversions)*, in SYMPOSIUM ON TRANSGENDER/RELIGION, HARVARD LAW SCHOOL 2011-13 (2017).

<sup>80</sup> Gray, *supra* note 40 at 86.

<sup>81</sup> *Id.* at 83.

<sup>82</sup> Ronit Irshai, *The Construction of Gender in Halakhic Responsa by the Reform Movement: Transgender People as a Case Study*, 18 J. MOD. JEWISH STUD. 160 (2019).

<sup>83</sup> *Id.* at 170.

<sup>84</sup> *Id.*

tion, the rabbis interpreted the biblical command as relevant to the reproductive organ itself, disconnected from the gender/sex of its owner. Such a method of interpretation, I suggest, portrays a functionalistic view of the human body shared by progressive feminist, trans and queer theorists.<sup>85</sup> Though the reproductive organ possesses profound cultural, historical, and normative meanings for Judaism of inclusion in the covenant between God and Abraham that the corporeal act of circumcision is meant to symbolically capture, it no longer necessitates the view of an attached fixed gender. The ritual's religious significance begins and ends in the realm of the foreskin, no gendered strings attached. Judith Butler's famous heterosexual matrix of priority and coherence between sex, gender, and sexuality seems to have dissolved completely in this particular religious ruling.<sup>86</sup>

Superimposing the functionalistic analysis offered by the rabbis on the HCJ's case involving the pregnancy of a transgender man, and adopting the Indian's Supreme Court method of tracing and interweaving cultural and religious sources into legal decisions, could, I suggest, deepen both the transgender advocacy analysis as well as enrich law's interaction with its cultural foundations. First, an application of the functionalist rabbinic view would make any gender reassessments by a specialized state committee fully redundant. The bodily organs in charge of caring and giving birth to a child are simply those and nothing more. It could further make redundant the need to "neutralize" the function of father or mother under the language of "parent" simply by taking seriously a person's self-identification either with a certain gender or a certain parental role, regardless of their body parts. These propositions hold greater importance in the context of trans identities intersecting with the practice of medicine.

The hyper-medicalization that trans people frequently experience serves as other forms of secular rational rhetoric and of secular techniques that disguise biases rooted elsewhere. Often, trans people suffer a paradoxically impossible situation: They are expected to perform 'gender' in manners meeting legislative and medical standards, yet they simultaneously suffer criticism for reifying gender norms.<sup>87</sup> Michael Toze, for example, has criticized the strong medical recommendation in the U.K. for trans men to undergo a hysterectomy, on this basis precisely, saying: "The combination of perceived 'riskiness', a desire to 'fix' gender and the perception of the trans masculine body as being either a non-reproductive female body, or a trans-

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<sup>85</sup> Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971); EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990); EVE KOSOFSKY SEDGWICK, *TENDENCIES* (1993); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); Michael Toze, *The Risky Womb and the Unthinkability of the Pregnant Man: Addressing Trans Masculine Hysterectomy*, 28 FEMINISM & PSYCH. 194 (2018).

<sup>86</sup> Irshai, *supra* note 82 at 171. But see Irshai's comment on how this might not correspond with transgender arguments that deny a physical residue that does not relate to an individual's experienced gender.

<sup>87</sup> See JULIA SERANO, *WHIPPING GIRL: A TRANSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY* (2007).

gressively productive male body, together creates a context in which hysterectomy becomes an obvious ‘solution.’”<sup>88</sup> Toze mentions that much of the hostility towards pregnant men even within the trans community stems from a concern over social validation, for “how can anyone take us seriously as men, if some of us get pregnant?”<sup>89</sup> I suggest that the secularized medical and regulatory gaze upon the trans subject can be eased significantly with the acceptance of a functionalist approach such as that offered by the religious (rabbinic) outlook.

The deconstructive method that the reform rabbis applied holds potential not just for trans communities but for a broader deconstruction of gender and gender roles via the decoupling of the reproductive organs from one’s presupposed human essence. The tendency to extrapolate a natural essence based on the functionality of an organ is, indeed, a general tendency of religions. But the fact that that essence changes and shifts is also, generally, religious. As the Indian case portrays, the court’s legitimation of a ‘third gender’, de-facto a novel legal category, drew on a re-interpretation of ancient customs in an attempt to inspire in them a new legal spirit. Adopting such a position recognizes religious diversity and religious choice to a much greater extent, I would argue, than the slogans of immutability offered by organizations such as the ADF as well as the views purporting to exile religion from the public forum. It sees religion as a rich and often contradictory human praxis that houses important views on trans identity, flexibility, and gender equality. Such views may assist in formulating future arguments in future legal struggles, whenever a religious voice seeks to monopolize the exclusivity over religion and its inalienable rights and beliefs. Be it by a justification of a ‘swapped soul’, a non-gendered metaphysics, or an eschatology of androgyny, religious thought has the potential to offer plush and fruitful platforms that seem to encourage the age-old human game of gender. There is no need to stop playing, only to accept some new interpretations of the rules of the game.

#### CONCLUSION

A recently published book by historian Mark Noll, who specializes in the history of Christianity in the U.S., details how scriptural interpretation of slavery in the Bible, sometimes of the exact same verses, were deployed with similar fervor to persuade that God had allowed and indeed sanctioned slavery, that God strictly opposed it, and that God preferred to stay out of the discussion altogether.<sup>90</sup> Throughout his illuminating examination, Noll admits that both readings have good basis in the text itself and in exegetical

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<sup>88</sup> Toze, *supra* note 85 at 201.

<sup>89</sup> *Id.* at 204.

<sup>90</sup> MARK NOLL, *AMERICA’S BOOK: THE RISE AND DECLINE OF A BIBLE CIVILIZATION, 1794-1911* (2022)

traditions. His examination leads one to realize that religious texts operate as adaptable bodies of literature, holding multi-layered, at times contradictory, cultural significances that should not be overlooked today, as they continuously play crucial parts in people's lives.

Through three telling examples of legal and religious treatment of transness in India, Israel and the U.S., this Note promotes the understanding that controversy over transgender issues should not be confined to the common binaries of religion vs. secularism, and progression vs. conservatism. More so, on the battlefield of advocacy religious rhetoric can and should be used to dismantle the twofold dichotomy of Masculine/Feminine and Religious/Secular. What transness and religious thought offer is a shared theology of constant transition, a perpetual reshaping of human identity.