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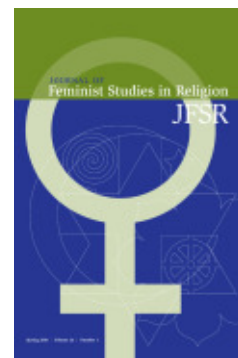
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TOWARD A GENDER CRITICAL APPROACH TO THE PHILOSOPHY OF JEWISH LAW (HALAKHAH)

Ronit Irshai

Within most Modern Orthodox circles in Judaism (and effectively all ultra-Orthodox circles), feminism is perceived as a dangerous threat because of its seemingly radical challenge to sacred Jewish values such as the Jewish family and the binding, largely immutable nature of halakhah (Jewish law, broadly construed). This article creates a framework for using feminist insights within Orthodox halakhic discourse, by suggesting, among other things, a conversation between feminist scholarship in halakhah and theology, and contemporary critical legal theory. In so doing, Irshai challenges some of the ways certain basic assumptions about gender inequities and, more important, asymmetries of power are produced and reproduced in contemporary halakhic practice. The author details how halakhah can be revised and renewed (while keeping halakhic tools, mechanisms, and procedures) in light of feminist values, without which the feminist revolution within Judaism cannot be completed.

Over the past thirty-five years, feminist religious scholars have done much to clarify the nature of their religiosity and its relation to their feminism.¹ As a

I want to thank my colleagues at the Women Studies in Religion Program at Harvard Divinity School (2007–2008) (Joan Branham, Monica Maher, Michelle Molina, Miryam Segal, and Sue Hochins) for reading several versions of this article and for their illuminating remarks. I also want to thank professors Tamar Ross, Hanina Ben Menahem, Tova Hartman, Evyatar Marinberg, and Susannah Heschel for their important and helpful critique. Translated from the Hebrew by Joel Linsider. Unless otherwise noted, translations of passages quoted from Hebrew sources are by the present translator.

¹ Jewish feminist writings, of course, are diverse and multidimensional. In my view, at least three fundamentally different genres can be identified. The first engages in criticism of substantive religious ideas in light of the insights of feminism and queer theory and considers the changes in the

general rule, we can say that most of the comprehensive analyses undertaken by Jewish feminist scholars were not invested enough in the halakhic question; that is, in the problem of applying a feminist-egalitarian framework within a halakhic world based largely on patriarchal notions. Rachel Adler, in a candid moment, made the following statement in her book *Engendering Judaism*:

Whether gender justice is possible within halakhah and whether a feminist Judaism requires a halakhah at all are foundational questions for feminist Jewish theology that have no parallel in Christian feminist theology. . . . Appropriating the terms and method of halakhah itself, many feminists concluded, drew them into a game they could not win. . . . Halakhah became the feminists' elephant in the living room. Everyone agreed it was in the way, and no one knew how to get rid of it.²

Although Adler herself broadly treated the halakhic problem (which I consider below), the question she raises is not at all a simple one. From a feminist perspective, there is ample room to argue that it makes little sense to engage in

various Jewish streams in the wake of that criticism. Several anthologies published over the years have collected some of these studies; two of the earliest ones are worthy of note (though not all of the essays within them meet the definition just offered): Susannah Heschel, ed., *On Being a Jewish Feminist: A Reader* (New York: Schocken Books, 1983); and Tamar M. Rudavsky, ed., *Gender and Judaism: The Transformation of Tradition* (New York: New York University Press, 1995). Among the more recent works, see Riv Ellen Prell, ed., *I Did It My Way, Women Remaking American Judaism* (Detroit: Wayne State University Press, 2007); and, most recently, Elyse Goldstein, ed., *New Jewish Feminism: Probing the Past, Forging the Future* (Woodstock, VT: Jewish Light Publishing, 2009). The second type involves the effort to construct a bridge between feminist concepts and the religious world suffused with patriarchal notions. Examples include Judith Plaskow, *Standing Again at Sinai: Judaism from a Feminist Perspective* (San Francisco: Harper & Row, 1991); Rachel Adler, *Engendering Judaism: An Inclusive Theology and Ethics* (Philadelphia: Jewish Publication Society, 1998); and Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Waltham, MA: Brandeis University Press, 2004). Finally, the third type engages in study of the Jewish religious oeuvre in all its forms (primarily, though not exclusively, the rabbinic literature) from a feminist perspective—that is, gender becomes a central and significant category for analyzing and interpreting the texts. Examples include Judith Hauptman, *Rereading the Rabbis: A Woman's Voice* (Boulder: Westview Press, 1988); Charlotte Elisheva Fonrobert, "Regulating the Human Body: Rabbinic Legal Discourse and the Making of Jewish Gender," in *The Talmud and Rabbinic Literature*, ed. Charlotte Elisheva Fonrobert and Martin S. Jaffee (New York: Cambridge University Press, 2007); Charlotte Elisheva Fonrobert, *Menstrual Purity: Rabbinic and Christian Reconstructions of Biblical Gender* (Stanford, CA: Stanford University Press, 2000); Cynthia M. Baker, *Rebuilding the House of Israel: Architectures of Gender in Jewish Antiquity* (Stanford, CA: Stanford University Press, 2002); Judith Baskin, *Midrashic Women: Formations of the Feminine in Rabbinic Literature* (Waltham, MA: Brandeis University Press, 2002); Miriam B. Peskowitz, *Spinning Fantasies: Rabbis, Gender, and History* (Berkeley: University of California Press, 1997); and Hava Tirosh-Samuelson, ed., *Women and Gender in Jewish Philosophy* (Bloomington: Indiana University Press, 2004). The present article falls primarily into the second category, for it treats the tensions arising within the halakhic system in the wake of feminist criticism and the ways to confront the resulting problems in principal.

² Adler, *Engendering Judaism*, xx.

halakhic analysis. Halakhah does not assert gender equality; moreover, under its auspices harsh injustices can be perpetrated (and, in practice, are perpetrated) against women, primarily with respect to marriage and divorce, and against gays and lesbians.

Accordingly, liberals call into serious question the need for feminist Judaism to adopt the language of halakhah as a medium through which feminists can express themselves and promote constructive change. Judith Plaskow, for example, took that view when she said that it was preferable for Jewish feminism to abandon the halakhic medium, primarily because the patriarchal concepts underlying it are so deeply rooted that it is difficult to imagine how they can be overcome without first undertaking fundamental theological revisions.³

But it is not only liberals who reject engagement with halakhah from a feminist perspective; that position is taken by more conservative thinkers as well. Cynthia Ozick, for example, believed the halakhic problem was “only sociological” and that the denial of gender justice was not part of the essence of the halakhah itself.⁴ That position has the effect of sharply diminishing the problem in the halakhic sphere, and it follows that the path to remedying the halakhah (not only to criticizing it) through use of its own principles and language does not become conceptualized as a matter of theory.

From another direction, that of Modern Orthodoxy, Tamar Ross has argued that though the tools for remedying halakhah are to be found within halakhah itself, the precondition to renewal does not lie exclusively in the hands of the halakhic decisors but entails a corrective theology that she proposes Jewish feminism adopt.⁵ In any case, most of Ross’s efforts are in the theological realm, not the halakhic. Tova Hartman, meanwhile, did not treat the halakhic problem at all because, in her view, “The challenge of feminism to Modern Orthodoxy is far

³ See Plaskow’s analysis of the question of feminism and halakhah in *Standing Again at Sinai*, 21–24. Her radical claim is that even though law takes precedence over beliefs and feelings, theology affects Jewish practice in important, unseen ways. Thus in her opinion, the problems extend far beyond halakhah.

⁴ Cynthia Ozick, “Notes Toward Finding the Right Question,” in Heschel, *On Being a Jewish Feminist*, 120–51; and Judith Plaskow, “The Right Question Is Theological,” in Heschel, *On Being a Jewish Feminist*, 223–34.

⁵ Tamar Ross devoted two articles to the question of halakhah and feminism, but her book primarily treats the theological problem, for she believes feminism’s theological challenge to Judaism to be more problematic and deep-seated than its challenge to halakhah. (Her understanding of that theological challenge differs from Plaskow’s, however.) See Tamar Ross, “Can the Call for Change in the Status of Women be Halakhically Legitimated?” *Judaism* 42, no. 4 (1993): 478–92, Tamar Ross, “Modern Orthodoxy and the Challenge of Feminism,” in *Studies in Contemporary Jewry* (16), ed. Jonathan Frankel, Eli Lederhendler, Peter Y. Medding, and Ezra Mendelsohn (New York: Institute of Contemporary Jewry and Oxford University Press, 2000), 3–38, and Ross, *Expanding the Palace of Torah*.

deeper than a challenge to specific aspects of *halakha*, or even to the halakhic process as a whole . . . what I propose, then, is not a halakhic debate.”⁶

I do not question the importance of the theological discussion, but I am surprised at the prominent place it occupies in Jewish feminist thought,⁷ especially since theological questions have never been the core area of Jewish interest. It may be that we see here the influence of Christian feminist thinkers, whose radical criticism in the religious sphere has often served as an important catalyst for the examination of questions of equality and gender justice within Judaism. Those Christian thinkers thereby made an important contribution to Jewish feminist discourse, but is there no place within Judaism, given its legalistic character, for a deeper inquiry into distinctively halakhic problems?

In order to treat the halakhic problem within a Jewish feminist framework, let me first briefly describe the importance of halakhah and its status with Orthodoxy; the reasons why Orthodox feminists feel committed to remaining within the framework of halakhic discourse; the proposals that have been made hitherto in this area; and the factors that distinguish the model I want to set forth in this article.

Why Is Halakhah So Important?

Halakhah is a fundamental characteristic of Judaism. Gerald Blidstein, a scholar and historian of halakhah, wrote that: “Jewish Law (halakhah) was the major integrative factor in Jewish life from early geonic times (eighth century) until the onset of the modern era.”⁸ In a similar vein, Jacob Katz—the well-known sociologist of halakhah—argued that “Orthodoxy” was a somewhat confusing misnomer for the non-Reform stream within Judaism. To call traditional Jews “Orthodox” represents a borrowing from Christianity, where the term refers to those who believe in the church’s official dogmas. In Judaism, however, because the mark of conformity had always been, “The correct observance of religious prescriptions, rather than correct belief. . . . ‘Orthoprax’ would have

⁶ Tova Hartman, *Feminism Encounters Traditional Judaism* (Waltham, MA: Brandeis University Press, 2007), 16.

⁷ Interestingly, Plaskow believes that Jewish feminists have not been adequately engaged in theology: “As it turned out, however, in the last twenty years, only Rachel Adler, Tamar Ross, Melissa Raphael, and I have published full length Jewish feminist theologies” (“Calling All Theologians,” in Goldstein, *New Jewish Feminism*, 4). In that article, she outlines the principal challenges with which Jewish feminist theology must grapple.

⁸ Gerald J. Blidstein, “Halakhah—History of Halakhah,” in *The Encyclopedia of Religion*, ed. Mircea Eliade (New York: Macmillan, 1987), 6:158.

been a more accurate designation.”⁹ Similarly, Isadore Twersky maintained that “halakhocentricity is the hallmark of historic Judaism.”¹⁰

For Orthodox Jews, halakhah continues to be a system of religious law, but other streams within Judaism, such as the Conservative, the Reform, and the Reconstructionist, relate to it in their own ways, treating it as a framework that, though less binding, continues to shape normative thought. These movements continue to maintain a conversation with the halakhic world, and even the Reform Movement, which would appear to have the weakest tie to halakhah, maintains an interesting and challenging relationship to Orthodox halakhah.¹¹ In other words, even the non-Orthodox streams continue to see the halakhah as a significant factor in the shaping of Jewish identity.

Within Orthodoxy, as already noted, halakhah is a central and significant category that affects the lives of Jewish men and women in the most direct way possible. Orthodox feminists’ stubborn insistence on fighting their battle within the Orthodox framework rather than outside it may flow from several factors.

First, Orthodoxy is their basic identity and they have no interest in alienating themselves from it. On the contrary, they want to remedy it and forge within it a Judaism that is just and egalitarian for women as well as for men. Hartman, for example, writes,

I stand with the tradition because it speaks to a deep sense of who I am; I affirm my free choice to stay or go, while noting that the language of choosing is not sufficient to describe the claim it makes on my identity. This ontological claim calls upon me not to abnegate tradition but totally and continually to reengage with it. Disparities between tradition and other claim-making frames of knowledge and values do not force me to exit but rather, on the contrary, to continue to gaze deeply into both.¹²

Second, they believe they can exert influence and bring about true and radical change only by speaking the language of halakhah. Throughout time, when

⁹ Jacob Katz, “Orthodoxy in Historical Perspective,” *Studies in Contemporary Jewry* 2 (1986): 3–17.

¹⁰ Isadore Twersky, “Religion and Law,” in *Religion in a Religious Age*, ed. S. D. Goitein (Cambridge, MA: Association For Jewish Studies, 1974), 70.

¹¹ See especially Moshe Zemer, *Evolving Halakhah: A Progressive Approach to Traditional Jewish Law* (Woodstock, VT: Jewish Lights Publisher, 1999); Mark Washofsky, “The Search for Liberal Halakhah: A Progress Report,” in *Dynamic Jewish Law: Progressive Halakhah—Essence and Application*, ed. Walter Jacob and Moshe Zemer (Tel Aviv: Rodef Shalom Press, 1991): 25–51, Mark Washofsky, “Abortion and the Halakhic Conversation: A Liberal Perspective,” in *The Fetus and Fertility in Jewish Law*, ed. Walter Jacob and Moshe Zemer (Tel Aviv: Freehof Institute of Progressive Halakhah, 1995), 39–89, and Mark Washofsky, “Against Method: Liberal Halakhah, between Theory and Practice,” 2004, <http://www.huc.edu/faculty/faculty/washofsky.shtml>.

¹² Hartman, *Feminism Encounters Traditional Judaism*, 18. She elsewhere quotes Peter Berger on this: “They want to remain faithful to what for them has been an experience of truth.” See Tova Hartmen, “Introduction,” *Nashim* 17 (2009): 7.

Jewish philosophers or kabbalists took radical or even anarchic positions, they were able to do so only because their religious world remained firmly grounded within the halakhah. Ephraim Elimelekh Urbach, one of the greatest scholars of the Talmud and rabbinic thought, explained, “The only movements that could attain influence within Judaism, that could make a positive contribution to its efflorescence and religious revitalization, were those that came to terms with the principles of the halakhah, even if they stood on a foundation that was opposed to it. Kabbalah could exert influence as long as it accepted the halakhic yoke.”¹³ It seems to me, therefore, that relating to halakhah in a manner that reflects a commitment to its internal principles is essential to the Orthodox feminist project. Audre Lorde wrote that “the master’s tools will never dismantle the master’s house,” but Orthodox feminists believe just the opposite; to paraphrase Lorde, they maintain that “it is precisely the master’s tools that can dismantle the master’s house.”¹⁴

Feminist Halakhic Writings

The possibility of revitalizing the halakhah in the spirit of feminist values is considered primarily in the writings of Tamar Ross and Rachel Adler.¹⁵ Although Tamar Ross’s feminist project, as already noted, is first theological, it seems to me to have a direct link to the possibility of halakhic change. The theological concept that sees feminism as a form of new divine revelation (under the general rubric of cumulative revelation), and thereby assigns it religious legitimacy, allows in principle for halakhic change. The key lies in the hands of the community of believers, for the interpretive options to which the text is subject will always be directly tied to the norms and values of the community that sees itself as committed to those texts. In other words, interpretive authority is ultimately vested in the community, and if this community regards feminism as divinely ordained, it will presumably find, within halakhic discourse, the interpretive mechanisms, the precedents, and the halakhic tools with which to revitalize the halakhah in the spirit of feminism. Ross cautions, however, that some conditions must be met by the community before it will be able to create new interpretations:

¹³ Ephraim Elimelekh Urbach, “*Mashm`utah ha-datit shel ha-halakhah*” [The Religious Significance of the Halakhah], in *Al yahadut ve-hinukh* [On Judaism and Education] (Jerusalem: Hebrew University School of Education, 1966), 138.

¹⁴ Audre Lorde, “The Master’s Tools Will Never Dismantle the Master’s House,” in *This Bridge Called My Back: Writing by Radical Women of Color*, ed. Cherrie Moraga and Gloria Anzaldúa (New York: Kitchen Table Press, 1981), 98–101.

¹⁵ Feminist writings on halakhah are more extensive, of course; see, for example, *Jewish Legal Writings by Women*, ed. Micah D. Halpern and Chana Safrai (Jerusalem: Urim, 1998). But my purpose here is to consider primarily those studies that deal with halakhic problems in principle rather than one or another specific halakhic area.

1. It must be connected to the existing halakhic establishment and to its internal interpretive tradition.
2. It must be connected to the public that is committed to halakhah and to its associated cultural baggage—for example, the inability to overcome the halakhah's hierarchical language.
3. It must be connected to the halakhah's religious language and its openness to the transcendent.¹⁶

Rachel Adler does not speak in theological terms of a new revelation, but for her, too, the key to halakhic change grows first out of a theological project.¹⁷ Drawing on the insights of Robert Cover, Adler attempts, in the spirit of egalitarian and feminist values, to revive the world of myth, the Jewish narrative, from which various interpretive options grow.¹⁸ Out of this new narrative, a different normative world, or “nomos,” can take shape. She does not sketch the lines of this project with precision, nor does she commit herself to remain bound by the terms in which halakhic discourse has historically been conducted; in other words, she is unprepared to commit herself to the existing halakhic establishment and its internal interpretive tradition or to the mechanisms regarded through the ages as legitimate mechanisms for halakhic change. In that sense, her proposal is not “Orthodox” even though she maintains a profound connection to the halakhah and its importance in the shaping of Jewish identity.

In this article, I want to draw on both Adler and Ross. I do not share Ross's view of the decisive importance of the theological discussion (given, as noted, the legalistic character of Judaism); accordingly, I do not see reference to the transcendent as a critical factor in bringing about halakhic revision. At the same time, I agree with her on the need, if the project is to succeed, to maintain connections to the halakhah's internal interpretive tradition, its language, its internal mechanisms, and the community that is committed to it. I also share Adler's view that the new feminist narrative that has been developing in recent years within Jewish communities has produced a new nomos. But I see a need for a more detailed demonstration of how this can take place while remaining committed to the halakhah's intrinsic mechanisms.

To put it differently, I do not disagree with Adler, Ross, or Hartman in finding that the halakhic problem is firmly rooted in more deep-seated theological or ideological concepts, but I believe that Judaism's legalistic character suggests a “reversal of course.” Yes, let us work with the “narrative,” which can generate

¹⁶ Ross, “Modern Orthodoxy and the Challenge of Feminism.”

¹⁷ Adler, *Engendering Judaism*, xiv–xxviii.

¹⁸ Robert M. Cover, “The Supreme Court 1982 Term. Foreword: Nomos and Narrative,” *Harvard Law Review* 97 (1983–84): 4–68.

a new *nomos*,¹⁹ and let us carry on a theological or ideological analysis of the feasibility of introducing feminist concepts into Jewish thought; but let us also work with the *nomos* itself in order to create, within the religious world, a new narrative. Given that Jewish norms shape Jewish theology more than the converse, I believe it is direct engagement with *halakhah*, rather than engagement with theology, that can exert the greater influence on normative views of the world. In the spirit of Robert Cover, we can say that *nomos* and narrative are inseparably interdependent, but *nomos* should be seen not only as grounded in narrative but also as creating and influencing narrative. As noted, Judaism's legalistic character requires considering the issues from this perspective as well. I now turn to the question of *halakhah* as seen from a feminist perspective within Modern Orthodoxy.

Feminism and Halakhah: What Is the Right Question?

The question I want to consider, then, is how to set up an intellectual framework for dealing with the problem of women within Orthodox *halakhah*. This is a trick question, insofar as it assumes the existence of some objectively defined and differentiated Orthodox essence, including criteria for determining what is Orthodox and what is not. But do such inherent criteria of Orthodoxy (be they substantive or procedural) really exist? Can we look to them to shed light on whether a particular *halakhic* idea can be considered Orthodox? I am inclined to think that if there are in fact defining characteristics of Orthodox *halakhah*, they are grounded more in debate over content and less in the procedural rules of the game. Moreover, in my view, resorting to the rules of the game usually cloaks opposition to matters of content. Accordingly, it is possible that any suggested intellectual-*halakhic* framework that incorporates feminist insights will immediately be seen as non-Orthodox, even in the face of weighty and persuasive arguments to the contrary. It may be best, therefore, to reformulate the question: we should inquire not only about Orthodox *halakhic* rules or principles that might incorporate feminist insights but also about the conditions under which a feminist *halakhic* intellectual framework could be acceptable within the Modern Orthodox community.

In the early 1980s, Cynthia Ozick and Judith Plaskow argued about whether the problem of patriarchy within Judaism should be analyzed as a sociological or a theological question.²⁰ That is, is patriarchy merely optional excess baggage that was imposed on Judaism by external sources, something in no way intrinsic

¹⁹ On the ways in which the new narrative of feminist legal scholars is changing the law, see Thomas Ross, "Despair and Redemption in the Feminist *Nomos*," *Indiana Law Journal* 69 (1993): 101–36.

²⁰ See Ozick, "Notes toward Finding the Right Question"; and Plaskow, "The Right Question Is Theological."

sic to Judaism, or is it something more profound, warranting even a critique of monotheism and its associated worldview? Today however, the widespread assumption among scholars of Jewish feminism is that the question of power provides the key to understanding the issue. They believe, in principle, that halakhah could incorporate egalitarian insights if women were able somehow to attain power more closely approximating the power held by those who dominate important religious positions;²¹ in that event, their interpretations of sources would be accepted as legitimate as well. As Susannah Heschel wrote:

Jewish feminism is not about equality with men. . . . Feminism is about women's refusal to submit to male authority. The real issue is not equality, but power. Who's in charge? Who defines Judaism, and who determines whether or not we get to dance with the Torah?²²

This view of the legal process as bound up entirely with the question of power warrants closer analysis and requires considerable clarification. Michel Foucault has importantly taught that we must come to a new understanding of the concept of power.²³ It does not operate solely on a unidirectional vertical axis, from above to below; rather, it is more diffuse, deployed within a network of relationships among entities and running from below to above—and even horizontally or diagonally—as well. It should not be thought of solely as something oppressive; it has a creative role in producing knowledge and discourse and does not necessarily instill false consciousness. It can sometimes be engaged in truth.²⁴

Given Foucault's reflections on how to understand power, it becomes necessary once again to reformulate the question. Because Foucault's model suggests that power is possessed by people generally (and not only by those who hold positions of authority and are vested with formal power), the question is

²¹ In one of the first books in Modern Orthodox circles to incorporate feminist ideas, Blu Greenberg famously wrote that "where there was a Rabbinic will there was a halakhic way," thereby opening the door to the question of power within the halakhic process. Blu Greenberg, *On Women and Judaism: A View from Tradition* (Philadelphia: Jewish Publication Society of America, 1981), 44.

²² Susannah Heschel, "It's Not about Equality—It's about Who's in Charge," in *Yentl's Revenge: The Next Wave of Jewish Feminism*, ed. Danya Ruttenberg (Seattle: Seal Press, 2001), xvi.

²³ Michel Foucault, "Truth and Power," in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 51–75; Michel Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, ed. Colin Gordon (Brighton: Harvester, 1980), 80–105, and Michel Foucault, *The History of Sexuality* (New York: Vintage Books, 1990).

²⁴ On the question of power analysis and the relevance of Foucault's ideas to feminism, see Amy Allen, *The Politics of Our Selves: Power, Autonomy, and Gender in Contemporary Critical Theory* (New York: Columbia University Press, 2008), esp. chap. 3; and Irene Diamond and Lee Quinby, eds., *Feminism and Foucault: Reflections on Resistance* (Boston: Northeastern University Press, 1988). For a summary of Foucault's concept of power, see also Sara Mills, *Michel Foucault* (London: Routledge, 2004).

no longer merely one of how to attain power in order to fight the religious establishment in support of a more egalitarian interpretation of halakhic texts. On the contrary, we should ask how the power *already possessed* by the members of the communities can be wisely deployed so that they can begin to take a more significant and weighty part in the legal-halakhic game in which they are participants. Before turning to that question, however, it is worth looking more probingly at the Foucauldian claim that power is held not only by the halakhic authorities (*posekim*) who head their communities but also by the very communities that participate in interpreting the texts through the lives they live in light of the texts' various meanings.

We can cast some light on the matter by considering it in the context of the debate between two well-known American legal scholars, Owen Fiss and Stanley Fish.²⁵ Their dispute lends itself to varied interpretations, but for our purposes, I believe it should be understood not only as a disagreement over the limits of interpretation and the degree of objectivity that can be assigned to it but also over the factors and forces that shape the deliberations of the judge/interpreter. Owen Fiss, while rejecting formalism, believes that the question to be asked is whether there exists any legal interpretation that can be characterized as objective, as the idea of a law requires.²⁶ Objectivity in law means that an interpretation can be measured against a set of external norms that transcend the person offering the interpretation, and that, in turn, means that the range of legitimate interpretations is bounded, that it is subject to constraints. Objectivity means as well that an interpretation can be judged by something other than the interpreter's personal proclivities and his ideas regarding what is legally "correct." Objectivity transmits a message of detachment.²⁷ Fiss thinks that the interpreter does not enjoy absolute, unlimited freedom. He is not free to read into the text any meaning that he wishes, for he is governed by an array of rules that specifically define the relevance and weight to be assigned to every factor. These rules and principles are not simply the whim of individual judges; rather, they shape the profession of law, constituting its "professional grammar."²⁸ Of course, they are binding only if the legal community invests them with binding authority.

Stanley Fish is a leading opponent of Fiss's position. He reasons that if the rules are to constrain the judge's discretion and constitute the objective dimension of adjudication, they themselves must be read independently, in a manner

²⁵ See Owen M. Fiss, "Objectivity and Interpretation," in *Interpreting Law and Literature: A Hermeneutic Reader*, ed. Sanford Levinson and Steven Mailloux (Evanston, IL: Northwestern University Press, 1988), 229–49; Stanley Fish, "Fish v. Fiss," in Levinson, *Interpreting Law and Literature*, 251–68, and Stanley Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press, 1980).

²⁶ Fiss, "Objectivity and Interpretation," 232.

²⁷ *Ibid.*, 233.

²⁸ *Ibid.*

not contingent on any interpreter; they must convey their meaning directly to every reader, without regard to the reader's own perspective.²⁹ To state it differently, if the rules tell us what to do with a text, they cannot be a text themselves; rather, they must be documents in the strong sense in which the term is used in old-style historiography. The problem, of course, is that the rules are, in fact, a text, and they themselves require interpretation; accordingly, they cannot serve as the barrier that constrains the interpreter. In Fish's view, then, rules always presume a preexisting understanding of the questions they are likely to raise. One not equipped with these presuppositions will immediately inquire about the meaning and implication of the rule, and the answer will pertain to one or another set of practices that will alert him to the reality of a particular area of the law. In other words, Fiss believes that rules preexist practice, but Fish maintains that clarity will be attained through a sort of knowledge or practice that shapes the rules more than it flows from them. Similarly, law students study cases and infer rules from them; when they later come around to learning rules, they will know how to apply them only because they are already deeply immersed in practice and have become part of the context within which the rules acquire their meaning.

In light of all that, Fish considers Fiss's fear of unrestrained interpretation to be groundless and sees no need for the interpreter or judge to be bound by *external* constraints—the law's rules. To be “deeply within” the context—as the interpreter or judge must be—means to be constantly aware of, and to function within, an array of norms, standards, and routines that both define and are defined by context. In this way, categories that are internalized through the course of training become part of a mode of thinking. Because one is always situated in this sense, one is already bounded; and one therefore need not seek out external barriers. In other words, it is the interpretive community that assigns that “situated sense” and creates the practices and norms that determine the force of an interpretation. In a different formulation, Fish argues that there are always “canons of acceptability” and that we are always “right to rule out at least some readings.”³⁰ But the fact that we can envision conditions or circumstances in which some other interpretation would be legitimate attests that the canons which at any time define the sorts of interpretation that are acceptable and unacceptable are subject to change.

It is easy enough to see the influence of Foucault on Stanley Fish's ideas, which suggest that the judge does not work in a vacuum and that the creative force in his decisions cannot be understood as acting solely in a “top-down” direction. His decisions, rather, are strongly influenced by his “situated knowledge,” by the insights of the legal community, and by conventions regarding

²⁹ Fish, “Fish v. Fiss,” 251–52.

³⁰ Stanley Fish, “What Makes an Interpretation Acceptable,” in Fish, *Is There a Text in This Class?* 349.

“what is accepted” and “what is done.” In other words, the judge’s power is limited and confined to the interpretive horizon of the community within which he lives and works. In that sense, the community and its prevailing conventions exercise decisive influence on his determinations. The judicial power, then, is not activated in a unidirectional manner; it works from the “bottom-up” as well. On this view, the power of the community is great indeed.

At first glance, Fiss’s concept of judicial objectivity seems better suited at least to the declared ethos of actual halakhic practice; and the interpretive community as a whole, Rabbis and faithful alike, appear eager to preserve this ethos fully. But I do not believe an examination of halakhic reality can come up with an objective criterion in the sense Fiss means to present it. The rules of interpretation and decision making are far from absolute and are themselves subject to ongoing interpretation, and that is why it is Fish’s position that seems better suited to illuminating the halakhic phenomenon. Objectivity, as he envisions it, is understood to be *within* legal practice, in the sense that the constraint on discretion flows from the interpreter’s own situated knowledge. That situated knowledge is not his exclusive domain; rather, the practices and modes of thought that he shares with the legal community are what allow for the acceptance and legitimation of his interpretive decisions.³¹

Nevertheless, as surprising as it may sound, Fish’s stance may be taken as excessively conservative, for it is nearly impossible for a critique of actual legal practice to be offered by those within the same legal community. The reason is that people who have been socialized into a given community act in accordance with that community’s practices and modes of thought. In that sense, Fish’s position can explain why, on the face of it, the revolutionary growth of Torah study by women within the Modern Orthodox community cannot be expected to bear halakhic fruit differing from that produced until now.³² These women, after all, undergo the same sort of halakhic socialization as their male counterparts, and they are taught to think in specific ways that constitute the “internal grammar” of the system. In other words, Fish’s emphasis on the community necessarily embodies a method that is more descriptive than normative. Meanwhile, those

³¹ Ibid., 338–55.

³² The only extant anthropological study of the new phenomenon of women’s yeshivas and *midrashot* predates the recent rapid expansion of these institutions and therefore does not provide a comprehensive analysis of the now widespread tendency of young Modern Orthodox women to attend them after finishing their high school studies. See Tamar El-Or, *Next Year I Will Know More: Literacy and Identity among Young Orthodox Women in Israel* (Detroit: Wayne State University Press, 2002). Two doctoral dissertations now underway at Bar-Ilan University are attempting to describe developments in this area from an anthropological perspective while also offering philosophical insights on new modes of study and the application of women’s hermeneutics to rabbinic sources. See also Tamar Ross, “A Bet Midrash of Her Own: Women’s Contribution to the Study and Knowledge of Torah,” in *Study and Knowledge in Jewish Thought*, ed. Howard Kreisel (Beer Sheva: Ben-Gurion University of the Negev Press, 2006), 309–58.

pursuing changes as radical as those called for by feminist legal or halakhic criticism want a comprehensive shift in paradigm that will change the system's point of view and undermine its patriarchal foundations. How can such a change take place?

It might be said according to Fish that the distinction between “internal” and “external” is less rigid than we tend to think. The law, even in its seemingly technical utterances, always reflects some religious, moral, or social vision, and when a decision is objected to on the basis of religious or moral principles, the objection is not “external” to the law; rather, it represents an effort to change the law so as to alter the understanding of what is internal to it. To effect change, then, one must be both “internal” and “external”—the very situation of those Orthodox women who, though part of the halakhic community, also partake of modern feminist consciousness. Women have never participated in creating the halakhic corpus and therefore can challenge the halakhic world from “outside”; at the same time, they are firmly planted within the religious world—and, with the recent growth of Torah study by women, in the world of the halakhah's “professional grammar” as well—and, therefore, are deeply invested with the practices, norms, and “situated knowledge” that are key to accepting halakhic interpretation as legitimate.

Modern Orthodox women, conscious of both their womanhood and their religiousness, are equipped to look from “outside” in a manner that allows them to identify the patriarchal concepts at the basis of the halakhah while also acting “inside” as partners in the field of practice who can propose needed remedies. The ability to be simultaneously inside and outside can afford a guarantee against the risk of what I have termed the “conservatism” that may flow from Fish's theory—the possibility that women might fully adopt the discourse and male perspective of existing halakhah.

Alternative Halakhic Stories

We can now turn to the question I raised earlier: How can the power already possessed by the members of the community (according to Foucault and Fish) be deployed wisely so that women in particular can begin to play a more significant and weighty role in the legal-halakhic game in which they are participants?

An important way in which women situated simultaneously inside and outside the system can promote the development of a gender critical approach to the philosophy of halakhah is by creating “alternative halakhic stories.” By that I do not mean the proposing of local halakhic solutions to one or another problem that women face. I am not seeking the halakhic tools that can be used to effectuate desired change in a specific halakhic matter (though I of course do not deny the importance of such local solutions). An “alternative halakhic story” is much wider and comprises two elements:

1. Creating a halakhic genealogy with the goal of uncovering the hidden values or moral paradigms on which halakhic rulings related to women rely and the exegetical tactics and the rhetoric that have been used to generate the prevailing hegemonic story. Doing so would pave the way to creating a different halakhic genealogy, based on the same sources but with different predispositions.
2. Proposing a preference for halakhic principles that can overcome halakhic rules that fail to produce gender justice for women.

*Halakhic Genealogy and Rhetoric*³³

Formulating a new halakhic story entails uncovering the halakhic genealogy and hidden paradigms that have shaped the halakhah's hegemonic attitudes. That, in turn, involves moving from a perspective of necessity to one of contingency; a transition that I believe embodies one of the most important aims of postmodernism.³⁴ To achieve the transition from one perspective to another, Foucault made use of the genealogical method. Genealogy means, quite literally, the study of origins; as a method, it does not necessarily preclude regarding the subject being studied in a positive light but is most often used critically. Scholars have noted that the genealogical method must sometimes be understood as the search for divergence, for the non-necessary connections between the links of the chain. Thus, the genealogies that Foucault proposes in *Madness and Civilization* or in *History of Sexuality* are meant to liberate us, either from the dichotomy between madness and reason or from a particular worldview regarding sex and sexuality.³⁵

³³ The genealogical method has generally been used as a critical tool in the study of rabbinic literature (though not necessarily in all the senses in which I use it). Numerous studies written from a gender perspective have sought to open up the hidden gender assumptions implicit in a text by seeking out its context and various manifestations. For the most part, however, the method has been confined to study of the Bible and rabbinic literature and has not been applied to the responsa literature through the ages or to other halakhic texts. Some prominent examples include Daniel Boyarin, *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley: University of California Press, 1993); Fonrobert, "Regulating the Human Body," 270–94; Judith R. Wegner, *Chattel or Person? The Status of Women in the Mishnah* (New York: Oxford University Press, 1988); and Hauptman, *Rereading the Rabbis*. My proposal here is novel in its application of this method to the halakhic literature. To do so means to examine the halakhic sources, diachronically and chronologically (throughout the generations), and to see how they are used by contemporary Rabbis in deciding halakhic questions that arise today.

³⁴ These ideas have been notably expressed by Foucault, Jean-François Lyotard, and, especially, Richard Rorty. On the notion of contingency and the resistance to all kinds of essentialism, see Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989).

³⁵ On the genealogical method and especially genealogy as critique in Foucault's writings, see Thomas R. Flynn, "Partially Desacralized Spaces: The Religious Availability of Foucault Thought," in *Michel Foucault and Theology: The Politics of Religious Experience*, ed. James Bernauer and Jeremy Carrette (Aldershot: Ashgate, 2004), 143–55; and Mills, *Michel Foucault*.

Similarly, halakhic genealogy unfolds the legal background of the hegemonic halakhic story and provides examples of how certain links in the chain have been forgotten, how the genealogical continuity presented by the hegemonic story is not necessarily the only one possible. It therefore has a liberating effect and therapeutic value as well, freeing us in particular from the illusion of necessity, that is, from the view that no other verdict could possibly have been formulated.

To illustrate, let us consider contemporary halakhic rulings concerning fertility issues. If we examine trends within those rulings in light of halakhic genealogy, we find something quite interesting: in all matters related to abortion and contraception, the signal tendency is one of stringency, while in matters related to modern artificial fertility, the decisions tend to be extremely lenient.³⁶ In other words, sex without procreation is treated strictly; procreation without sex is treated leniently, on the premise that reproduction at almost any cost is the preferred value. What can account for this pro-natalist tendency? Multiple explanations have been offered, but I believe they must be supplemented by an understanding of the gender-related issues that underlie the ideology reflected in the decisions.³⁷ In my judgment, a latent concept of gender that defines women and femininity with reference to women's biological functions constitutes a necessary (though not sufficient) condition for this trend. This concept does not regard woman as an "end in itself" (in the Kantian sense); rather, it sees her primarily in her reproductive role—as a means.

What we must ask ourselves, in any event, is whether the commandment to procreate was so important as to outweigh all other considerations. Does halakhah require the bearing of children without taking account of other interests or values? Or do the halakhic sources allow for the construction of a different model, one that recognizes various needs that might warrant limiting procreation? Is it possible to create an "alternative halakhic story" that will enable women to realize themselves as human beings with roles beyond the reproductive, even though the only justifications advanced in classical halakhah

³⁶ See Ronit Irshai, "Fertility Factors," *Harvard Divinity Bulletin* (Spring 2008): 15–17, and Ronit Irshai, "Family Planning: A Halakhic–Gender Perspective," *Nashim* 12 (2006): 95–128. Halakhic discussion of fertility issues has been confined, of course, to the heterosexual context, since it is the only one deemed normative within halakhah. The feminist-queer critique is highly relevant in that regard; see, especially, Chaim Rapoport, *Judaism and Homosexuality: An Authentic Orthodox View* (London: Vallentine Mitchell, 2004), esp. chap. 7, on procreation and parenthood; Rebecca Alpert, *Like Bread on the Seder Plate: Jewish Lesbians and the Transformation of Tradition* (New York: Columbia University Press, 1997); and Daniel Boyarin, Daniel Itzkovitz, and Ann Pellegrini, eds., *Queer Theory and the Jewish Question* (New York: Columbia University Press, 2003).

³⁷ These include the desire to replenish the ranks of the Jewish people after the Holocaust. See Laurie Zoloth, "'Each One an Entire World': A Jewish Perspective on Family Planning," in *Sacred Rights: The Case for Contraception and Abortion in World Religions*, ed. Daniel C. Maguire (New York: Oxford University Press, 2003), 21–53.

for limiting procreation were factors that took account of the interests of men, not of women?

The halakhic genealogy of this subject suggests, I believe, that the foregoing questions can be answered affirmatively. For example, we can see that the ongoing tension between a man's duty to fulfill the commandment to procreate and his duty to study Torah was almost always resolved in favor of Torah study.³⁸ Moreover, the need to make a living was considered, over the generations, to be a relevant and legitimate reason for limiting childbearing, even though today's hegemonic halakhic rhetoric rejects economic considerations as totally irrelevant and even disparages them as indicating a lack of faith in God.³⁹ This tendency, of course, is harmful primarily to women, who are required to undergo frequent pregnancies and invest all their energies in childrearing, but it is far from being a necessary implication of halakhic sources, even though it is presented as such.

Uncovering the moral paradigm underlying the exclusion of women from religious rituals is even more obvious. The primary basis for that exclusion is the image of woman as a "ticking sexual time-bomb." The idea of holiness is profoundly tied to this—the more a woman is hidden, the holier the atmosphere. In other words, woman is equated with the unholy or even the "anti-holy"; at the same time, man is seen as a "sex-obsessed hormone dump."⁴⁰ Halakhic genealogy can uncover this paradigm, present it to Modern Orthodox men and women, and ask whether they are prepared to look in the mirror and then buy into this image.

Such a process will encounter resistance, given the clear and obvious "danger" that it might bring about radical changes in the structure of religious life. Indeed, we can already identify a typical sort of response, a tactic used effectively against efforts such as those I am proposing; and it seems to me that part of the critical project of the alternative halakhic story is to expose that tactic and publicly show it for what it is. I call this form of response "formalistic reductionism," by which I mean that whenever one identifies an effort to uncover

³⁸ Maimonides wrote: "He who is so desirous of studying Torah constantly that he is immersed in it like Ben `Azzai, and cleaves to it all his life, neglecting to take a wife unto himself—there is no sin in his hand, provided that his passion is not wont to overpower him. If, however, his passion repeatedly overcomes him, he is obligated to take a wife, even if he already has children, lest he should fall victim to unchaste thoughts" (*The Code of Maimonides*, Book Four, "The Book of Women," trans. from the Hebrew by Isaac Klein [New Haven, CT: Yale University Press, 1972]), *Hilkhot ishut* 15:3; Yale Judaica Series trans., 93–94. On the tension between the duty to procreate and the duty to study Torah, see Boyarin, *Carnal Israel*, chap. 5.

³⁹ For extensive consideration of this point, see the first chapter of my forthcoming book, *Fertility, Gender, and Halakhah*, to be published by Brandeis University Press.

⁴⁰ For an extreme statement of this view, presented in the context of how the laws of modesty bear on women reading from the Torah during Sabbath morning services, see Eliav Shohetman, "Aliyyat Nashim la-Torah" [Women Being Called Up to the Reading of the Torah], *Sinai* 135, no. 6 (2005): 272–349.

the morally problematic value system implicit in halakhic rulings with respect to women, the conservative counterattack goes something like this: “You misunderstand entirely; it’s entirely a formalistic matter, and questions of values, if one is concerned about them, are situated totally elsewhere.”

That is what happened, for example, with respect to women’s prayer groups.⁴¹ I need not here reiterate the extensive treatment this issue has been given in Jewish feminist research, but note only that the most prominent of the various halakhic issues involved here is that of the *minyan*, or prayer quorum.⁴² The halakhic definition of a *minyan* is ten males over the age of thirteen; the presence of such a group is prerequisite to public worship. Women are not counted in the group. Prayer within a minyan is regarded more highly, for there are certain passages that may be recited only in this framework, and the divine presence is said to come to dwell only in an assembly of at least ten men.⁴³ Women’s prayer groups in no way challenged the idea that women could not be part of a minyan; they made no request to be counted among the men at prayer. They sought only to worship separately, to read from the Torah themselves, and to create at least the atmosphere of public worship similar to that in a minyan of men. On the surface, there should have been no halakhic opposition to their doing so, but that, of course, was not the case. The most interesting element in the counterattack was the “formalistic reduction.” In at least one of the responses, minyan was transformed into a merely legal category having no bearing whatsoever on such matters as religious atmosphere or level of sanctity.⁴⁴

What this suggests is that the weapon of formalistic reduction does more than offer those who wield it theological benefits, allowing a return to the safe harbor of neutral objectivity without confronting disturbing moral issues and perhaps the need for change. In addition, it devalues women’s efforts in the area

⁴¹ Women’s prayer groups stemmed from the quest of Orthodox women for greater participation in religious life. As Tamar Ross explains: “[This quest gave rise to] the formation of women-only groups that convene for the purpose of worship. These gatherings, more popularly known as women’s *tefillah* groups, have mushroomed in Modern Orthodox communities around the world since the 1970s, reflecting the need experienced by some Orthodox women to participate more actively in the service, in a manner prohibited to them in the presence of men” (*Expanding the Palace of Torah*, 73).

⁴² Rachel Adler, “Innovation and Authority: A Feminist Reading of the ‘Women’s Minyan’ Responsum,” in *Gender Issues in Jewish Law*, ed. Walter Jacob and Moshe Zemer (New York: Berghahn Books, 2001), 3–32; Ross, *Expanding the Palace of Torah*, 73–83; Hartman, *Feminism Encounters Traditional Judaism*, 106–13; and Norma Baumel Joseph, “Women in Orthodoxy: Conventional and Contentious,” in Prell, *I Did It My Way*, 181–209.

⁴³ “Said Rabbīn bar R. Ada in the name of R. Isaac: How do we know that the Holy One blessed be He is present in the synagogue? For it is said (Ps. 82:1), ‘God stands in the congregation of God.’ And how do we know that when ten worship the divine presence is with them? For it is said, ‘God stands in the congregation of God’” (Babylonian Talmud, *Berakhot* 6a).

⁴⁴ See Mayer Twersky, “Halakhic Values and Halakhic Decisions: Rav Soloveitchik’s *Pesak* Regarding Women’s Prayer Groups,” *Tradition* 32, no. 3 (1998): 5–18.

at issue. If women want to worship in the masculine “style,” that style becomes, on purely formalistic grounds, simultaneously unchangeable and less important (at least rhetorically: it is merely a halakhic requirement, not an expression of value).

It is clear as well that moving the focus of discussion to halakhic formalism closes the door to analysis and ultimately divests the halakhah of all moral significance. There are, to be sure, Jewish religious philosophies that strive to neutralize halakhah’s value component and regard the highest form of divine service to be adherence to halakhah simply as divine dictate; but I do not believe those views carry significant weight within Modern Orthodoxy.⁴⁵ That being so, uncovering “formalistic reductionism” directs the community back to fundamental questions regarding the moral concepts that shape its religious world. Is the community prepared to accept this formalism as its overall religious philosophy? If not—and I assume that answer will be the one most often given—why accept it only as part of the counterattack against feminism?

An alternative halakhic story will be interested as well, as noted, in the rhetoric and interpretive tactics that have been used in the formulation of the hegemonic halakhic story. Rhetoric is of considerable importance, for it can sometimes reveal, even more than the bottom line of the halakhic verdict, where the halakhic authorities’ values lie.

One interesting example is the halakhic statement of opinion written by Rabbi Aharon Lichtenstein to a commission appointed by the Israeli government in 1979 to examine questions of abortion and legislation related to it.⁴⁶ For our purposes, his conclusion is less important than the rhetoric he used in justifying his position:

It is worth making clear, certainly to those who, in seeking a humane approach, are liable to adopt slavishly an overly liberal attitude in this area, that from the perspective of the fetus and those concerned with its welfare, liberality in this direction comes at the expense of humanity. . . .

⁴⁵ See, among his many writings, Yeshayahu Leibowitz, *Judaism, Human Values, and the Jewish State*, ed. Eliezer Goldman (Cambridge, MA: Harvard University Press, 1992). For a summary of his formalistic approach and the divide between religious and moral obligation, see especially Avi Sagi, “*Nisayon ha-Aqeidah: Iyyun Mashveh be-Hagutam shel Qirqegor ve-Leibovitz*” [The Trial of the Binding of Isaac: A Comparative Study in the Thought of Kierkegaard and Leibovitz], *Da’at* 23 (1989): 121–34, and Avi Sagi, ed., *Yeshayahu Leibovitz: Olamo ve-Haguto* [Yeshayahu Leibovitz: His World and His Philosophy] (Jerusalem: Keter, 1995). On the problematic relation between his formalistic concepts and his position on the status of women in halakhah, see Tamar Ross, “*Ma’madah shel ha-Ishah ba-Yahadut: Kamah Hasagot al Tefisato shel Leibovitz le-gabei Manganon ha-Ti’um bein Halakhah le-Mezi’ut*” [The Status of Women in Judaism: Some Comments on Leibovitz’s Concept of the Mechanism for Reconciling Halakhah with Reality], in Sagi, *Yeshayahu Leibovitz*, 148–61.

⁴⁶ Published in English as Aharon Lichtenstein, “Abortion: A Halakhic Perspective,” *Tradition* 25, no. 4 (1991): 3–12, reprinted in his *Leaves of Faith: The World of Jewish Learning*, 2 vols. (New Jersey: Ktav, 2003–4), 241–53.

It is not only the honor of God which obligates us, regardless of the cost, to avoid what is prohibited and to obey the commands of the Holy One Blessed be He that are expressed in this Halakhah. It is also the honor of man in Halakhah, the humane and ethical element which insists on the preservation of human dignity and concern for human welfare, that rises up in indignation against the torrent of abortions.⁴⁷

This formulation resounds with Rabbi Lichtenstein's clear moral stance: "from the perspective of the fetus and those concerned with its welfare"; "the humane and ethical element which insists on the preservation of human dignity and concern for human welfare." Rabbi Lichtenstein chooses this wording to formulate the question solely from the perspective of the fetus. To view the woman as a legitimately interested party, having a position or a say with respect to pregnancy or abortion, is negatively branded as "overly liberal," while concern for the fetus and its interests is given the positive designation of "humanity." Moreover, "human dignity . . . and human welfare" in this context refers to that of the fetus but not that of the woman.⁴⁸

As one critically parses additional halakhic narratives on various subjects, one increasingly uncovers both the rhetoric and the interpretive tactics used by rabbis in grounding their positions and one finds increasing instances of rhetoric harmful to women, especially when used by contemporary rabbis. Moreover, by uncovering the rabbis' interpretive tactics and their manner of construing sources, one comes to see that there is no moral or halakhic necessity to the existing halakhic story. Meanwhile, examining the halakhah's genealogy can suggest a path to the construction of an alternative halakhic story. An important question, though, is whether it will always be possible to do so. And here we come to the second part of the process.

Halakhic Principles vs. Halakhic Rules

To this point, we have been engaged in parsing the dominant halakhic narrative into its factors and uncovering the various ways in which it is problematic. But how can we rephrase it; how can we create a different story with the same legal corpus? The exegetical tools at our disposal are many and varied and in many cases can be useful in forging a different halakhah. On occasion, however, the halakhic rules will not be able to withstand the feminist critique. Creating a new halakhic story, therefore, will likely require, at times, the favoring of halakhic principles over halakhic rules.

An interesting suggestion in this regard has recently been made by Rabbi Daniel Sperber, writing about the rule of "congregational honor" and the prin-

⁴⁷ Lichtenstein, "Abortion," 12.

⁴⁸ For a broader discussion on abortion in Jewish law and its gender implications, see my forthcoming book, *Fertility, Gender, and Halakhah*, chap. 2.

ciple of “human dignity.”⁴⁹ The rule of “congregational honor” serves as the halakhic reason for barring women from reading Torah in the synagogue before a congregation of men. According to the Babylonian Talmud, “Our rabbis taught: All may be numbered among the seven [who are called to the Torah on Shabbat], even a minor and even a woman, but the Sages said: a woman is not to read from the Torah on account of congregational honor” (*Megillah* 23a).

Understood simply and straightforwardly, this statement means that a woman reading from the Torah would humiliate the congregation of men because it would imply that not one man present was capable of reading from the Torah. Other passages in the Talmud in which the term *congregational honor* is used confirm that it refers to a sort of humiliation that the congregation (of men) might sense. To overcome it, Sperber proposes to apply the principle of “human dignity,” which, like other principles in the legal corpus, can often trump local rules. The principle of human dignity appears in the Babylonian Talmud as well as in the Talmud of the Land of Israel, and the rabbis understood it as something that can overcome rules likely to impair a person’s dignity. In their words, “great is human dignity, which displaces every negative commandment in the Torah.”⁵⁰

What strategy has been applied against this proposal? First, we again see “formalistic reductionism”: it has been argued repeatedly, in quite a few articles, that the concepts of “congregational honor” and “human dignity” are something entirely different from what we think they are; they are, it is claimed, formal and objective and therefore not subject to change.⁵¹ For example, Eliav Shohetman, a legal scholar and expert in Jewish law, maintains that “congregational honor” is not a general or subjective concept; in his view, it is objective and must be understood only in the contexts of religious duties that are binding on men but not on women.⁵² Nor, in his view, is human dignity a subjective concept that can be invoked by a person sensing an affront in a particular situation. Rather:

“Human dignity” is a term used only with respect to something that is shameful to every person by virtue of being a person, such as going naked, and not with respect to something that only one or more individuals see as shameful to themselves. . . . If we apply that to the matter at issue . . . we are speaking of a very specific group of women who argue that they suffer distress as a result of being denied the possibility of being called to the Torah as men are. If we are speaking of something that is not regarded as an affront to women in general, we cannot apply

⁴⁹ Daniel Sperber, *Darkah shel Halakhah: Qeri'at Nashim ba-Torah: Peraqim be-Mediniyut ha-Pesiqah* [The Path of Halakhah: Women Reading the Torah: A Case of Policy in Halakhic Ruling] (Jerusalem: Reuven Mass, 2007).

⁵⁰ Babylonian Talmud, *Berakhot* 19b; and Jerusalem Talmud, *Kil'ayim* 9b, 32a.

⁵¹ See Shohetman, “*Aliyyat Nashim*”; and Gidon Rothstein, “Women’s Aliyyot in Contemporary Synagogues,” *Tradition* 39, no. 2 (2005): 36–58.

⁵² Shohetman, “*Aliyyat Nashim*,” 311.

there the principle of “great is human dignity,” for the entire community of women is not affronted by it.⁵³

Given this formalistic understanding of “human dignity,” I wonder whether it could ever be applied as a binding moral principle within the halakhic infrastructure.

A second prong of the counterstrategy is to note that even though the principle of human dignity is firmly anchored in the Jewish tradition, it has been used by halakhic authorities over the ages only rarely, in extraordinary cases. Accordingly, it has been argued that while Sperber’s position is grounded in the halakhic literature, as a practical matter, halakhic decision making does not favor the sort of reasoning he has proposed. This is the sort of preexisting sense that Fish speaks of—an informal understanding of “what is done and what isn’t done” in the practice of a particular field of law.

This sort of argument does not deny the legitimacy of the proposal but argues only that “we don’t do things that way,” an argument I take to mean that the problem is not perceived as serious enough to warrant deploying the heavy weaponry of favoring a principle over a rule. But uncovering the problematic moral consciousness on which many halakhic rules rely will likely force the Modern Orthodox community to confront the question of why it continues to cooperate with that consciousness, even though it has managed, in certain areas, to find halakhic solutions that enable it to overcome similarly problematic situations. For example, the halakhic principle of “acting in the interests of peace” overcomes the arguably racist halakhic rule—a rule not applied—that forbids violating the Sabbath in order to care for a sick gentile. (There was no question that a sick Jew may be cared for.) In other words, Modern Orthodox society will have to account in a meaningful way for its inconsistencies: Why, when it is the dignity of women that is at stake, does it fail to apply halakhic principles that would allow for reasonable solutions?

I suggested at the outset that, in the manner suggested by Foucault and Fish, the halakhic community functions as a player in the game and already has the power to influence the shaping of the hegemonic halakhic narrative. But that is not the full picture; for one who is empowered must know as well how to deploy that power wisely. Only in that way will it be possible to achieve any sort of consensus.

Here, I believe we can usefully resort to insights from the field of rhetoric, especially as developed in the writings of legal scholar and philosopher Chaim Perelman.⁵⁴ In his studies, Perelman teaches that when an issue involves conflicting values and cannot be resolved by reference to objective standards, rhetorical mechanisms can be helpful in determining which opinions should prevail

⁵³ Ibid.

⁵⁴ Chaim Perelman, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Purcell Weaver (Notre Dame: University of Notre Dame Press, 1969).

over others. I cannot deal here with all of Perelman's perceptions, but I want to look briefly at one of his insights that strikes me as critically important for the matter at hand. Perelman determines that when a speaker sets out to persuade an audience, the first, most basic, and perhaps most important thing for him or her to confirm is that the audience accepts the premises of the speech; without that acceptance, the presentation will be doomed to failure. If agreement exists on basic premises, it may be transferrable to conclusions as well; but if there is no agreement as to premises, or if any such agreement is very tenuous, the speaker will have to use every possible means to bolster it—or may be well advised simply not to speak.

Borrowing from Perelman's analysis, I think that the success of the Orthodox feminist project depends in great measure on attaining that basic agreement on fundamental principles or moral values. And here I come full circle, returning to the alternative halakhic story I proposed earlier. The main goal of an alternative halakhic story is to present the moral values regarding women and gender justice on which there is a consensus within the Modern Orthodox community. By presenting the halakhic paradigms that are hidden beneath the surface of final halakhic rulings, we can impel many Modern Orthodox Jews to confront the basic premises they are unwittingly buying into when they accept those rulings—premises at odds with their shared values and that, as a practical matter, they likely reject in most areas of their lives. If we can show that there is no divide in the values, and that the distinction between how they are applied in the religious and secular dimensions of life is artificial, then the task will be made easier, for it will widen the circle of people within the halakhic community who will express their dissatisfaction with the status quo or will, at least, be troubled by it.

I have suggested that the halakhic problem be seen from the feminist perspective not solely as a problem of power. My basic assumption is that women within Modern Orthodox communities already possess knowledge and power sufficient to exert their influence in the development of a more egalitarian and just halakhah. The question is how they can wisely deploy that knowledge and power in order to bring about halakhic change. As a response to that question, I have proposed the creation of an "alternative halakhic story." The first stage of that process involves probing the genealogy of hegemonic halakhic tendencies with the goal of uncovering the hidden moral paradigms on which halakhic rulings related to women rely; uncovering the problematic nature of the counterstrategy that makes use of what I have termed "formalistic reductionism"; and assessing the rhetoric of halakhic rulings.

In the second stage of the process, efforts will be made to create a new halakhic story in the area under consideration. The story will make use of all the sources and of *existing halakhic mechanisms* ("the master's tools"), but because its perspective will be one that is interested in gender justice, it will lend itself

to construction and interpretation in a way that is consistent with egalitarian insights. To the extent halakhic rules do not permit that, recourse can be had to more general principles—principles that hegemonic halakhah knows how to use when doing so serves interests that are regarded as “desirable” or “legitimate.” By doing so, we can shed light on the values that are widely shared within the Modern Orthodox community and on that community’s lapse into inconsistency when it denies the relevance of these values to women. We may also bolster the agreement on premises, as suggested by Perelman, and improve our chances in this persistent game.