

In Search of a Liberal *Hasidut Zmanenu*

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In Search of a Liberal *Hasidut Zmanenu*: Summary

The goal of this thesis is to examine the possibility of a *hasidut zmanenu*—a current, post-modern method of Jewish decision-making that will be maximal in terms of halakhic observance while also maintaining liberal values that are internal to Judaism. This question comes to be out of a desire for liberal Jews to take their practice more seriously. It grounds itself in the tradition of pious groups that have existed throughout Jewish history, the *hasidim harishonim* and the *hasidei Ashkenaz*, and creates the next segment: *hasidei zmanenu*. This is a new vision of piety because it exists in a framework of personal commandment, where autonomy and obligation both play a role. It is not merely about observance but also about decision-making processes, values, beliefs, and relationship with God. In order to propose such a system this thesis examines eight thinkers and their different understandings of Jewish law. This new notion of piety and its accompanying discussion of these thinkers is the contribution of this thesis.

It has nine chapters, made up of an introduction, seven chapters each analyzing the theory and application of modern Jewish thinkers on liberal halakhah. One of the theory and application chapters combines the thought of Rachel Adler and Tivka Frymer-Kensky into a single chapter on feminist thought regarding halakhah. These main seven chapters are presented in order from most liberal to most traditional: Eugene Borowitz; Mark Washofsky; Rachel Adler/Tikva Frymer-Kensky; Gordon Tucker; Elliot Dorff; Joel Roth; and David Novak. Its contents is based on a variety of sources that ranged from rabbinic texts, historical materials on the *hasidim harishonim* and the *hasidei Ashkenaz*, to books, articles, and responsa written by many of the thinkers whose systems of halakhah are addressed in this document.

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Chapter 1: Why is there a need for a liberal *hasidut*?

Many religions have a group of pious individuals—people who want to do more than is required of the masses. Judaism is no exception to that; we have two significant examples of pious collectives in our history, the *hasidim harishonim* and the *hasidei Ashkenaz*.

In rabbinic literature, the notion of *middat hasidim* or *middat hasidut* arises with a group of people known as the *hasidim harishonim* (the first pious ones). *Middat hasidim* is a lifestyle of being extra-pious or extra-observant. For example, let us examine the question of how rabbis of the early rabbinic period understand the biblical command to avoid cutting the corners of one's face in contrast to how the observers of *middat hasidim* might address the same issue. Some *rishonim* allow that a man can cut his beard with scissors or with a razor-like utensil, but in accordance with *middat chasidim*, he can choose not to use the razor or cut his beard at all.¹ Early *Hasidim*, who lived during the Tannaitic period, would spend an hour preparing to pray before they would actually engage in prayer and then wait an hour after prayer before engaging in other activities. They did not interrupt their prayers, even in the face of significant danger². They hurried to affix *techelet/tzitzit* onto a tallit or other garment. As soon as three fingerbreadths had been woven, they would put on the *tzitzit* even though the garment is not yet obligated to have *tzitzit* on it since its last two corners are not done being woven.³

Hasidim harishonim were anxious to perform mitzvot at the earliest moment possible. Even though the garment is not yet wearable and thus there is not yet an

¹ Encyclopedia Talmudit entry on *hashad*

² Brachot 5:1; Brachot 30b

³ Menachot 40b

obligation to affix the tzitzit, they would nevertheless run to fulfill the mitzvah of tzitzit. And at the same time, they would opt to take time when necessary to pray with the utmost intentionality. They approached whatever commandment they are facing with an extreme sense of piety and seriousness. They did more than the norm, more than is required. When the Talmud discusses the need to things that might block the plow of an area, it explains that the *hasidim* would not simply remove them. If someone put thorns into his neighbor's wall and then the neighbor one day tears it down and in doing so, the thorns injure someone, then the one who positioned the thorns is responsible for the injury. To be extra cautious about avoiding this situation, the *hasidim harishonim* actually buried the thorns or other inhibitive objects three *tefachim* underground so that they would not harm anyone or any activity.⁴ They are meticulous about it all—they strive to go beyond the call of duty in commandments between people and between themselves and God. Louis Jacobs explains that although some of these descriptions of the *hasidim harishonim* may be exaggerations, there still seems to be “an authentic tradition of pietists with special rules of their own, according to which they conducted themselves with a scrupulousness extending far beyond the laws applicable to the generality of Jews in matters of prayer, of Sabbath observance, of ritual in general, and of social welfare.”⁵

The *hasidim harishonim* were not alone in Jewish history, though. Though pietistic trends came and went in small waves, the next significant pietistic movement comes with the *hasidei Ashkenaz* in the 13th century. The term ‘*hasidim harishonim*’

⁴ Bava Kamma 30a

⁵ Louis Jacobs. *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law*. Second Edition. (Portland: Littman Library of Jewish Civilization, 2000), 174.

refers literally to the first *hasidim*, or group of pious ones, while ‘*chasidei Ashkenaz*’ indicates the *hasidim*, or pietists, who were living in Ashkenaz, the Rhineland. These people were pious because they saw their piety as a way to enter into close relationship with God. Part of their enterprise was to find the mystic or unrevealed elements of Jewish practice and hold fast to them as well as the standard observances. Ivan Marcus, in describing the *hasidei Ashkenaz*, writes, “In its central teaching, pietism requires of the pietist Jew complete obedience to an infinite demand generated by the will of God, now conceptualized as hidden as well as partially revealed.”⁶ The straightforwardness of law and the ambiguity of mysticism merged for the *hasidei Ashkenaz* as they tried to unite with God through their observances. Other mystics tried to connect with God through rearranging letters in text or lying atop graves of sages, but for the *hasidei ashkenaz*, their method was to find God through obligations and in the uncovering of new practices in our texts and traditions.

When one chooses to take this extra-serious approach to Jewish living and to God, he would likely feel isolated from everyone else. He might feel pressure to engage in activities that he used to do before he became pious, and feel the temptation to resist the stringencies of *hasidei ashkenaz*. There are two different approaches to addressing this social issue: either the pious person essentially operates on his own and draws his energy and willpower from God, or he forms a new community of like-minded individuals. Judah the Pietist’s *Sefer Hasidim* encouraged pietists to form a community as a safeguard from those who are less pious in society. *Sefer Hasidim*, one of the main works of

⁶ Ivan G. Marcus. “The Devotional Ideals of Ashkenazic Pietism,” in *Jewish Spirituality I: From the Bible Through the Middle Ages*, ed. Arthur Green. (New York: Crossroad, 1986), 357.

chasidei Ashkenaz, instructs them to separate themselves from the Christians and non-pious Jews who might have been living amongst them. On the other hand, another significant person in the *chasidei Ashkenaz* movement, Eleazar of Worms, only writes about the individual pietist. For him, the quest was an individual quest.⁷ One's judgment of his deeds in the world-to-come is, after all, based on your actions alone. Is piety an individual endeavor or a collective process? Perhaps it can be both.

Because of this individual aspect to the movement, there was also a surprising awareness that each person has his own learning curve, faith, and structure. "Although the German pietists always projected an impossibly demanding religious goal for the *hasid*, they were paradoxically also aware of the importance of allowing for individual intellectual and religious differences, and they adjusted their requirements in accordance with them."⁸ There is tension here between the individual and the collective and between the variant interpretations of piety.

If we were to translate this idea of piety or *hasidut* into our current Jewish frame of reference, we might assume that the pious are the Orthodox. Yet that is not the only possible way to understand piety. It may be surprising that some people are interested in being non-Orthodox pious Jews. This idea is unexpected because the overwhelming belief and practice of modernized American Jews appears to indicate that Jewish law is no longer binding. However, liberal Jewish practice does not need to be equated with being less observant. The goal of progressive halakhah is not simply to find a legal way to allow for less observance or for a broader set of practices, but instead to fuse the post-modern world and the Jewishly-derived values that accompany it with the traditional laws

⁷ Ibid, 359.

⁸ Ibid.

of Jewish living. When an ethically or otherwise newly challenging issue is confronted, a modified practice might be appropriate.

Unless such a challenge arises, though, one should simply follow the default—that is, the normative halakhic practice. But that is not how most liberal Jews choose to live out their Judaism today. Many adhere to a pick-and-choose form of Judaism, observing that which is meaningful to them or that which their family or even their rabbi has deemed as significantly important to Judaism. Others find some mitzvot obligatory upon themselves and others not, based on convenience or meaning or their applicability to the modern world. Yet others only see themselves as obligated to uphold the ethical commandments but not the ritual ones. What if someone wants to be as observant as they can while still maintaining a sense of liberal Judaism? What sort of halakhic system can that person turn to for a framework?

How might the contemporary pious individual, the person who is pursuing a life within the construct of *middat hasidut*, might relate to the world around him? Today's *hasidut* might not be only personal; it may also be connected to a criticism of the surrounding Jewish world that is not acting in a socially conscious and religiously conscious way. This existed in Ashkenaz too. Yitzhak Baer, a scholar of the Ashkenaz community, writes that, "It is not necessary to emphasize that [the Pietist] departs from Jewish law only in matters which affect social relations, while in laws and commandments which apply to himself, he is strict to the point of excess."⁹ This leads to further translating *hasidut* into our 21st century liberal setting.

⁹ Yitzhak Baer as cited in Ivan G. Marcus, *Piety and Society: The Jewish Pietists of Medieval Germany*. (Leiden, Netherlands: BRILL, 1981), 7.

If we apply this notion of those who opt to hold themselves to a higher standard—not better but more-stringent—to the liberal Jewish world, then the maximal progressive observance would be today's version of *middat hasidut*. It is someone who, in an autonomous world, opts into a heteronomous system. It is pushing oneself to obey a mitzvah that is burdensome or frustrating or meaningless at a given time, but still refusing to go against the core beliefs that define liberal Judaism.

What does that mean in terms of one's practice? It could be as simple as this: even though liberal halakhah has found a way to allow for driving on Shabbat, the person who is following a liberal *middat hasidim* will still refrain from driving. Yet there will be another area of practice in which that same person will actually feel obligated to follow a more lenient or progressive interpretation because of the ethics that are at stake. As far as I can tell, nothing quite like this exists at the moment. There are many teshuvot by the Conservative movement's Committee on Jewish Laws and Standards (CJLS) that argue for and allow more liberal practices, but this is different. The aim here is to reach upward, toward the more traditional observances and see if they are indeed still within the liberal corpus¹⁰.

Middat hasidut, can have a negative side as well, though. While it is admirable to hold oneself to a higher law in the context of interpersonal and ethical relations, doing so with religious obligations was often looked down upon in the times of the *hasidim harishonim* unless that person was regarded as an extremely pious member of the community. If that is not the case, the extra level of religious observance is considered to

¹⁰ This does not mean that those who might operate under the *hasidut* construct would be 'better Jews.' It is simply a different way of choosing to approach decision-making.

be a demonstration of *yohara*—pride or ‘priggishness.’¹¹ How do we avoid this? First, there should be a serious component of learning that accompanies the mitzvot to which one obligates himself. That learning will likely increase one’s sense of piety. As such, the ultimate goal is to not just be pious in one’s actions but also in one’s faith—and ultimately, to merge faith and action into one seamless lifestyle. If one is constantly learning and constantly evaluating whether a certain practice is too maximal—as will be discussed—then that eliminates at least some of the potential pride.

Also, the autonomy that comes with liberal or progressive Judaism is crucial.. While I am advocating for a system that is beyond autonomy and even beyond the Self as the ultimate decider, I also believe that this also necessitates pluralism. It calls for a community of individuals who are each balancing their own autonomy and their collective, covenantal responsibility in unique ways. Further, one of the goals of reshaping practice is to encourage people to start with a wider corpus of practice and then peel away only the observances that they find to be incongruent with their view of progressive Judaism. Often, people instead explore solely the ones that are immediately relevant or meaningful to them, but this system could change these meaning-based explorations. It has the power to become a process that revolves around understanding commandment, obligation, and the opportunity to perform mitzvot. Because of this reverse trajectory, the negative implications of *hasidut* will hopefully not carry over into our postmodern, liberal *middat hasidut*.

In order to move any further, the term ‘liberal’ of ‘liberal *middat hasidut*’ must be defined, particularly in the context of halakhah. What is liberal or progressive

¹¹ Louis Jacobs. *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law*. Second Edition. (Portland, Oregon: Littman Library of Jewish Civilization, 2000), 176.

Judaism and what is its relationship to Jewish law and practice? I am not using denominational terms like ‘Reform’ or ‘Conservative’ because I believe that the theories explored in this paper can apply to any and all non-orthodox Jews. Liberal Jewish belief, then, first acknowledges some semblance of autonomy, as Eugene Borowitz’s thought will argue later. By recognizing the role of modernity and the human-divine relationship in revelation, we must also recognize that choice and autonomy are at play. As much as someone may adhere to Jewish law, that adherence is a choice that she is making; no one but God is enforcing the laws or their interpretations.

We no longer live in a society with Jewish courts or anything of the sort, nor have we for quite some time. And yet, some individuals may examine their belief systems and find themselves personally obligated to Jewish law. Those people recognize a binding force in the halakhic system but are in search of a way to still express their liberalism in their practice. They need a set of benchmarks or guidelines. Where should they push themselves to follow a Jewish practice that does not particularly appeal to them? Where can—and should—they renegotiate an observance because of their progressive beliefs? That is one goal of this work: to provide a structure for those who choose to maximalize their still-liberal observance.

Many Jews seem to enter into Jewish practice with a blank slate of non-observance and only add to it their family traditions and a select set of deeds that are meaningful to them. Many of our traditional laws and customs have become problematic for liberal Jews they appear to conflict of our modern ethics or inhibit our ability to make use of our technological innovations at all times. We may not be able to live out the Judaism that was laid out for us in the Talmud and codes because of seeming injustices

within them, but we can still give that corpus of Jewish observances the weight it deserves in our decision-making. We cannot simply dismiss a practice because it is complicated or challenging to our beliefs: in order to exempt ourselves from something in our tradition, we must justify it with other beliefs that stem from a Jewish framework. We may feel the need to eliminate more than a few practices and yet, Judaism without any sense of halakhah—of precedence and practice—is not allowing us to live as Jews in the fullest sense.

W. Gunter Plaut writes, “[P]rogressive Judaism without halakhah quickly deteriorates into forms of ethicism and becomes a foil for convenience. Only the strengthening of the halakhic impulse can keep our movement healthy, and therefore an inquiry into the nature of a liberal halakhah becomes important, nay, imperative.”¹² So instead of starting with a ‘blank-slate’ of limited observance and only taking on those that bear significance to us, why don’t we begin from a maximal standpoint of accepting the entirety of traditional practice and then only dismiss the actions that are problematic for us, particularly if mitzvot and perhaps even halakhic exploration are a way to deeper connection to God? This is the initial framework of a liberal *middat hasidiut*: a liberal Judaism that protects itself from Plaut’s warning of deteriorating into pure ethics.

Liberal Judaism demands an acknowledgment of historical context and the human role both in revelation and its interpretation. It does not, however, need to dismiss the role that God or tradition plays in one’s understanding of revelation and how that translates into determining how to live one’s life. Moshe Zemer explains that, “we

¹² W. Gunther Plaut, “Reform Responsa as Liberal Halakhah” in Walter Jacob and Moshe Zemer, *Dynamic Jewish Law: Progressive Halakhah – Essence and Application* (New York: Berghahn Books, 1991), 108.

must...conclude that a serious Progressive Jew accepts or rejects the content of tradition, not out of convenience or caprice, but rather from a liberal theological *Weltanschauung*¹³ on revelation, history, and halakhah. ”¹⁴ Should a Jewish legal issue arises that is truly unjust—making the innocent suffer in some way—the liberal halakhist can excise that law from her practice.

The liberal halakhist exercises that flexibility only as a last resort, but the non-liberal halakhist cannot do even that; she does not have that flexibility because she is bound to the texts and their unswerving traditions. In contrast, someone who is trying to create a liberal *middat hasidut* still desires to uphold the sacred texts—perhaps even feeling bound by them—and yet also feels bound by other criteria. The specific question at hand is how one determines maximally traditional practice while still upholding a liberal understanding of Judaism. What pushes something out of her corpus of observance? Is that a decision that an individual can make or must she consult a rabbi, book, or other source of authority? Which modern halakhic systems are too liberal and which are too stringent to uphold such a way of going about determining practice?

Explanation of Chapters on Thinkers:

The body of this thesis examines eight contemporary Jewish thinkers, their approaches to Jewish practice, and their understandings of halakhah. Each thinker has his or her own chapter, with the exception of Rachel Adler and Tikva Frymer-Kensky who

¹³Definition: A comprehensive conception or apprehension of the world especially from a specific standpoint. Meriam-Webster.com definition.

¹⁴ Moshe Zemer, “Authority and Criteria in Liberal Halakhah” in Walter Jacob and Moshe Zemer, *Dynamic Jewish Law: Progressive Halakhah – Essence and Application* (New York: Berghahn Books, 1991),11.

are grouped together as feminists for ease of putting forth the goal of this paper. These thinkers are presented from most liberal to most traditional understanding of the halakhic system. In order, they are Eugene Borowitz, Mark Washofsky, Rachel Adler and Tikva Frymer-Kensky, Gordon Tucker, Elliot Dorff, Joel Roth, and David Novak.

Each thinker chapter is divided into four sections. The first describes the general theory of the thinker and how he or she understands Jewish obligation. The second is entitled “(Name of thinker) as a Serious Jewish Thinker: Committing to Jewish Legal Practice” and aims to demonstrate how each thinker is committed to Jewish observance, using examples of how they understand Shabbat practice. The third section shows how all of these serious Jewish thinkers are also liberal thinkers: how they each overturn some aspect of Jewish law. For the most part, the laws that they refute in this part address issues of inclusion and exclusion: relations between Jews and non-Jews, roles of women in Judaism, and inclusion of gay and lesbian Jews. This part is entitled “(Name of thinker): as Serious Liberal Jewish Thinker: Overturning a Jewish Practice.”

The fourth and final section examines the observance of *niddah* (menstrual or family purity laws) as a method for determining whether or not that thinker is indeed a maximalist—would they observe even when they do not find the observance itself personally compelling or meaningful? Might they resonate with the piety of the *hasidim harishonim* and the *hasidei Ashkenaz*? This part is fittingly entitled “Maximalist? Examining the Question of *Niddah*.” The caveat with this section is that my intention did not necessarily come through. I had hoped to find a law to explore for this category that would have no gender-based or ethical challenges yet was still contentious within the mainstream Jewish community. Since I could not find anything more compelling, I used

niddah because it is an interesting topic with many conflicting viewpoints. But it is probably not the best choice for determining if someone is truly a maximalist or not. Nonetheless, it does add a unique element to the conversation.

Chapter 2: Eugene Borowitz

I. Theory

Eugene Borowitz, a Reform Jewish scholar, offers a theory of Jewish responsibility that is based on the Jewish Self being in Covenant. He understands one's obligation—whether social or ritual—to be rooted both in the relationship that a person has with God and in the relationship that someone has with the broader Jewish community. Just as one feels a sense of duty to a life partner or relative, such a commitment also develops between a person and his or her Judaism. However, that results in a wide range of ways to express that relationship. Some people may take their relationships with God and with the Jewish people quite seriously and some may deal with it rather flippantly. Since Borowitz's theory of observance is so significantly based in one's relationship with God, it is truly grounded in theology while other theories of halakhah or Jewish practice are rooted in the law but may become fairly removed from theology. The centrality of one's theology is a very compelling part of Borowitz's system.

The relationship that one has with God, and in particular, one's relationship with what God asks of us, stems from revelation at Sinai. If one believes that all of Torah (both Oral and Written Law) was transmitted directly from God to Moses to the people at Sinai, and that person understands God's word as a forcible command to her, then the only question at hand would be deciding how a new situation would fit into the ancient legal system. There would not be space to argue with the law because it is God's law as opposed to the law of another person or community. Yet if one believes in anything other than that narrative from Sinai, then there is room for liberal understandings of law, however maximally or minimally one chooses to adhere to them.

However, the traditional understanding of Sinai allows no space for the human voice to play a role in revealing God's commands for us; the voice is God's alone, not the collective human self throughout time or the individual self today deciding how to live out her Judaism. "Were there a non-Orthodox theory of revelation that indicated how God authorizes that corporate determination of individual Jewish duty, many might bend conscience to a newly flexible halakhah. But no one has yet provided one and the task seems presently undoable. The stumbling block remains the authority we have vested in selfhood."¹⁵ As God spoke to us collectively at Sinai, we all experienced God's presence in unique ways.

If revelation was not experienced in the same way by all of the Israelite people, then the revelation that we each experienced at Sinai is personal or individual. My understanding of what God revealed there and what exactly I am commanded to do will be different than your understanding. Under the framework of personal revelation, then, halakhah can no longer be the enactment of our collective interpretation of revelation. Further, Borowitz sees a challenge in believing that our only source of revelation is Sinai, particularly since all people have a basic covenantal relationship with God that includes some understanding of commandments. Between the question of a singular revelation and a personal revelation, Borowitz questions the necessity of the halakhic system. In an environment where the self has a significant role in revelation—since revelation is really entering into a relationship with God and understanding what actions and responsibilities that entails—the need for a halakhic system that mandates communal practice is not as present as it might be otherwise.

¹⁵ Eugene Borowitz, *Renewing the Covenant: A Theology for the Postmodern Jew*. (Philadelphia: Jewish Publication Society, 1991) 281.

The individual interpretation of revelation and commandedness would lead the way to this corporate path to individual Jewish duty, but we still experienced Sinai standing next to one another—as a community. So in some ways, halakhah might be the collective journey of our individual attempts to determine our duties. There is significant weight to that because halakhah stems from God and results from our covenantal pursuits to determine God’s commands and then act upon them. I do not want to disregard the importance of the Jewish self here, but perhaps people can take their selfhood and individually opt into the halakhic system as a tool to access their relationship with God.

Autonomy allows someone to choose whether or not to be part of the system, but it does not preclude one from being part of it as long as she realizes that it is of her own prerogative. Moreover, Borowitz rejects the notion that we need to be operating within a halakhic process in the first place. He asks if “the radically changed Jewish social status and cultural ethos that resulted from modernization prompt us to devise a more appropriate way of framing Jewish existence [than the current halakhic system]?”¹⁶ His answer is ‘yes’ since modern Jews see Jewish law as instructive instead of obligatory and because the majority of non-Orthodox Jews assume their right to choose the aspects of halakhah to which they will or will not adhere. Sociologically, he is correct, but that does not have to be the status quo. Particularly, some individuals may not know how to navigate their selfhood and its relationship to God without some sort of roadmap—and halakhah may be that roadmap. However, halakhah in its traditional sense is not a roadmap for the individual. It is an absolute law that all should follow.

¹⁶ Ibid.

But using halakhah as a binding source of authority is antithetical to Borowitz's philosophy. "A halakhah that can require the significant surrender of "conscience" will be unacceptable."¹⁷ Traditional halakhah as a governing, disciplining system cannot truly exist in the postmodern world, argues Borowitz. Instead, it may act as guidance or, more interestingly, he says that the relational theory of revelation can lead to its own 'halakhic' structure. It is not rabbinic halakhah, though, nor is it rooted in it. He frames it not as "law as a required, corporally-determined regimen" but as "as self-discipline that, because of the sociality of the Jewish self, becomes communally focused and shaped. The result is a dialectical autonomy, a life of freedom-exercised-in-Covenant."¹⁸ He explains the five themes that shape this self-discipline as follows:

"First, the Jewish self lives personally and primarily in involvement with the one God of the universe...Second, a Jewish relationship with God inextricably binds selfhood and ethnicity, with its multiple ties of land, language, history, traditions, and faith...Third, against the common self's concentration on immediacy, the Covenant renders the Jewish self radically historical...Fourth, though the Jewish self lives the present out of the past, it necessarily orients itself to the future...Fifth, yet despite the others with whom it is so intimately intertwined—God and the Jewish people, present, past, and future—it is as a single soul in its full individuality that the Jewish self exists in Covenant."¹⁹

These themes ground Borowitz's Jewish Self in its relationship with God, in history, in ethnicity, in culture, and in the hope for tomorrow but it leaves much of the details—the observances themselves—up to the individual. The Jewish Self is making decisions in the present, but roots itself in the past and must also be constantly looking forward toward the future. As opposed to modern understandings of continuing revelation, which give weight to contemporary opinions over ancient ones, Borowitz presents the

¹⁷ *ibid*, 282.

¹⁸ *Ibid*, 288.

¹⁹ *Ibid*, 289-293.

postmodern view that biblical and rabbinic texts still exert the most authority.²⁰ The Covenant is not just with one's Self and her community, but also with the Jewish past. Similarly, the desire of the Jewish Self is to ultimately see the covenant lead to the coming of the Messiah. The Self's decisions must be made with the future in mind—what will this action do to my relationship with future Jews, including the Messiah? This viewpoint may, at times, compel the Jewish Self to break with a practice that was once precious but is now empty if that change can be a vehicle to continue the Jewish future and move it forward.²¹

As the Self determines its observance, she may use the practices that are inherited through covenant as suggestions, or even guidelines, but the covenant does not strictly mandate them. This does not mean that the covenant is merely a recommendation. Instead, it is a unique relationship of obligation that will be interpreted by the Self. The Self might declare the essentialness of the covenant but that claim cannot be forced upon someone else. It can only be proven to that individual. This notion of covenant assumes a significant burden of responsibility on the individual Jew to really examine her relationship with Covenant, with God, with Jewish time—past, present, and future. The Self is much more responsible for one's practices than the traditional law is.

Borowitz explains, though, that this postmodern process “cannot, for all its emphasis on human-self determination, be called anarchic, libertine, or uncommanded. In its devoutness it finds the imperatives arising from our people's Covenant with God more directly through the self than through any text or tradition.”²² Still, the Jewish self may be

²⁰ Ibid, 291.

²¹ Ibid, 292-293.

²² Ibid, 253.

inclined toward a vast amount of observance, but arrive there through a direct path that is unmediated by halakhic process. It may also thoroughly consider certain observances, and after examining them in a covenantal fashion, choose to dismiss them. In Borowitz's construct, this is no less of an authentic decision than any other. So long as one's practice is fully determined by her covenantal relationship with God, with the Jewish people, and her understanding of selfhood, then it is a valid Jewish practice. But if the same practice, or lack of practice, is determined by simple laziness or apathy without being in true relationship, then it is not in the same realm of possibility. Unbridled autonomy, without grounded relationship and responsibility, is not what Borowitz is envisioning.

I hope to find a way to meld this sense of personal obligation with the corpus of traditional Jewish practices. The language of law may be less effective in communicating that than Borowitz's language of relationship. All the while, is it still possible to maintain a serious relationship with the traditional halakhic structure, even if the relationship is not the traditional one? Is there a place for the self and the values and priorities that each individual brings to her Jewishness? The significance of Borowitz's focus on the Jewish Self cannot be denied—it is an honest recognition of our place in postmodernism. In the traditional halakhic structure, there is very little space for the Self. But the notion of *middat chasidut* that I hope to create should at least allow for the Self to choose whether or not to opt into this more stringent version of practice. It will take the halakhic framework as a vehicle to drive one's relationship with God but not as the only way to relate to God.

II. Borowitz as a Serious Jewish Thinker: Committing to Jewish Legal Practice

Borowitz is extremely committed to Jewish belief and its relationship to practice. However, he recognizes that one's understanding of God dictates a significant part of how one understands her obligation to certain practices, and a belief in God may not always be in sync with a given commandment. In that case, perhaps the individual commandment may be the human voice and not the Godly voice and it can then be dismissed in order to honor the individual's or the community's overarching understandings of God and God's values.

He parses out the Mishnah's rule that one can violate all rules of Shabbat in order to save a life, but if one starts digging through a pile of rubble to save a person buried under it and discovers that the trapped person is a non-Jew, then the other person should stop digging and go back to observing Shabbat. Borowitz takes issue with this decision and says that all liberal Jews would not find themselves able to uphold this rule. They would keep digging and save their fellow man.²³ If Shabbat and the life of a non-Jew are pitted against one other, the life must always win. The universal value of human life is significant in Borowitz's theory of obligation. God shares this value, so the Mishnah's decision reflects an outdated human viewpoint instead of the will of God. In a premodern time when the Jewish community was under significant persecution, there might have been reason for such a particularist action.

But today, it is part of our faith to recognize the claim that both Jews and non-Jews have on our religious law. If we are to be full members of society at large, how can we authentically say that we would save a Jew on our holy day but not save a non-Jew? If

²³ Ibid, 249-250.

God creates each of us in God's image, regardless of religious practice, and Shabbat is our day of rest and our day to observe and maintain creation, then how could we honestly be keeping Shabbat if we only deem certain lives worth saving on that day? Wouldn't we then be denying the holiness of God's creation of people outside of our covenant at Sinai but still within our Noahide covenant? Shabbat, for Borowitz, must not override the command to save lives, no matter whose life it is.

However, if Shabbat is not in conflict with saving a life, then one must adhere to a level of Shabbat observance that is in coherence with that person's faith, their relationship with the Jewish community, and their understanding of God's command. Without a reason for breaking Shabbat that is embedded in one's relationship with the community or God, then Shabbat practice, as understood by the Self, cannot be disregarded.

One's reason for breaking Shabbat cannot be "I want to go to shopping" or "I have too much homework to do" or even "My cold food is bland and I really would love to cook something new for Shabbat lunch today." Shabbat, of all holidays and observances, is perhaps of utmost importance to Borowitz, since it is a sign of the covenant: "The Israelite people shall keep the Sabbath, observing the Sabbath throughout the ages as a covenant for all time."²⁴ Covenant, after all, is the foundation of Borowitz's understanding of Jewish duty. If one were to disregard Shabbat, it would be as if she were disregarding the covenant with God as a whole.

III. Borowitz as Serious Liberal Jewish Thinker: Overturning a Jewish Practice

²⁴ Exodus 31: 16, JPS translation.

In addition to Borowitz's permission to overturn the Mishnah's stance that Shabbat observance supercedes the need to save the life of a non-Jew, he also issues permission for egalitarian practice and other innovations. He delineates the feminist argument that each person should have equal access to God, instead of a hierarchical system of organization. He can operate within a framework that instructs him but cannot function within one that silences him or anyone else. When women are silenced from communal decision-making, it violates his sense of egalitarianism.²⁵ Women, therefore, should be able to have an equal role in Jewish communal life and act as rabbis and other Jewish professionals. Borowitz states that, "...committed so fundamentally to the concept of personhood, I consider women's equality a critical matter for contemporary Judaism."²⁶ He believes that the silencing or suffering of another human being goes against the covenant that one holds with selfhood and with the community.

Further, he looks at the challenging situations of *agunot* and *mamzerim*. An *agunah* is a woman whose husband will not grant her a *get* (divorce document). Without a *get*, she cannot remarry and is then prohibited from remarrying. She is basically no longer a full member of society—she is a chained woman yet not in a relationship with her husband. It is not her fault, as only her husband can change her status. A *mamzer* is the child born out of incest, adultery, or out of the scenario in which the woman had presumed that her former husband had died, had a child with a new husband, and then the first husband is found to be alive.²⁷ Like an *agunah*, a *mamzer* cannot marry anyone in the general Jewish community and yet the *mamzer* did nothing to cause this isolating

²⁵ Ibid, 99.

²⁶ Ibid, 297.

²⁷ Shulchan Aruch Ezen HaEzer 4: 13

status. He was simply born into it because of his parents' actions.

Traditional Judaism has to work within the legal construct to examine the individual situations of various *agunot* and *mamzerim*. Sometimes the issues can be overcome, but not always. Elie Spitz wrote a teshuvah for the Conservative movement's Committee on Jewish Laws and Standards that found a way to render the concept of *mamzerut* inoperative today,²⁸ but there are still communities that uphold the constructs. Borowitz sees injustice in the separation from society that the *agunah* and the *mamzer* are forced to experience since they did nothing to bring this about and there is nothing that they can do to reverse the title. This goes against "clear-cut human and Jewish values;" it "contravenes some of our most primary Covenantal responsibilities."²⁹ He feels strongly that this is problematic and voices his support for acting in disagreement with the law, though he also does not believe that an Orthodox Jew should compromise his own beliefs about how God's law functions.

Nonetheless, he says, "As I understand the range of my obligations under the Covenant, I do not believe God wants some Jews to relate to other Jews by categorizing and treating them as *agunot* and *mamzerim*. Thus I will abet Jews seeking to fulfill their Covenantal responsibilities outside these laws."³⁰ By vesting the Self with the power to overturn a law like this, Borowitz is indeed a liberal Jewish thinker who truly embodies the value of justice.

IV: Maximalist? The Question of *Niddah*

²⁸ Elie Kaplan Spitz, "Mamzerut." Available at http://www.rabbinicalassembly.org/law/teshuvot_public.html.

²⁹ Eugene Borowitz, *Renewing the Covenant: A Theology for the Postmodern Jew*. (New York: Jewish Publication Society, 1991). 296.

³⁰ *Ibid*, 297.

Borowitz examines *niddah* in its historical and sociological contexts, since both of those categories are at play when evaluating its applicability in one's current covenantal relationship with Self, community, and God. Traditionally, he explains, the decision to maintain or overturn a law or practice has rested with the male sages and rabbis of each generation who do their best to interpret God's law. There is little space for the community to voice its own understanding of the law and even less space for the individual voice. In such a hierarchical system, do the Jewish community and the Jewish self really have a way to offer input or is it strictly in the hands of those sages at the top to decide what is or isn't God's way? The community needs a place to decide and act because it is the community that accepts the commandments at Mount Sinai when they collectively agree to do God's mitzvot and understand them.

Borowitz points out that the laws of *niddah* are the only remnants of biblical purity laws that are still in operation so far after the destruction of the Temple. And oddly enough, after biblical times, the extra stringency of seven clean days after the end of menstruation was added. Many attribute this change to the women themselves; it is apparently a custom that women of long ago chose to take on and then became codified as law. However, Borowitz raises the point that this stringency cannot be removed in the same way that it was created. Most women today have opted out of practicing *niddah* and yet, the authority to determine the law (even if it was once only a custom), either further restricting it or creating a leniency, traditionally rests with the small body of rabbis. Borowitz is frustrated by this one-sided power but he does not think that everything should be determined by pure democratic vote.³¹ The individual needs an

³¹ Ibid, 243-244.

element of participation; modernity has left us believing that we are not completely passive in interpreting what God wants of us.

He explains that, “Little touches the modern spirit more than self-determination, having a realistic role in fixing the rules by which one is expected to live.”³² Had women been given the ability to declare for themselves whether or not to maintain the practice of *niddah* at all, or at least whether or not to uphold the extra clean days, it might have been more of a covenantal practice. The trajectory for Borowitz is not just the law but also how the law fits into one’s striving for God. If *niddah* helps to achieve that goal, then Borowitz might mandate it for that individual. However, if it deemed to be detrimental and gender-biased, then it might prohibit the ability for the individual to form a true relationship with God, community, and their life partner.

He explains that for the non-orthodox, “the human self always mediates what we know of God. Hence, each individual’s quest for God concerns them as much as does what the past or the present community discerns as God’s reach toward humankind.”³³ In this way, Borowitz is not deciding whether or not one should maintain the laws of *niddah*, but he is instead advocating for a multi-step, multi-vocal process for determining that decision. It is tricky, though, for an individual—a Jewish Self—to decide not to practice *niddah* since it directly affects her partner. Is there a role for the family or the domestic unit in the covenantal structure that Borowitz lays out?

³² Ibid, 244.

³³ Ibid.

Chapter 3: Mark Washofsky

I. Theory

Mark Washofsky, a Reform Jewish scholar, demands that, “we must consider the issue of precedence in halakhah seriously, even if our liberal consciences call for a change. If we describe what we are doing as *halakhah* then the way we do it must fit the contours of that centuries-old rabbinical practice. If there is no law—or *halakhah*—without precedent, then liberal *halakhah* too must take precedent seriously. This implies more than lip service; it demands a commitment to the set of legal values that have defined and continue to define the practice of Jewish law.”³⁴ Taking precedence seriously means following the precedent unless the objection to it outweighs the value of precedence itself. The merits of possible objections will be explored later on, but precedence deserves significant consideration because of history, preserving *Klal Yisrael*, and the reality that previous generations may see a truth to the observance that we cannot yet see.

Washofsky also realizes that there are certain values that Jews must abide by in order to truthfully call themselves liberal. These are the boundaries on the other side of precedence—without them our progressive nature might be invalidated. If any of these four principles come into conflict with traditional halakhic practice, the traditional practice can be rejected.

“Our experience [as liberal Jews] has led us to see that Torah, if it is to serve us as a sure source of religious truth, cannot exist in the absence of certain essential moral and ethical commitments...they operate in a concrete way in our responsa literature as underlying assumptions which

³⁴ Mark Washofsky, “Taking Precedent Seriously: On Halakhah as a Rhetorical Practice,” in Walter Jacob and Moshe Zemer, eds. *Re-examining Progressive Halakhah*. (New York: Berghahn Books, 2002) 50.

govern our work and direct our conclusions. Among these, we can cite the following examples:

1. Reform Judaism is committed to gender equality.
2. Reform Judaism affirms the moral equality of all humankind.
3. We are open to the possibility and the desirability of religious innovation and creativity...while we should innovate carefully and respectfully, and while we should not abandon the standards of traditional practice without good reason, our responsa will not say ‘no’ to new ideas merely because they are new or because they depart from familiar forms of practice.
4. Finally, while our responsa seek to uphold traditional halakhic approaches whenever fitting, we reserve to ourselves the right to decide when they do not fit. When even the most liberal interpretations of the texts and sources yield answers that conflict with our moral and religious commitments as liberal Jews, we will modify or reject those interpretations in favor of others that better reflect our religious mind and heart.³⁵

In these specific ways, Washofsky differentiates Reform responsa from traditional law.

As he understands it, traditional law offers men more rights and more obligations to mitzvot than women, holds significant moral distinction between Jews and non-Jews, and often fears change even if there is no legal problem with it. Living a Reform lifestyle is, in some ways, the opposite of that. Being comfortable with change is important and creativity in law and practice is beneficial, but Reform Jews must acknowledge that change may not always be the most desirable option in the legal realm. Change should only occur when one of the formerly stated principles cannot be upheld. As defined by Washofsky here, “our moral and religious commitments” that might demand change are only matters of egalitarianism and of equality for Jews and non-Jews alike.

I believe that it is different to propose innovation in a way that does not subtract from what has been done in the past, but instead adds to it—that is, no law is negated, but something new is added. To take away a piece of liturgy that has been mandated for thousands of years without it breaching equality is problematic but adding a new text to

³⁵ Mark Washofsky, *Jewish Living: A Guide to Contemporary Reform Practice*. (New York: UAHC Press, 2001) xxiv-xxv.

the corpus of prayer is not. Nevertheless, Washofsky approaches halakhic process in a very serious and honest way that holds faith to both his values and his tradition.

Today all streams of Judaism value both ethical and ritual law, but how exactly are we obligated to those laws? We cannot merely do what is meaningful for us in a given moment. The Central Conference of American Rabbis (CCAR) writes responsa that are the opinions of a group of rabbis and act as guidance for those who read them. They are not position papers for the movement, though. They offer suggestions of how to act in given situations, but they are not mandates to act; that is, there is no binding power to them. Nonetheless, they can offer unique insight into the way in which some Reform rabbis, including Washofsky, might go about deciding one's practice in relation to halakhah.

In a responsa that discusses whether a tent can be used as a sukkah, the CCAR explores the Reform movement's commitment to practices that do not necessarily provide us with the benefit of meaning. The CCAR notes that "[t]he question challenges us to consider the meaning of ritual observance in Reform Judaism. Is ritual, in and of itself, ever a "necessity" for us? Does a traditional practice possess any obligatory force above and beyond the moral or religious meaning it conveys? Put in this way, we believe the answer to the question is "yes"." The tent cannot be used as a sukkah.³⁶ Even "Reform responsa literature has suggested a rule of thumb which we might term the "preferential option" for tradition. Tradition, that is, serves as our necessary Judaic

³⁶ <http://data.ccarnet.org/cgi-bin/respdisp.pl?file=4&year=5755> Washofsky pointed me to both this responsum and the following one.

starting point.”³⁷ It is good to know that we aim for tradition, but what determines when we veer from that starting point?

At the same time, the Reform movement appears ready to dismiss observances that they find unpleasant for a variety of reasons. “It is true that Reform Judaism has radically altered or done away with many traditional observances. When we have done so, however, we have tended to justify our decision on the grounds that the observance in question was fatally flawed, no longer in keeping with the spirit of modern culture and civilization, or objectionable on moral or aesthetic grounds.”³⁸ Again, the question is how fatally flawed must an observance be in order to be rejected? This is left quite vague. And is there an attempt to preserve as much of it as we can? Can we minimally alter our practices instead of radically altering or doing away with them?

II. Washofsky as a Serious Jewish Thinker: Committing to Jewish Legal Practice

For Washofsky, Shabbat observance is so central to Jewish life that even if one’s level of commandment or relationship to mitzvot is ambiguous or even non-existent, Shabbat is something that cannot fall by the wayside. He explains that even though “the idea of mitzvah, of commandment, is deeply problematic in Reform theology...a life of authenticity—a pattern of living composed of acts that ‘a Jew ought to do in response to God and to the tradition of our people’—is ‘inexorably bound up with Shabbat observance.’”³⁹ If it is observed in response to God and in response to Jewish tradition, it may not be a command in the sense that it comes with full force and necessity to follow through with the action, but it is still an obligation in some sense. Each generation has

³⁷ <http://data.ccarnet.org/cgi-bin/respdisp.pl?file=7&year=5757>

³⁸ *ibid.*

³⁹ Mark Washofsky, *Jewish Living: A Guide to Contemporary Reform Practice*. (New York: UAHC Press, 2001), 74.

reassessed the nature of Shabbat in their own lives, though no generation can eliminate the essence of it.

Washofsky outlines the basic structure of Shabbat and the mitzvot of *oneg Shabbat* (being joyous on Shabbat), *menuchah*, (rest) and refraining from *melakhah* (categories of work). He also describes the preparations for Shabbat, candle lighting, the meals and accompanying blessings, the services, and havdalah. Recognizing the evolution of the term *melakhah* from its biblical to rabbinic to post-rabbinic forms, he acknowledges that there may be prohibitions on certain behaviors during Shabbat that were not originally intended by the original texts. If they are a *siyag l'Torah* (fence around the Torah), then they might be up for some level of debate. Definitions of *melacha* and *menucha* could change with time, just as they changed during rabbinic times. However, he is unwavering in his stance that he, and Reform Judaism in general, holds that Shabbat is a day of rest and as such, work should not be done.⁴⁰ He also cautions that when Reform Jews consider their Shabbat observance, they need to start with a careful examination of traditional understandings and practices in order to maintain connections, at the very least, with the observances of our past.

The principles of Shabbat are non-negotiable but many of the specific practices could be altered in order to ensure that the ethos of the principles are retained in today's times when much of daily living—and therefore our understandings of work, rest, joy, and creation—are so different than they were in biblical or rabbinic times. Thus, Washofsky explains that one may choose to engage in a more traditional sense of Shabbat observance in which the person refrains from any creative actions and instead spends

⁴⁰ Ibid, 83.

time with family, friends, self, and God.⁴¹ The abstention from creative activities might free up space for holiness and reflection that might otherwise be filled with creative, work-like, or business-like activities. Alternatively, someone else might choose to observe Shabbat by as a “day of freedom from devotion to necessity”⁴² and do things that are in the spirit of Shabbat even if the specific actions might be traditionally forbidden on Shabbat. Washofsky offers the example that someone may drive to a museum and even pay admission because art is a way for that person to rejuvenate his soul and reflect on the art that another human has created with the spirit of God. He brings both of these Shabbat observances together under the heading of making Shabbat a day that is distinct and holy. Again, the principle of Shabbat holds true even if the specifics are held up to individual interpretation.

Yet when he analyzes the role of Shabbat in a congregation, he sets more rigid boundaries. Congregational fundraising and other business transactions should not happen on Shabbat. Tzedakah projects that involve what is normally considered to be work should not take place on Shabbat. Similarly, he maintains the traditional stance that weddings and funerals are not to be held on Shabbat.⁴³ This articulates that there is a baseline observance of Shabbat—both in terms of the positive action of distinguishing the day from weekdays and the negative action of refraining from certain lifecycle events and communal financial transactions—which demonstrates the seriousness with which Washofsky approaches tradition. He does not simply leave everything to the individual. Furthermore, he recognizes that there is a place for communal norms, or a higher level of

⁴¹ Ibid, 84.

⁴² Ibid.

⁴³ ibid, 85-86.

stringency, even in Reform settings that often seem to revel in autonomy.

III. Washofsky as Serious Liberal Jewish Thinker: Overturning a Jewish Practice

As a test case for both decision-making that breaks with halakhah and for the notion of a *middat chasidut* practice, let us examine the question of whether to celebrate *yom tov sheni* (second day of festival). Washofsky argues for changing the observance of *yom tov* from two days to one day, which makes a lot of logical sense—the reason for keeping two days was about a *safek* or doubt regarding the start date in the ancient world. That is no longer a concern of ours because current mathematical formulae that produce very accurate calendars can now be distributed worldwide. But new calendar-based information does not qualify as a moral or egalitarian problem that needs to be overturned. Our tradition consciously kept this extra day even when the calendar issue had been resolved.

The concern of miscommunication had already been significantly lessened by the time of the Talmud when it asks, “now that we know how to set the calendar by means of mathematical calculation, no longer relying upon eyewitness testimony and messengers to inform the Diaspora, why do we not return to the original, biblical standard of observing for only one day?”⁴⁴ The rabbis wanted to preserve what had become historical minhag so they declared a *takkanah* or decree that communities in the Diaspora must keep the two-day practice on the off chance that a hostile government may one day prevent Jews from studying Torah and therefore from enacting the calculations that determine the calendar.

⁴⁴ Translation by Mark Washofsky. Mark Washofsky, *Jewish Living: A Guide to Contemporary Reform Practice*. (New York: UAHC Press, 2001), 95.

Washofsky explains the three reasons that the Reform movement has veered away from the observance of *yom tov sheni*: the calendar itself is no longer in doubt, the persuasiveness of the *takkanah* has become weak since calendar data is now public and probably not the sort of knowledge that a hostile government would call ‘Torah’ and try to usurp, and lastly, economic hardships from taking two days off of work could be relieved by eliminating the second day.⁴⁵ The first two reasons are logical—the observance came out of a concern which appears to now be completely resolved and because of the way it was resolved, and the public and scientific method of calendaring, the concerns that led to the *takkanah* preserving the practice do not seem so relevant. But nothing is wrong with keeping the extra day of *yom tov*. It does not invalidate people in our community or create theological problems. The concern for one’s loss of income does not seem significant enough to alter the *takkanah*. Several extra days during the course of the year will not drastically harm someone’s finances. Yes, it does encourage people to spend extra days in synagogue and follow the pertinent rules of the holiday, but I would argue that doing so is actually a beautiful thing. It upholds the *takkanah*, and in doing so is the halakhically commanded thing to do, but at the same time it is also a conversation between humans throughout history about how historical or societal changes affect our religious practices.

Where does the distinction between those who are operating within the standard liberal system and those who are acting within the construct of *middat hasidut*? Perhaps, in this case, the people who are not adhering to the *middat hasidut* construct could observe one day only and those who are in the *middat hasidut* grouping could observe

⁴⁵ Ibid, 95-96.

two days. Scientific or even historical change as exhibited in this case —when not combined with a presenting moral issue—could be the distinguishing factor, between the modern liberal observers of *middat hasidut*, and the rest of the community who are not holding themselves to that standard. If, however, new information like what is raised here can combat a moral problem, then it should be able to do so and transform even the practice of the *middat hasidut* followers.

Let us also examine issues that are discussed in reference to several of the other thinkers: issues of women in the rabbinate and of homosexuality. Firstly, the issue of ordaining women is almost a moot point for Washofsky because of the centrality of egalitarianism for him. As mentioned above, the first of his four principles of Reform Jewish commitments that dictate his decision making process is gender equality. Unless he wanted to invalidate his own statement, he would have to grant women the same rights as men in all aspects of Jewish life. In making this statement, he does not need to find a way for women to take on this role within the traditional halakhic framework as Joel Roth will do or as David Novak will be unable to do; Washofsky allows the principle to override. This is bold and can create an equality that is truly overarching in a way that might not be possible in a system that operates under solely obeying pre-determined laws (see legal formalism in chapter on Joel Roth).

Similarly, the Reform movement takes an unequivocal stance in supporting full and equal rights for people of all sexual orientations.⁴⁶ This may be an even more radical statement than acknowledging the equality of men and women because it appears to contradict the statement of Leviticus 18:22, “Do not lie with a male as one lies with a

⁴⁶ Ibid, 320.

woman; it is an abhorrence.” There is no explicit biblical statement that forbids women from equal leadership, even though it is definitely implicit in much of biblical narrative and explicit in many areas of rabbinic literature, some of which are considered to be *d’oraita* (from the Bible).

Washofsky addresses this significant divergence from tradition by demonstrating both its strengths and its challenges. He defends the change by noting the different context in our time versus biblical times. For us, we know that sexual orientation is not a choice but a result of biology and chemistry that one cannot simply change at will. It is arguable that in biblical times, homosexuality was perceived as a sinful choice and we now know better. However, same-sex marriage is still a complicated issue for him and his colleagues. Even though Washofsky absolutely does not see same-sex relationships as sin, he seems to not be certain that they should be sanctified through Jewish wedding ceremonies. Because he is not able to fully define what a sexual orientation is and is thus still left with insufficient information, he writes, “many of us are hesitant to draw the kinds of conclusions which we would require in order to justify so radical a departure from age-old Jewish tradition and universally-accepted standards of Jewish religious practice.”⁴⁷ However, this cautionary stance does not preclude him from still supporting equal rights for all people across the spectrum of sexual orientation. Does the cautionary stance make him more of a maximalist or less of a liberal than if he had entirely broken free from tradition in this situation?

There is something maximal about his desire to wrestle with tradition even when he seems to know that in general, homosexual and heterosexual relationships are both

⁴⁷ Ibid, 323.

equally valid. If they are equally valid, one might infer that they are also equally holy, except the texts challenge that in several regards. Firstly, as stated earlier, they simply do not see both types of relationships as equally valid. But even if they did, Washofsky finds a stumbling block in the issue of *kiddushin*.⁴⁸ A marriage between two men or two women could not, by definition, be *kiddushin* (the process by which a man acquires a woman). So either he can use a different term instead of *kiddushin* or not perform such ceremonies. But in either case, Washofsky makes it very clear that he understands it to be a mitzvah to recognize same-sex partnerships as families within the synagogue, welcome them, and help them create a Jewish home.

IV. Maximalists? Examining the Question of *Niddah*

The topic of *niddah* is absent from Washofsky's book, just as the question of viewing women as rabbis or witnesses is not addressed. I would guess that Washofsky considers *niddah*—a woman's monthly immersion in the mikveh for the purposes of ritual cleansing—to be a misogynistic, gendered ritual that has little to no place in today's Jewish world. Additionally, he also believes that there should be a certain level of privacy surrounding one's domestic life. This is a liberal value that it is not characterized in the rabbinic tradition, but it might still be at play in this issue. He writes, "As liberals, we are heirs to a tradition of thought which holds that a human being's most personal decisions are properly left to private discretion with a minimum of interference from the state or the community."⁴⁹ For Washofsky, it is a question of balancing the principle of gender equality with the similarly significant demand to retain at least a semblance of tradition.

⁴⁸ Ibid, 323-324.

⁴⁹ Ibid, 321.

Chapter 4: Feminists—Tikva Frymer-Kensky and Rachel Adler

I. Theory

Feminism seems to take a unique stance in its view of halakhah, but it may not be as different from the others as one might think. It demands reframing the halakhic structure by breaking down categories or deriving overarching ethics or themes, as do the theories of Gordon Tucker and Elliot Dorff in some ways. Tikva Frymer-Kensky's approach resembles Tucker's narrative system. Rachel Adler recognizes the problems with trying to address gender diversity by plugging women into traditional categories as Joel Roth does and she too adopts a narrative-based view, though different from Frymer-Kensky's. While there are a handful of other Jewish feminist thinkers, Adler and Frymer-Kensky are the two that best tackle feminism's relationship with Jewish law.

Feminism, according to Adler, is the belief that "being a man or woman is an intricate blend of biological predispositions and social constructions that varies greatly according to time and culture...power disparities [that are created as a result of unequal gender standing are viewed as] a moral wrong and an obstacle to human flourishing."⁵⁰ This understanding affects their understanding of many, though not all, laws. Regardless of its weight on a specific law, it very much alters the way feminists interact with halakhah as a system or an aggregate of laws. Feminism is beyond gender equality, though. It necessitates a fluidity of categories and at least for Frymer-Kensky, a need to create meaning in a practice beyond simply performing commandment.

Tikva Frymer-Kensky argues that halakhah is no longer able to demand that people adhere to its system. It has no outside enforcement like a police force or any other

⁵⁰ Rachel Adler, *Engendering Judaism*. (Philadelphia: Jewish Publication Society, 1998), xv.

this-worldly punishment, so those who feel a sense of obligation will opt into the system and others will take on the parts that are meaningful or logical to them. She asks the question of what binds us to halakhah. In order to be a stand-alone system, halakhah must have a “compelling rationale for observance.”⁵¹ This could be a sense of tradition or commandment or dialogue with God, but no matter what the rationale is, it is necessary in order to establish an environment in which any sort of true maximalism—spiritual commitment—might flourish. She explains that, “We now live in a post-halakhic age in which the language of obligation has no meaning.”⁵² Simply by acknowledging that, she eliminated the traditional narrative about the origins of halakhah that both tells the story of God presenting the laws at Sinai and holds that the laws are unchanging even though they continued to be codified and interpreted throughout history.

Then she presents a variety of other narratives and rejects each one for a different reason. Most are not compelling enough to authentically motivate Jews to live out halakhah, particularly because many reinterpret what might fit within the framework of halakhah. The Conservative narrative, which attributes law to mankind and yet still demands our adherence to the law, is at least somewhat incongruous. Frymer-Kensky explains that the texts and the current laws are not direct transmissions from God and yet we are obligated to them.⁵³ Why? If the commander is a human collective, then couldn't a new human collective choose to overturn them? It seems that only a divine power could withstand that drive. Similarly, the Reconstructionist narrative attributes texts, laws, and practices to mankind, but does not attempt to hold the Jewish people to adhere

⁵¹ Tikva Frymer-Kensky, “Toward a Liberal Theory of Halakhah,” *Tikkun*, volume 4, number 10 (1995): 43.

⁵² Ibid.

⁵³ Ibid.

to practice that they do not collectively agree upon. In some way, the Jewish people are both the commander and the commanded in that narrative.

One attempt to rectify this lack of inspiration to follow halakhah creates a rationale by maintaining divine power in the commands while still admitting imperfect transmission of some laws but this too does not satisfy Frymer-Kensky. She finds this approach problematic because it deifies the rabbinic tradition⁵⁴. In order to have a definition of halakhic evolution that can truly embrace a contemporary understanding of feminism or gender equality, it needs to see revelation of halakhah as a continuing process through today. Instead, this approach allows for the changes and adaptations of law that are codified within rabbinic Judaism but does not allow for similar modifications in current times. Frymer-Kensky argues that this system and the fully traditional narrative are both discriminatory in regards to gender and sexual preference. So she continues to search.

Her goal is to find a system in which the main aspect is honoring the process of encountering God. More and more Jews are embracing parts of halakhah that determine ritual, and while that is lovely, it does not address the issue of a coherent system. Those individuals who are embracing specific aspects of halakhah are doing so for a variety of reasons but they are taking each law or each tradition as its own decision or obligation. “The problems of halakhic observance primarily arise when Jews are asked to respond in non-ritual ways, when they are expected to observe a Shabbat beyond lighting candles, saying Kiddush, and attending synagogue, when they are urged to extend the religious

⁵⁴ *ibid*, 44. This is David Weiss HaLivni’s approach.

aspect of eating beyond having ceremonial meals.”⁵⁵ In a basic way, this is the question of maximalism. Ritual is easier because it is finite—it requires a few minutes of action and then it is done. It might convey meaning or be part of the Jewish people’s narrative, like the way the Pesach seder reenacts our liberation from Egypt. What compels someone to do something that does not add new meaning to her life? Or all the more complicated, why might someone uphold a practice that actually conflicts with other beliefs of hers?

Because we no longer live in a society where one would be punished for not obeying mitzvot, the reward for doing mitzvot is the execution of them. Frymer-Kensky teaches that halakhah has always literally meant “God’s way” and not “law.” In the biblical and rabbinic past, she says, halakhah is both the way of God in the world and the way of the world to God.⁵⁶ This is a more fluid definition than halakhah as a static law. A path changes and adapts to the area that it is winding through. Similarly, God’s path would evolve in terms of how it is realized, but regardless of individual changes, it is always God’s path.

It moves us toward synchronizing our way with God’s way. “[Halakhah] situates us in our history (on the path from Sinai) and cosmos, and enables us to recognize each other as part of the same destiny. It is thus our *nomos*, the way we conceive alternative (ideal) reality and the bridge that links our reality to this vision. The community has a shared vision—standing with God at Sinai, being God’s partners in the world—that requires a roadmap for reaching and attaining it.”⁵⁷ Thus, halakhah is the variety of

⁵⁵ Ibid, 44.

⁵⁶ Ibid, 45.

⁵⁷ Ibid.

practices that adhere to this vision. It is a set of practices and laws that direct our quest toward partnership with God, both in reaching back to Sinai for guidance and forward to tomorrow's ideal reality of realizing God's dreams for our world.

In conjunction with understanding halakhah as God's path and our path toward God, it is a system by which we might find holiness (Godliness?) in otherwise mundane moments. "The ultimate purpose of halakhah is to infuse our daily biological and social activity with a sense of divinity, purpose, and community, so that we can truly live in the path of God."⁵⁸ As such, Frymer-Kensky's narrative paints the origin of halakhah as centering on our reaches for God. It is as follows:

"Since forever, the Universe has been filled with God. Humans developed in awareness of this transcendent immanence. They responded to the Presence and sought to establish connections with it...Humanity's vision of divinity raised living above mere subsistence, gave value and focus to human life and community. Surviving artifacts give us glimpses of their religious quest—not enough to inform us of the content of belief, but enough for us to know and acknowledge the process of faith and ritual. Written documents allow us to follow more closely our more recent ancestors' attempt to approach divinity. Sometimes their ways appear beautiful in our eyes, at other times ludicrous. But we must always acknowledge the fact of their faith."⁵⁹

Thus, the overarching or meta-halakhic principle in this system is to be a holy people.⁶⁰ Without a principle of this sort, law cannot evaluate itself. This bears some resemblance to Gordon Tucker's use of narrative à la Robert Cover. If a certain law or practice falls outside of the framework of how holiness can be conceived, then that law must be done away with. Frymer-Kensky explains that, "our religious duty is not only to follow the path. We must monitor and adjust the path so that it leads to holiness and the

⁵⁸ *ibid.*

⁵⁹ *ibid.*, 45-46. All of the other narratives discussed above are flushed out to a similar level in this article. They are summarized for the sake of addressing all relevant material.

⁶⁰ *Ibid.*, 46.

divine order. This is the purpose of the halakhic process...“if we begin to sense that a particular rule points us to unholy ways and would lead us to a less than holy reality, then it not only can, it must be altered.”⁶¹

Her approach to halakhah has a few other meta-halakhic principles as well. The next is that all humans must be accepted as in the image of God. After all, “the domination of one person over another can never lead to God. Patriarchy is another form of domination, by males over females. Now that we have come to this religious realization, it is our duty to dismantle patriarchy. It is also our religious duty to dismantle heterosexism, racism, ageism, and maybe even speciesism, and ultimately forms of domination that we have not yet learned to identify.”⁶² Frymer-Kensky offers the example of how the rabbis overturn slavery after biblical times—the ethics that fill our thoughts are also part of how we should understand Torah.

But her call to disengage from domination does not give permission to abandon most other types of mitzvot. Kashrut, she argues, is not an observance that needs to be defended. Instead, if someone is compelled to not keep kosher, he must offer a cogent argument about why kashrut is unacceptable. The question for such commandments can only be “why not?” Asking “why?” is insufficient. This “why?” mentality occurs often for many non-orthodox Jews—they think, “Convince me why I should keep kosher or stop spending money on Shabbat.” Like Frymer-Kensky, I find this quite problematic. In that framework, people tend to take on mitzvot only when they find them to be meaningful and compelling, but what is meaningful today might not be tomorrow. Meaning is quite subjective as well—what is meaningful for me may be meaningless to

⁶¹ Ibid.

⁶² *ibid*, 47.

you but something should bind our practices together. Our practices are bigger than ourselves: the command comes from an external source. Frymer-Kensky cautions, “We alter our communal path only when it leads us in directions that we now perceive as unrighteous, that can no longer express our love for God and can no longer lead us to a reality that we perceive as better.”⁶³ So long as the principles that guide the mitzvah are coherent with our understanding of Judaism, we must communally move forward with obeying the command.

She believes that Judaism must be flexible enough to recognize that on occasion, a particular rule within halakhah should no longer be considered as such. By demanding that we articulate the context of a law through a sacred narrative, she believes that we will have both the motivation to hold by the law or to change it if it no longer fits within the narrative. Her guiding principles for halakhah, which derive from the sacred narrative that she presents, are being holy; bringing the divine order; establishing peace and justice; and repairing the world.⁶⁴ These principles might lay the foundation for defining liberal practice within the vision for modern, liberal *middat chasidut*. These are very broad categories, though, which would likely be hard to unequivocally declare about a given law.

Like Frymer-Kensky, Rachel Adler believes that halakhah alone cannot be sufficiently modified properly to be acceptable to feminists. The narrative or the theology must be altered as well. “Praxis,” Adler writes, “is the issue that suffuses all theological categories; a theology requires a method that can connect what we believe

⁶³ Ibid, 48.

⁶⁴ Ibid, 77.

with what we do.”⁶⁵ Her method is not a narrative like Frymer-Kensky’s, though. She works toward formulating a multidisciplinary heuristic of sorts. Her goal is to view halakhah “...not as a closed system of obsolete and unjust rules, but as a way for communities of Jews to generate and embody their Jewish moral visions...”⁶⁶ Both of these feminist thinkers attempt to redefine halakhah instead of fix its internal structures. They are not satisfied with finding a way to eliminate certain rules that are offensive to women or others—they go further and recreate the framework. It is still a binding framework of a path, but in a new sense. It is a “communal praxis grounded in Jewish stories.”⁶⁷ The question, then, is who gets to decide which stories are in that corpus and how they are interpreted.

Adler wrestles with how the secular values of equal respect, inclusiveness, diversity, and pluralism clash with the subordination and exclusion of women, which she sees in classical halakhah.⁶⁸ As a result of this contradiction, she rejects the traditional halakhic system but still draws upon it as a basis for praxis and stories that lead to praxis. She worries about systems like Joel Roth’s *grundnorm* which she sees as allotting all their power to the law itself, so that no law will ever be truly infringing upon the principles that ground the system. She is searching for an authentic source of authority that guides that law. History alone or legal formalism alone (the basis of the *grundnorm*) is not sufficient. She wants a proactive halakhah that begins by defining its own understanding

⁶⁵ Rachel Adler, *Engendering Judaism*. (Philadelphia: Jewish Publication Society, 1998). Xxii.

⁶⁶ *Ibid*, 21.

⁶⁷ *Ibid*, 25.

⁶⁸ *Ibid*, 27.

of halakhah instead of first preserving certain principles or working to modify others.⁶⁹

Like Gordon Tucker, and in some ways, Frymer-Kensky, Adler relies on Robert Cover's idea of *nomos*—"a universe of meanings, values, and rules, embedded in stories."⁷⁰

She moves beyond Tucker and Frymer-Kensky by beginning to define the specifics of her *nomos*. It will be heavily influenced by her Jewishly-based understanding of what it means to be human. Difference would be depicted in terms of variation, not deviation⁷¹ in order to convey the sense of plurality that is inherent in feminism. It would also strive for moral justice under a social contract in the way that John Rawls creates a hypothetical pre-birth scenario in which all people are ignorant of their soon-to-be lot in life. They don't know if they will be born into wealth or poverty, into a family or into an orphanage. He urges people to attempt to treat one another as they might in that stage of life—with an ultimate, universal sense of fairness⁷². These values would be superimposed upon the Jewish community even though it is—for Adler—a covenantal community and not a social contract-based community, like the one that Rawls is positing. The discourse that would come out of such a theory is central to Adler's vision.

Adler offers to Jewish narratives that might serve as the *nomos* for her new understanding of halakhah. Both are about Yalta, the wife of Rabbi Nahman and the aristocratic daughter of the exilarch Rav Huna:

Ulla once happened to be a guest at R. Nahman's house. He ate a meal, led the grace after meals, and passed the cup of blessing to R. Nahman. R. Nahman said to him, "Please pass the cup of blessing [*kasa d'virkhata*] to

⁶⁹ Ibid, 34.

⁷⁰ Ibid.

⁷¹ ibid, 40

⁷² ibid, 41-42.

Yalta, sir.” He replied, “This is what R. Yohanan said: ‘The issue of a woman’s belly [*bitna*] is blessed only through the issue of a man’s belly [*bitno*],’ as the Bible says, ‘He will bless the issue of your [masc. sing.] belly [*p’ri bitnkha*] (Deut. 7: 13). It does not say “her belly,” but “your belly.”

So too a baraita [an earlier Tannaitic text] teaches: R. Natan said: “where is the proof-text in Scripture that the issue of a woman’s belly is blessed only through the issue of a man’s belly? As the Bible says, ‘He will bless the issue of your [masc. sing.] belly [*p’ri bitnkha*].’ It does not say ‘her belly’ but ‘your belly.’

When Yalta heard this, she got up in venomous anger [*zihara*], went to the wine storeroom and smashed four hundred jars of wine. R. Nahman said to Ulla, ‘Please send her another cup.’ He sent [it to her with the message]: “All of this is a goblet of blessing [*navya d’virkhata*].” She sent [in reply]: “From travelers come tall tales and from ragpickers lice.”⁷³

The context of this text is that is within a conversation about *Birkat HaMazon* (grace after meals). While the Talmud states here that women cannot be counted in a quorum of men, it does not yet answer the question of whether or not women can gather together and form their own women-only collective to recite the invitation to *Birkat HaMazon*. Specifically, though, our text directly follows a listing of ten rules about the cup of blessing over which the leader of the recitation of *Birkat HaMazon*. The last rule states that the leader (head of household or honored guest) will send the cup around as a gift so that everyone can share in its blessing. Thus, when Ulla cites R. Yohanan, he is saying that women cannot be blessed on their own because of their biological differences. The Deut. 7:13 proof-text that he then refers to correlates blessing with fertility, which we might associate with women, actually connects it to men. It is referring to fertility of the land, not fertility of new human life. Even if the cup is likened to the womb, a woman cannot create offspring without the participation of a man. But the original set of ten

⁷³ Ibid, 53. Brachot 51b, translation by Rachel Adler.

rules about the cup of blessing offers a series of spiritual and material blessings, not just one about fertility.

Yalta is rightly insulted when Ulla turns the blessing into one of patriarchy, so she goes and breaks the jars of wine because she does not want those to be blessed under such biased auspices. When he then offers her more wine, she takes it as an insult and insults him back—his offering wine is like a beggar offering his lice; a disgusting gift from someone who has nothing to give. She challenges the inherent power and meaning of the law. By preventing everyone else from having wine, she makes the ceremony impossible for the entire group. Adler argues that she is challenging the notion of law-as-meaning and exposing the fact that there is deeper meaning and affect to law besides the simple enacting of the rule.⁷⁴

The second story about Yalta can show that power can be used not only to restrict others' behavior, but to also empower them. It is as follows:

Yalta brought blood to Rabbah b. Bar Hana, and he ruled that it was impure. Then she turned around and brought it to R. Yitzhak b. R. Yehudah, and he ruled that it was pure. How could he do such a thing when a baraita [an earlier Tannaitic text] teaches: "If a sage ruled it impure, his colleague is not permitted to rule it pure. If he ruled it forbidden, the colleague may rule it permitted"? At first, [R. Yitzhak] ruled that it was impure. When she told him, "Every other time [Rabbah] has ruled for me that [blood] just like this was pure, and today he has a pain in the eye," R. Yitzhak then ruled it pure."⁷⁵

Here, Yalta is the person who is relying on the decision made by the rabbi—she needs to be declared pure, not impure. After one judge declared her blood impure, she went to the other and convinced him to declare it pure. One judge normally won't go against the word of another, but Yalta convinced the

⁷⁴ Ibid, 53-56.

⁷⁵ Ibid, 56. B. Niddah 20b, translation by Rachel Adler.

second judge that the initial judge only declared her impure because he was not able to think straight since he was in pain. Either we read it at the *p'shat* (straightforward) level, or we see Adler's more innovative reading of the narrative. Adler offers the possibility that Yalta is not strictly stating the facts or being manipulative. Instead, she is trying to avoid the stigma of impurity at any cost—she wants to find justice in a world where women are inherently more impure than men. Adler understands it as a “‘folktale of justice’ and view[s] Yalta as the trickster in the tale, the folkloric prankster who incarnates and unmask[s] what is arbitrary, chaotic, or unjust in our universe.”⁷⁶ She shows the reader that beyond following the letter of the law, power is what is at stake in enacting law. Power can be utilized by someone in the traditional role of a judge or in the non-traditional role of a woman like Yalta, bending the law to find what she deems fair.

But is Adler advocating that we turn the law upside down like this? Does she think that our narrative should be of women and others manipulating the law to achieve their personal sense of feminist justice? I think that rather than such an extreme view, she is advocating for that to be the bridge that will take us to the new narrative that will embody true justice and equality. Both Adler and Frymer-Kensky want justice to be the top priority in their new version of halakhah, which centers around a modified narrative instead of a stringent legal structure.

⁷⁶ Ibid, 57.

II. Feminists as Serious Jewish Thinkers: Committing to Jewish Legal Practice

Adler writes, “We have refused to disavow the sacred stories of Jewish tradition, to cease to converse with them or attempt to appropriate them. We have refused to reject summarily elements of our practice that other feminist theologians regard as patriarchal and dichotomizing: our sense of distinctness as a people, for example, or religious behavior affirming separation such as kashrut, Shabbat, or *havdalah*.”⁷⁷ She does not want to eliminate practices unless they conflict with the values of justice and equality. There is nothing inherently problematic about many ritual aspects of Jewish practice, like Shabbat, kashrut, or having a Passover seder, so they would continue to be a part of this new version of halakhah. Those practices are indeed part of our narrative and as such, they would be incorporated into our way of Jewish living.

However, she and Frymer-Kensky might argue for some adaptations to traditional Shabbat practice. In the vein of gender equality, they might argue that all Jews—both men and women—are obligated to light Shabbat candles. They might focus on making sure that one’s beliefs and one’s practice are in sync, but Shabbat observance is not likely to cause much discrepancy in that regard. For most people who do not observe Shabbat in some way, it is not because they do not think that there is religious significance to having a seventh day of rest. Instead, people who disregard the detailed rules of Shabbat observance tend to do so because they do not believe in the legal system that has created them—rules about refraining from work may seem relevant to the general narrative of Shabbat as rest from creation, but seeming minutia about using electricity or sorting or

⁷⁷ Ibid, 50. Adler is referencing “Feminist Reflections on Separation and Unity in Jewish Theology,” *Journal of Feminist Studies in Religion* 2 (Spring 1986), particularly T. Drorah Setel, 113-118, and Marcia Falk, 121-125.

cooking may not fit into their personal narrative about Shabbat. It could seem too extraneous.

Both feminist thinkers discuss the importance of not dismissing tradition unless it conflicts with the values of the feminist Jewish narrative. While they might be more permissive than legal formalists like Joel Roth in specific rules of Shabbat, they would not be willing to dismiss Shabbat itself. Some could even argue that the Shabbat narrative—of rejuvenation, creation, rest, reflection, and refraining from work—is one of the most significant narratives that bridge toward the ideal world of justice. For in Shabbat, we are able to see a glimpse of the perfection in the world-to-come.

III. Feminists as Serious Liberal Jewish Thinkers: Overturning a Jewish Practice

Tikva Frymer-Kensky explains that her “contemporary theory of halakhah is informed by the very principles that feminism holds most dear: the importance of community, the ethics of care, the full status of women, the value of diversity.”⁷⁸ As such, she must overturn parts of Jewish law that others would not. She does not try to find a way for gender equality to fit within the current legal system, as it is so far removed from the traditional functioning of the gender roles in halakhah. Instead, she defines the principles that guide her narrative of halakhah and eliminates those laws that blatantly contradict those principles. For example, mutuality is a guiding principle for her halakhah (understood as a way to God) but the traditional marriage rite of *kiddushin* enacts a man acquiring a woman to be his wife. This ritual is contradictory to the concept of mutuality, which Frymer-Kensky sees as a significant characteristic of holiness. Thus, she asks if the wedding should be modified to fit the ideal of mutuality. “It may not be

⁷⁸ Tikva Frymer-Kensky, “Halakhah, Law, and Feminism.” *Conservative Judaism*, 47, 2 (1995): 52.

proper to act out in a ritual drama a concept of marriage which horrifies us when it is spelled out.”⁷⁹ While she does not propose a new concept of marriage, she clearly is in support of change for the sake of mutuality and gender equality.

Rachel Adler also questions the use of *kiddushin* in marriage and takes the criticism to its next step by proposing an alternative: a *Brit Ahuvim* (Covenant of Lovers) ceremony and ketubah-like document that is a ritual marking love instead of acquisition.⁸⁰ She works with existing models—narratives—within the Jewish tradition and reframes them from a notion of partnership in a business model to making it fit into the context of marriage. She determines that the language of *sheva brachot* (the seven blessings said during or after a marriage ceremony) expresses sanctification through holy coming-together while *kiddushin* demonstrates sanctification through separation.⁸¹ The separation in *kiddushin* is overwhelming—the woman is separated from her family, she is dealt with and “acquired” as a separate entity from her husband and remains that way, and they are not entering to marriage as a single unit but as two people under the same roof. And yet, that is the only construct for marriage in the Jewish tradition. It is quite radical for Adler to propose an entirely different ritual instead of a modified version of *kiddushin*, but she is enacting her theory—she is bringing to life her new narrative. She believes that the rhetoric of “holy coming-together” needs to supercede that of separation. *Sheva brachot* supercedes *kiddushin*, so she uses that as her model. Adler operates by taking a different framework from within Jewish tradition and recontextualizing it.

⁷⁹ Tikva Frymer-Kensky, “Toward a Liberal Theory of Halakhah.” *Tikkun*, volume 4, number 10 (1995): 48.

⁸⁰ Rachel Adler, *Engendering Judaism*. (Philadelphia: Jewish Publication Society, 1998). Chapter 5 – p. 169-207.

⁸¹ *Ibid*, 190.

Frymer-Kensky takes a slightly different approach to rationalizing why change can happen. In articulating the need to change Judaism's stance on homosexuality, she discusses how Torah prohibits some things that we choose to still do and it commands some things that we don't do, like animal sacrifice. The precedent for change is there, though not in these cases. "Perhaps," she says, "this is another instance in which the path upon which our ancestors set out now leads in a direction that invalidates and hurts members of the community and that the path must be redirected to be more appropriate to our vision of ourselves and God."⁸² When a praxis or rule within our tradition leads to the pain of others—or particularly their subjugation within the Jewish community—Frymer-Kensky feels a command to change the path.

By definition, the feminists discussed here are giving more weight to justice and the wholeness of humankind than to the traditional halakhic discourse when the two are pitted against each other. Yet they do not aim to create an entirely new tradition. They want to stay as much within tradition as they can because they recognize it as a significant narrative in itself—a lengthy attempt at reaching God and God's ways. Their feminist narratives are perhaps branches of that but not entirely separate.

IV. Maximalists? Examining the Question of *Niddah*

For both Adler and Frymer-Kensky, mutuality is of utmost concern. *Niddah*, at least as traditionally understood, is not a legal category that embodies mutuality. In fact, it very much places the woman in an impure state on a regular basis while the man does not undergo a similar status change. In this regard, one might assume that they would disregard *niddah* entirely. However, they also both attempt to hold onto traditions that

⁸² Tikva Frymer-Kensky, "Toward a Liberal Theory of Halakhah." *Tikkun*, volume 4, number 10, 1995. 77.

are not deeply troubling. Since Rachel Adler does away with *kiddushin* because of its acquisitional nature, she may also eliminate it. She articulates her frustration with its place in Jewish society through her interpretation of the second Yalta story (see above). In that respect, she is not a maximalist. She will give up tradition to make sure that there is nothing in our praxis that contradicts her theology of feminism and justice.

Because both Adler and Frymer-Kensky are comfortable with eliminating or entirely recreating a ritual that does not fit within their framework of principles, I would argue that neither of them would reframe the concept of *niddah* into something that seems more about love or holiness than separation. The responsa written in the Conservative movement about encouraging *niddah* practice either kept the original construct of purity and impurity between man and woman or reframed it as a question of *kedushah*—holiness via separation. Adler and Frymer-Kensky are more radical in this regard—and arguably less maximalist—but they also do a very good job of upholding the values that underlie their view of Judaism.

In the context of discussing how women have always had some role in molding halakhah, Frymer-Kensky cites BT Niddah 66a and Berakhot 31a in order to show that the Talmud claims that women actually extended the monthly amount of time that they were to be away from their partners by a week. Why might they have done that? Would that be their own form of creating a *siag l'Torah* (fence around the Torah) so that they might appear to be more pious? Or would it show their husbands that they have the utmost concern for maintaining their partner's purity? If it is the former idea, then it is actually an act of empowerment, but if it is the latter, then the women may have fallen further into subjugation.

The other topic within the question of *niddah* that could arise particularly within this feminist construct is the issue of other categories of domestic relationships besides a man with a woman. Would two women in a committed relationship need to observe a modified type of *niddah*? Would two men have any sort of parallel obligation? What might an egalitarian way be to mark the cycles that our bodies experience without creating a dichotomy of purity and impurity? Could the man and the woman each immerse, as Joel Roth suggests? Or does immersion into the *mikveh* become a ritual that is no longer used for marking the end of a menstrual cycle but instead for marking other moments of physical or emotional significance, in the way that Adler took a business construct and transformed it into a marriage rite?

Chapter 5: Gordon Tucker

I. Theory

Gordon Tucker proposes an alteration of the halakhic system that fits within the broad framework of halakhic discourse and yet is also quite liberal and innovative. He sees the significance of precedent in Jewish practice but also defines law itself in a unique way that allows for a broader interpretation than a system based strictly on fitting new questions into old categories of laws and precedents. Precedence cannot be the only thing that defines our current practices; law and our interpretation of it should not be completely static. Tucker says that, “its preservation must not simply be a reprise of past decisions and interpretations, but rather an enterprise, at least on occasions that call for it, in improvising on established themes...[Precedent] will most often be not only a guide but also a template. But sometimes it will be a reference point from which innovation will proceed because careful and respectful innovation is what is demanded.”⁸³ Wrestling with the legal precedent is necessary, but we do not need to always maintain that precedent if there is a serious and legitimate reason from within the tradition for change.

Precedent, it seems, can be found both in halakhah (law) and aggadah (narrative). Our narrative is both a lens through which we view law and a source of law itself. Tucker creates the space for narrative to give way to law because he believes in a theology in which Torah and the resulting legal works are not solely jurisprudential texts that are delineated straight from God to us—the texts are our attempts at bringing God’s vision into reality.

They are “...not a record of commanding utterances from God, but rather

⁸³ Gordon Tucker, “Arguments Concerning Judaism and Homosexuality.” 13.
http://www.rabbinicalassembly.org/law/teshuvot_public.html

a record of the religious quests of a people, and of their understanding of how God's will commands them. The long-standing – and understandable – tendency to divide up religious literature into halakhah (law) and aggadah (narrative) has thus always been a mistake....The ongoing, developing religious life of a community includes not only the work of its legalists, but also its experiences, its intuitions, and the ways in which its stories move it. This ongoing religious life must therefore have a role in the development of its norms, else the legal obligations of the community will become dangerously detached from its theological commitments.”⁸⁴

Tucker takes Robert Cover's idea of narrative as law and applies it to Judaism. He, like Cover, does not believe that any narrative in our own contemporary community can flippantly be read back into the text and the tradition. He wants to follow the law and the traditional halakhic methods while also being able to integrate the theology, ethics, and morals that have become normative, at least on some level, in our community and in Jewish theology in general. While it may seem like an utter break in tradition, it is not necessarily so. He is simply arguing for a different understanding of law, which he takes from the secular legal world—an approach that

Positivism, which we shall see is the basis for Joel Roth's approach, is the idea that law is interpreted exactly as it is posited in codes or other legal documents. If there is a law prohibiting or permitting something, then that is how it much function. However, Tucker accurately argues that there are certain critical issues for which this is not sufficient. Sometimes the law itself needs to be altered because the community realized a new moral truth that they had not yet acted upon—even if the moral itself has been a part of the community's values. Tucker cites Cover's explanation of the civil rights movement, in which Americans realized the injustice in the current laws and acted to overturn and rewrite them.

⁸⁴ Ibid, 19.

If citizens of the community could not feel a sense of authority in the law itself—not just the lawmaker or lawgiver but the standing of the law in its own right—then they would be coerced into following it instead of obeying it of their own volition. It is upon those citizens to change the law so that their beliefs and their legal systems are in line. The civil rights movement was based in values inherent to our Declaration of Independence and Constitution that all men are created equal. So if we can find a persuasive, substantially authoritative narrative that holds true to the values of the community, then it is not just our right but our duty to reinterpret the larger notions of law and reject the positivist laws that are incongruous with our beliefs. Cover offers an empowering vision by saying that, “Our lives constitute the bridges between the reality of present official declarations of law and the vision of our law triumphant.”⁸⁵ This gives way to a much more active role in legal interpretation, but still does not abandon the usual legal system without finding sources within tradition—the changes must be made from within.

II. Tucker as a Serious Jewish Thinker: Committing to Jewish Legal Practice

Elliot Dorff and Gordon Tucker take similar stances in terms of approaching the tradition with serious level of commitment and obligation. Together, they wrote a responsum permitting the usage of taping or recording devices during Shabbat or Yom Tov.⁸⁶ As such, they clearly start from the assumption that in order to be permissive on those Shabbat behaviors, there needs to be an argument that stems from the halakhic process. Several months before he wrote the responsum with Dorff, he wrote one about

⁸⁵ Robert Cover, “Nomos and Narrative,” 97 *Harvard Law Review* 4 (1983): 47.

⁸⁶ Elliot Dorff and Gordon Tucker, “On Recording Shabbat and Yom Tov Services,” September 1989. http://www.rabbinicalassembly.org/law/teshuvot_public.html

whether or not a remote audio/video system could be used on Shabbat or Yom Tov in order to maximize the number of people who are able to participate in the services.

In the same way that he later argues that it is acceptable in only certain circumstances to record during Shabbat, he does not simply allow video projection in favor of upholding the value that more people should be able to experience the prayer services that the clergy are leading.⁸⁷ He does acknowledge the importance of that, but that is not enough for him to bend the laws. Since the question of audio and video projection was not present in rabbinic times, he has to examine the how such projection would be permissible or impermissible according to the current system of laws. He does not alter any of the laws, but instead explores how those laws might be interpreted in light of current technological innovations.

He explains that praying in such a way is very much against the ideal, but it is still permissible under certain guidelines if there is truly no other alternative. He addresses the issue of whether a tape is actually being recorded and made in the process as opposed to only being projected onto a screen; if it is both being projected and recorded, then he prohibits it, even though he allows a very similar practice several months later in the Dorff/Tucker teshuvah. Later, he tackles questions of if sound or images are actually being created—and as such, if this would be against the laws of Shabbat—as well as if there would be a problem with putting the equipment on a timer before Shabbat, and if this sort of prayer experience would actually fulfill one's obligation to pray in the first place. And would it lessen the sanctity of the service?

Ultimately he permits it as long as no permanent tape is being created, the

⁸⁷ Gordon Tucker, "The Use of a Remote Audio/Video Monitor on Shabbat or Yom Tov." February 1989. http://www.rabbinicalassembly.org/law/teshuvot_public.html.

mechanisms are set up on timers so that no one needs to start or stop them, the equipment is inaccessible for repair if it should break (or someone who isn't Jewish is appointed beforehand to address that problem should it arise), and there is no distortion in audio or visual parts of the system.⁸⁸ The underlying concerns for Tucker here are both the legalities of the action and the spiritual ramifications—will it alter someone's experience? Will it need to be repaired if it breaks, and as a result, be violating an aspect of Shabbat law? Would there be a way to set it up so that it can operate on its own and not cause someone to perform acts of *melacha*? If Tucker had not been able to find a way to make this permissible without outwardly violating the principles and rules of Shabbat, he probably would not have allowed this. He addresses issues with a seriousness in terms of the traditional laws, the legal methods, and the changing trends and needs of our society today.

III. Tucker as Serious Liberal Jewish Thinker: Overturning a Jewish Practice

Gordon Tucker's teshuvah to the Conservative movement's Committee on Jewish Laws and Standards, had it been accepted—would have not only fully overturned the ban on homosexual practice but also posited a new vantage point from which to operate within halakha. Tucker explains that in regard to a question like the full acceptance of people regardless of their sexual orientation, “the logic of the system and its precedents do not fit well with the personal experiences and narratives of gay and lesbian Jews, and with the growing moral senses of the community.”⁸⁹ While Tucker could have chosen to abandon the system entirely at this stage and instead simply give standing power to their

⁸⁸ *ibid*, 294.

⁸⁹ Gordon Tucker, “Arguments Concerning Judaism and Homosexuality.” 12. http://www.rabbinicalassembly.org/law/teshuvot_public.html.

narratives he recognizes the significance and authority of precedence in Jewish law.

Without giving weight to precedence, then there might be little continuity of practice and law over time.

Unlike Dorff, whose solution is to allow for a leniency within the halakhic system by inserting morality and theology into its construct, Tucker creates a different approach to halakhic process entirely. Before he rethinks the legal system, he first reasons away the impossibility of the theological conflict in Leviticus 18:22 by utilizing a non-orthodox understanding of revelation. The words of the Torah generally cannot be done away with because they are understood to be the literal words of God and to do away with God would be hugely rebellious and problematic to say the least. Even if they are not considered to be the direct words of God, there is an extra level of legal stringency known as *d'oriata* (as opposed to *d'rabanana*—sources from rabbinic times) that is often applied to biblical texts or sources that the rabbis attribute to the bible even if they are not actually there

In a more liberal understanding of Torah, though, the belief that the Torah is divine does not necessarily mean that it is entirely God-given and unchanged since Sinai. Tucker cites Heschel, who tells us that, "...whatever hand wrote the Torah included the 'finger of God'..."⁹⁰ Therefore, the Torah is significantly based on God's word, but over the course of time, may also developed historical or human-based currents to its words. Tucker claims that the Torah is our first, and by extension, our most significant, expression of God's will as illuminated in human language, but this portrayal of God's

⁹⁰ Abraham Joshua Heschel, *Heavenly Torah*. (Translation by Gordon Tucker). (New York: Continuum, 2005), 666.

will is not necessarily perfect and infallible.⁹¹ The implications of this are huge.

Anything can then be reinterpreted. Understanding God's true will, beneath the barriers of human language, becomes that much more complex. It then is not as simple as merely following the letter of the law—it involves our own input into the process.

Tucker also provides examples of biblical commands that are not acted upon and realized as concrete law. The verse Exodus 21:12 instructs, "He who fatally strikes a man shall be put to death." Instead of applying this as a universal call for capital punishment, it has been used only sparingly based on context and scope of the situation at hand. Killing another in self-defense has been permitted throughout time even though it contradicts the words of Exodus 21:12. Further, some laws are overturned post-biblically because of their severity or immorality. When the writers of the Talmud realized that parents would not stand for the injustice of stoning a child because of an excessive desire for food and wine, they declared that no one had ever been condemned to enacting this law of the "stubborn and rebellious son" and it would not be upheld in the future either.⁹²

Yet if these rules are not meant to be followed, then what are they doing in our sacred text? Tucker explains that they are for the inherent benefit of the dialectic—*d'rosh v'kabel s'char*—the intellectual and spiritual dialogue that we must pursue with the text in order to make decisions about them. This is a truly liberal approach to revelation and text, but by still referencing previous changes to biblical law, it holds onto tradition at the same time. So is this allowing for a minimal traditional approach or a maximal liberal approach? At this point it may be minimal traditional but as the rest of Tucker's theory becomes apparent, it will become more and more of a maximal liberal

⁹¹ Gordon Tucker, "Arguments Concerning Judaism and Homosexuality." 6.

⁹² Ibid, 7.

approach.

Robert Cover's theory of law as nomos and narrative gave Tucker a way to reframe the law so that it reflected the values inherent to the narratives that established the law. Tucker ultimately creates space for the full acceptance and embrace of gays and lesbians into Jewish life in exactly that way. He first takes current narratives of gay men struggling to be a part of the observant Jewish community and while staying true to themselves. They cry out for authenticity and wholeness. They want companionship and cannot have it, to no fault of their own. Tucker acknowledges that this too is a strand of narrative even if it is not documented in canonized Jewish text. He brings in the motifs that were used and accepted more broadly when dealing with *mamzerim* (the child born under certain parental circumstances, who, because of this status, cannot be a full member of the Jewish community) and *agunot* (women whose husbands will not grant them divorce, and hence cannot remarry)—(1) it is not good for someone to be alone and (2) the critique that certain rules can give birth to innocent victims.⁹³ He moves beyond that, though, by including a lesser-acknowledge aggadic text. Babylonian Talmud Baba Batra 119b offers a midrash on the daughters of Zelophehad, who ask to have access to their father's inheritance since he has no sons to pass it onto and daughters generally do not inherit land or other assets in the Bible.

God supports their request and then the text continues, saying, "God's compassion extends to both males and females. God's compassion extends to everyone, as it is written: 'who gives food to all flesh,' (Psalms 136:25) and 'who gives the beast its food' (Psalms 147:9). And, it is also written, 'The Lord is good to all, and His mercy is upon

⁹³ Tucker, 26.

all His works' (Psalms 145:9).” Compassion becomes synonymous with providing food. Tucker goes beyond that, though, in order to link it with the question of same-sex relationships. He uses a midrashic interpretation of *lechem* and reads as a euphemism for sexual relations; it does not just provide satiation in terms of food but instead extends to sexual satiation as well.⁹⁴ If that is indeed the case, then this text becomes the aggadic basis for not just allowing for full inclusion of gays and lesbians but also for accepting the entirety of their sexual expression—which could not be done in any other sort of halakhic framework. Washofsky and Borowitz could not ground it in a textually-based halakhic proof and Dorff, Roth, and Novak cannot provide an allowance for total sexual expression. And ultimately, this all stems from our newly nuanced understanding of God’s compassion.

Since we know that God is compassionate and we know that the outcome of upholding the bans on accepting gays and lesbians is uncompassionate and hurtful, then the law must not fit “...[f]or God...is good to all, and being good minimally means not imposing undeserved agonies and unfulfillable yearnings (yearnings, that is, that do not harm others) on any creature.”⁹⁵ Compassion drives Tucker’s viewpoint, but not compassion as a standalone outside value; for him, compassion comes from within because it is God’s compassion that must drive our legal structure and our own daily interactions.

Both Dorff and Tucker rely on values, theology, and morals that are inherent to our tradition but they use those themes differently. Dorff takes the theological or ethical

⁹⁴ Tucker references Genesis Rabbah on Genesis 39:6. Translations and citations are Tucker’s.

⁹⁵ *ibid*, 29.

ideas that conflict with a certain law and attempts to synthesize the two by peeling back layers of restrictions from the commandment, but he usually leaves some layers behind. He is operating from a very liberal but still positivist model, even though his model is heavily influenced by aggadah and the beliefs that result from it. Tucker, on the other hand, moves away from the entire positivist notion and embraces a wholly new model. Tucker's model can do what Dorff's can't—it can eliminate the incongruity of banning anal sex while embracing gay and lesbian relationships in general. Tucker's approach seems like a more holistic treatment of the people at hand; they can be fully released from their struggle instead of a limbo of some rights but not all.

IV. Maximalist? Question of *Niddah*

Tucker does not see *niddah* as a part of Jewish living that needs to be abolished. He does, though, support Susan Grossman's teshuvah, which both reduces the number of days until the woman can resume sexual relations to seven days after the beginning of her period and reframes the language of *niddah* from one of impurity and purity to one of holiness through separation. He voted to pass Grossman's teshuvah but voted against Miriam Berkowitz's and Avram Reisner's teshuvot on *niddah*. Grossman is able to remove the days of *zivah* from the number of days of separation because she understands it as a customary stringency in the same way that Joel Roth interprets it. Tucker likely finds this change compelling for somewhat similar, but not identical, reasons. He too is comfortable with removing extra stringencies to allow more people access to certain rituals, as we saw with his teshuvot about using audio/visual equipment on Shabbat or Yom Tov.

But he uses that rationale sparingly. He is more moved to create change in halakhic

practice when it fits with shift in narrative, as he did in his teshuvah on homosexuality. He believes fully in egalitarianism and even states that embracing it was not a turn away from tradition but actually the realization of an aggadic narrative (Zelophehad's daughters).⁹⁶ Believing that women carry an impure state on a monthly basis may seem counterintuitive to someone who completely embraces egalitarianism. So it seems understandable that he supports the teshuvah that upholds that general practice of *niddah* while also reframing it as much more gender-friendly.

Women should not be viewed as “other” in Jewish society. Grossman arguably also alters the narrative that surrounds *niddah* when she suggests that we “turn from the concept of ritual purity and impurity to that of holiness, something to which we all strive and which reflects positive connotations of the highest order.”⁹⁷ Perhaps if Tucker felt that *niddah* were an oppressive construct that had no way of being redeemed or reinterpreted, then he would have dismissed the laws of *niddah*. At the same time, Tucker remains committed to tradition so long as it does not undermine another narrative of human equality or an similarly crucial value.

⁹⁶ Ibid, 21-22.

⁹⁷ Susan Grossman, “Mikveh and the Sanctity of Being Created Human.” 18.
http://www.rabbinicalassembly.org/law/teshuvot_public.html

Chapter 6: Elliot Dorff

I. Theory

The merging of values with Jewish law also influences the way Elliot Dorff envisions halakhah for today, just as it has influenced the theories of Borowitz, Washofsky, Tucker, Adler, and Frymer-Kensky. He sees the nexus of change and tradition to be akin to understanding Jewish law as a living organism—that both changes and stays constant. But perhaps more centrally, he believes that Jewish law as “an expression of the love that we Jews have for both God and other human beings.”⁹⁸ That changes the focus from the traditional orthodox construct that centers around how to derive practice from pre-existing legal codes to demanding instead that practice be an expression of our love for God for each other. Love does not exist in a vacuum though; Jewish law as mediated through love has many pieces that stay static and others that must change as time moves forward. Dorff uses the idea of a body and soul to explain this: just as we show our love to another person both through our physical bodies and through our souls (emotions, passions, etc), so too does law have that interplay. It is like halacha and aggadah. It is the laws with their evolution and the spirit and emotion that either enhance or depreciate them.

The physical body or living organism metaphor to Jewish law shows how law operated much like the various systems that make up a well-functioning human body. Dorff first discusses change in the human body. With the exception of brain cells and eggs in a female, all cells in the body are actually replaced multiple times during one’s lifetime. Some change daily and some take months to regenerate. But those changes do

⁹⁸ Elliot N. Dorff, *For the Love of God and People: A Philosophy of Jewish Law*. (Philadelphia: Jewish Publication Society, 2007), 45.

not actually affect the organism's daily functioning—blood cells are replaced with identical blood cells, liver cells create new liver cells, and so on. Other changes are much more dramatic, though, like birth, puberty, or pregnancy. Dorff correlates those with *takkanot* in Jewish law like those that moved Judaism to revolve around the synagogue instead of sacrifices once the temple was destroyed. More often, we face smaller challenges—a stress fracture from too much running or obesity that developed over a year—and our body needs to adapt and heal. We encounter social realities that gradually bring the impetus for change within the Jewish sphere. As feminism started to demand equality in the home and the workplace, the Jewish community realized that egalitarianism had to find its way into Jewish law as well. This was not caused by an overnight shift but by something more gradual. Its “cure” will also be gradual.

As Dorff continues to explore this metaphor of Jewish law as a living organism, he examines internal and external influences on the law, resistance to outside factors, identity, period of rest and inactivity, and the ultimate birth and death of whole organisms.⁹⁹ He explains that changes can come from either the outside or the inside—societal pressures or internal developmental changes that a person goes through as she develops. While organisms and legal systems are resistant to external change, they cannot be fully immune to it. If they ignore it, they will not be able to function in the larger world. Dorff says that animals adapt based on instinct. For us, too, it is a choice that must be made based on our own judgment. This notion of comparing law to a living organism shows how the system can retain its identity while individual components

⁹⁹ Ibid, 61-76.

change and adapt over time. This whole construct is still within the realm of understanding law as the physical body of an organism.

The soul of Jewish law is not about how law adapts to the external world or how it goes through periods of more and less active change. Instead, it is about covenant and how we ensure that our interpretation of law reflects the covenant from Sinai that we hold with God and therefore with other Jews and with the world at large. Dorff presents the three types of covenant that the Bible presents—a suzerainty treaty, a marriage, and a parent-child relationship—as a basis for the duties that become Jewish law¹⁰⁰.

Obligations arise from covenantal relationships, whether rooted in governance, love, or familial ties. Interpretations of law that arise as new questions occur should then be based on these values of covenant and the above understandings of Jewish law as an adapting yet individual organism. He does not believe in individual autonomy for interpretation of law, but instead upholds the notion of the *mara d'atra*, or regional governance, in which the rabbi or leader of a community can decide how to interpret a particular halakhic question. The members of that community, then in turn, follow the ruling of the *mara d'atra*.

Questions arise in Dorff's theory when the body and the soul begin to clash. What if the morality of the soul conflicts with the functionality of the body? In legal terms, what does someone do when his ethical beliefs contradict the inherited legal code? Jewish tradition “trusts the legal process to discern the moral path, teach it, and motivate people to follow it.”¹⁰¹ Because our theology demands that God is a moral God, we must use a morally sound lens to interpret law. Dorff finds that morality and theology are not

¹⁰⁰ Ibid, 96.

¹⁰¹ Ibid, 211.

simply ideas that can be derived from our legal discourse, but that they are instead “at the very heart of Jewish law.”¹⁰² In other words, when applying law to our own practical decision-making, the goal is for the outcome to be morally and theologically sound. Whether or not that is achieved becomes the test case for whether or not the ruling has been made properly. Our greater goal is to create a maximally moral practice while still adhering to the legal constructs. Theology and morality are not external factors that alter the legal process or invalidate it. Washofsky sees morality as an outside force that weighs into our decision making process—ethics from the secular world as opposed to ethics that are derived from within the Jewish tradition.

The next question is whether to interpret law based on individual rulings, thereby following what has been posited by a legal code (positivism) or to make decisions based on the situation surrounding a specific case. Dorff favors a casuistic or situational method:

“This case-based (“casuistic”) method also means that moral reasoning is not based on a mere hunch or on obedience to some authority figure; it is rather based on the decisions of rabbis who must present *reasoned arguments* for their decisions, with the facts and logic of those decisions open to public scrutiny and criticism, including by other rabbis and lay Jews. The linkages to past decisions and the exposure to public debate will strengthen the prospects that rabbinic decisions will be wise, having gained from the experience of many people in the past and present.”¹⁰³

However, there is more to this method than the reasoning and historical precedents. There must also be a sense of obedience to God, an authority figure of ours. The question is what God wants and how we can determine that.

¹⁰² Ibid, 225.

¹⁰³ Ibid, 216.

Defining a moral practice becomes challenging when some of what seemed moral centuries ago is no longer moral by our own standards. The rabbis reinterpreted biblical laws to fit their theories of justice and social understandings—so we can have a parallel process. Doing so is a dialectical exercise—from text to value and back. When specific laws contradict the principles of the Torah, the rabbis, or our own society, we face several choices. In some instances, Dorff suggests that we have the courage to break with tradition and defend the principle. In others though, we should use the traditional law to critique the conflicting practice.¹⁰⁴ He leaves the decision between the two methodologies up to the individual *mara d'atra* or decision maker for the community at hand. While he says that the rabbis used a similar process and even admits the objection of it being too imprecise, he himself must take a stance as to how flexible he can be with the law. When concrete law and general moral statements are pitted against each other, which wins out when Elliot Dorff is asked to decide?

II. Dorff as a Serious Jewish Thinker: Committing to Jewish Legal Practice

Elliot Dorff believes not just in laws themselves, but also in the rationales behind them. For example, observing Shabbat is an important commandment that is apparent in multiple places in the Torah, and then in many rabbinic texts that follow. While the idea of Shabbat as a day of rest is likely very significant to Dorff as a reason for observing it, it is not the only one. Many people in liberal circles have taken Shabbat to mean a day of rest and relaxation, which might be expressed as spending time with family, or doing rejuvenating activities that cannot fit into the rest of the week like getting a haircut or painting a piece of artwork or crocheting a sweater. He maintains the original rabbinic

¹⁰⁴ Ibid, 225.

restrictions on work during Shabbat, which would prohibit those activities, even though he acknowledges that they might be one's individual way of fulfilling Shabbat and therefore trying to honor God. He offers an example: "...using Shabbat to paint a picture...would violate the Sabbath in the very act of trying to honor it."¹⁰⁵ One's motivations to follow commandments are significant but they are not limitless.

Dorff suggests that motivations should include wisdom, moral knowledge and motivation, covenantal promises, our covenantal relationship of love with God, gratitude, preserving God's reputation—and ours, making our lives holy, enforcement, refining human beings, maintaining the world, identifying as members of a distinct community, and making life beautiful.¹⁰⁶ A combination of those reasons will lead to one's observance—sometimes driven by one and at other times by another entirely—but their multiplicity makes for a strong demand to keep Jewish law regarding Shabbat and many other areas unless it is in conflict with our theology.

However, Dorff is also willing to find ways to lessen the restrictions that are inherent to Shabbat. The Conservative movement passed a teshuvah in 1986 that allowed driving on Shabbat or Yom Tov, so long as the person was driving to synagogue or another holiday-related event like a meal. Similarly, he and Gordon Tucker wrote a teshuvah in 1989 that allowed, though did not encourage, the usage of recording devices for Bar or Bat Mitzvah ceremonies on Shabbat.¹⁰⁷ The main problem with this is that recording is still a relative of writing, which is one of the categories of *melacha* or

¹⁰⁵ *ibid*, 180.

¹⁰⁶ *Ibid*, 133-182.

¹⁰⁷ Elliot Dorff and Gordon Tucker, "On Recording Shabbat and Yom Tov Services" September 1989. Available at http://www.rabbinicalassembly.org/law/teshuvot_public.html

prohibited work on Shabbat. They say that if the synagogue permits it, then a non-Jew should do it, but where does that leave us? Condoning it or not? The ideas of Shabbat are clearly central to Dorff, and the restrictions on Shabbat are significant to him, but he finds a way to make leniencies, which still directly violate the law but might fulfill the intention of it, acceptable. In this regard, I am looking for a theory that is more maximal.

III. Dorff as Serious Liberal Jewish Thinker: Overturning a Jewish Practice

Dorff believes that congruity must exist between the theology and morality that are inherent to Judaism and the laws that guide our lives. If there is a significant discrepancy between the two, then he works to find a way to eliminate the practice or at least temper its severity. Because he is willing, at times, to take a stand against the traditional laws in order to uphold a value, he is a liberal Jewish thinker. Liberalism means being able to think about commandment and law as divine but not necessarily given by God in the precise form that we have it. Each thinker that is addressed here is both committed to Jewish law and committed to liberalism in varying degrees.

For Dorff, it is immoral to treat Jews and non-Jews differently—there is a Jewish notion of *s'tam yeinam*, which states wine becomes impure and unusable because non-Jews have been involved in its production and he eliminates that idea in a teshuvah for the Conservative movement's Committee on Jewish Laws and Standards¹⁰⁸. He comments on his own process: "it completely overturned the rationale for the prohibition of *s'tam yeinam* based on the notion that non-Jews were idolators and might have used

¹⁰⁸ Elliot Dorff, "On the Use of All Wines" YD 123:1.1985, http://www.rabbinicalassembly.org/law/teshuvot_public.html

the wine in their idolatrous practices. Previous rabbis (in particular, the Me'iri) had distinguished Christians from idolators for purposes of this law, but I went further, maintaining that the very idea of separating ourselves from non-Jews in this way is something we should not strive to do.”¹⁰⁹ The principle of integrating Jews and non-Jews into society is enough for Dorff to add extra weight to the opinions of earlier rabbis who had argued that Christians are not idolators, and therefore this restriction on wine does not apply to wine made by Christians. Dorff seems to believe that this should not be an issue at all.

His theory of applying larger principles of covenant and relationship to specific rulings seems to play a role here. As his notion of covenant—held together in part by love—applies to how Jews relate to God, to each other, and to outside communities, “Jews as a community should relate to non-Jews with love.”¹¹⁰ Just as with other philosophies about how Jewish life should be exhibited, he grounds this belief in text. He cites examples including Lev. 24: 22, “You shall have one standard for stranger and citizen alike, for I the Lord am your God,” and Lev. 19: 18, “Love your neighbor as yourself.” Further, he grounds his notions of social equality in ideas of rights. He admits that the tradition has some biased views against how to treat non-Jews and he hopes that we can overcome them. In one book, he writes, “May God help us reinterpret our traditions so that the nasty and chauvinistic elements in them no longer lead to suspicion,

¹⁰⁹ Email exchange on November 27, 2008

¹¹⁰ Dorff, *For the Love of God and People*, 94.

hatred, suspicion, abuse of the other, and even war; let them instead do what they were intended to do...mutual respect and cooperation...”¹¹¹

Perhaps the most timely and pertinent case through which to examine this is the question of homosexuality in Jewish life. Most recently, Dorff, along with Rabbis Daniel Nevins and Avram Reisner, submitted a *teshuvah* to the Conservative movement’s Committee on Jewish Law and Standards in 2006, which passed and was accepted into their accepted rulings on practice. The Jewish laws pertaining to homosexuality are based in Leviticus 18:22 and 20:13, “Do not lie with a male as one lies with a woman; it is an abhorrence” and “If a man lies with a male as one lies with a woman, the two of them have done an abhorrent thing; they shall be put to death—their bloodguilt is upon them,”¹¹² respectively. However, over the course of time, the laws widened and included not just anal intercourse between men (which is how the rabbis initially understood these verses) but also any form of gay or lesbian sexual expression. So Dorff, Nevins, and Reisner used their moral reasoning to peel back the prohibitions to their earliest—and least restrictive—form.

On the one hand, this made great practical strides in the Conservative world. By only prohibiting a specific act but not the entire relationship, it leaves space for other sexual and emotional expression. Kissing, loving another, and sharing in a committed union are all acceptable and open under this construct. It opened the doors for gay and lesbian Jews to openly be admitted to Conservative rabbinical schools. It allowed what had traditionally been condoned. But it is not enough. It does not openly accept the

¹¹¹ Elliot N. Dorff, *To Do the Right and the Good*. (Philadelphia:Jewish Publication Society, 2004), 95.

¹¹² JPS translations.

entirety of the relationship, since anal sex is a significant part of expressing the love that two gay men share. It lessens the severity of the law but it does not eliminate it. It opens the door partway, but not fully. Though Dorff states that in these moments of judgment, sometimes “we must have the courage to change the practice to reflect our own understanding of God’s will for us in our time,”¹¹³ it seems to me that if God wants us to fully embrace homosexuality, then Dorff does not quite bring us all the way. In a fully ethical construct, he would have completely broken with the Leviticus prohibitions.

In some ways, that is what I would support. But I also respect the integrity with which Dorff made his decision. He explains that he attempted to overturn the prohibition on anal sex as well, and even found that the verses themselves may refer only to bisexual men having sex with men, but ultimately felt bound to the interpretive Jewish legal structure of maintaining how the rabbis, in particular, interpreted Torah. He recognizes the tension between the need to have a functional sense of morality that undergirds the law and upholding the law itself. Dorff says, “...because I believe that the law must *balance* tradition and change, I sought a way within the bounds of the received law to enable gays and lesbians to celebrate their unions in a Jewish way in front of their families and community, to engage legitimately in at least some forms of sexual expression, and to be eligible to become rabbis and cantors.”¹¹⁴ The unanimous precedent against anal sex made Dorff hesitant to push the envelope even further and challenge Torah law. He explains that had there been lots of legislative discussion amongst the rabbis about the issue, then it might have been easier to overturn that ban as well. Perhaps then he would have acted differently. But the issue is even more nuanced

¹¹³ Dorff, *For the Love of God and People*, 230.

¹¹⁴ *Ibid*, 234.

for him—he knew that the committee that had decided whether or not to adopt his responsa would not embrace such a radical change. This seems to be the realia that set in for his decision-making. Politics.

I understand it and yet I also understand that Dorff is still “pained by the limits of what [he, Nevins, and Reisner] did.”¹¹⁵ His pain is lessened by two things: the knowledge that not all gay men engage in anal sex, so it is actually possible for them to live out his responsa, and the possibility of adopting a practice of silence about the prohibition unless the rabbi feels that the couple will actually follow it. This latter idea parallels a current practice among Conservative rabbis in which most rabbis will perform weddings without mentioning to the couple the fact that it is an abomination (*toevah*—same word as used for a man lying with another man as he would lie with a woman) to have sex while a woman is having her period because they assume that most couples will not adhere to Jewish purity laws. These two facts seem to skirt around the larger moral issue. If Dorff were making a decision about this issue without the confines of a policy-making body like the Committee on Jewish Laws and Standards, would his outcome have been different?

While I am arguing for maximalism, I believe that there are limits to that if one wants to stay within the borders of the liberal Jewish world as I do. Like Dorff, I think that morality and theology must be intrinsic to the law. A person might only opt into the Jewish legal system if she has a theology that accompanies it—the command and the commander cannot be fully separated. Similarly, if that person believes in a just, moral, ethical God, then she can only be true to her theology if she follows laws that she

¹¹⁵ Ibid, 235.

believes are given with that God-given sense of justice and equality within them.

However, should a law go against her sense of what is moral, as derived from Judaic values, then she should not just find a way to eliminate the most immoral parts, but be able to eliminate the entire construct that is unjust.

If equality amongst all people, or at least all Jews, is a Judaic value of *k'vod habriyot* or being created *b'tzelem Elohim*, and we understand that homosexuality is an inherent part of one's biological identity and not a choice, then that means embracing gay, lesbian, and straight people as equals. Dorff even states that, "any Jewish teaching that fails to recognize the sacred and unique character of each human being as created in God's image would fail Judaism's own moral test."¹¹⁶ That would then seem to demand overturning the entirety of the ban stemming from Leviticus 18:22 from within, while still holding onto all parts of Jewish law that do not conflict with such issues of equality and respect that are internal to Jewish values.

IV. Maximalist? Examining the Question of *Niddah*

While issues of equality between non-Jews and Jews or between homosexual and heterosexual individuals may break down the traditional law for Dorff, other issues do not seem to hold the same weight for him. This is where the question of maximalism comes in—when approaching issues that might be burdensome or challenging to modern norms but are also not as unethical as other topics. *Niddah*, or ritual purity laws, require a woman to refrain from coming into contact with her partner both while she is menstruating and for a certain number of "clean" days afterwards. Then she goes to the *mikveh* (ritual bath), ritually cleanses herself, and can go back to normal relations. Very

¹¹⁶ Ibid, 230.

few people in Rabbi Dorff's Conservative community observe the laws of *niddah* but that does not mean that no one *should* observe them. Yet he applies the same policy of strategically sharing or withholding this legal information from couples that he would marry as he does to gay couples that he might potentially perform a commitment ceremony—only informing a couple about the laws if he thinks they will actually observe them. So by not overtly enforcing it with couples, he seems to be creating a sense of leniency with it. He is using the principle that it is better for one to sin unintentionally than intentionally¹¹⁷, recognizing that the rabbi will not likely change the couple's sexual practices. He will share the rulings about *niddah* with those who he thinks will follow them, but not others. In not actively trying to convince all couples to observe *niddah*, he appears to subtly be condoning it.

And yet, at the same time, he voted to approve three different teshuvot that came before the CJLS about encouraging people to practice *niddah*, albeit with some modifications.¹¹⁸ Two out of the three changed the language from one of purity and impurity to instead focus on the holiness of relationships. The third kept the original language. It should be noted, though, that the language change is not because of an inherent problem with purity and impurity being related to women's status. Instead, the argument posed by Rabbis Grossman and Berkowitz is that the entire notion of ritual purity no longer holds without the Temple in our presence. Therefore, the practices themselves stay, but our impetus for upholding them—aside from the fact that they are commanded—is now different. In another change from traditional understanding of

¹¹⁷ Ibid, 236.

¹¹⁸ Teshuvot by Rabbis Susan Grossman, Avram Reisner, and Miriam Berkowitz are available at http://www.rabbinicalassembly.org/law/teshuvot_public.html

niddah, one of the two that changed the language still maintained the seven clean days of prohibited relations, while the remaining two *teshuvot* held seven days from the start of the woman's period—which then lessens the restriction on the couple and makes it less of a burden. If it is less restrictive and reframed in terms of maintaining holiness instead of cleansing the woman's natural monthly impurities, then more couples might adhere to it.

Does this make Dorff a maximalist? Since he respects the privacy of couples and admits that most do not adhere to this set of laws, he appears to be liberal. He acknowledges the challenges. But he also strives for increasing the observance of *niddah*, as he votes to pass this set of *teshuvot*. He views it as a way to connect to the miracles of lives, similar to the holiness language that is used in two of the *teshuvot*. It is a way to pause and give thanks to God for the “awesome potential for procreation”¹¹⁹ when the prohibited days are over. For him, it is parallel to the idea that we refrain from work on Shabbat in order to return to it renewed. He explains that “the old and new rationales given for these laws, taken together, have enabled some contemporary couples to see these laws as a way to enhance the ongoing holiness in their marital relationship—just as the Torah declared the purpose of these laws to be.”¹²⁰ So while he reframes the idea to make it more palatable to the liberally-minded, egalitarian, he does not dismiss its religious and legal significance. He is a maximalist, but he also allows for some flexibility within the law that absolute maximalists might not allow. That is, the permissive stance of counting days of restricted behavior between partners to start when

¹¹⁹ Dorff, 156.

¹²⁰ Elliot N. Dorff, *Love Your Neighbor and Yourself*. (Philadelphia: Jewish Publication Society, 2003), 87.

menstruation begins instead of when it stops. Even though this is based on a biblical precedent, it is still a leniency.

I feel like he presents a certain kind of inconsistency because he holds true to the importance of *niddah* but does not try to compel others to do it, unless he knows from the outset that a couple cares seriously about religious law and therefore would likely uphold it. There is also a challenge with voting for contradictory teshuvot, but that is an issue of process within the Conservative movement and not with Dorff himself. The CJLS operates under a structure in which multiple disagreeing opinions can be accepted within the same corporate framework. As long as one person who is voting sees legal and Judaic validity to the teshuvah, he or she could support it alongside someone else who votes for a teshuvah that contradicts the former one.

There is nothing inherent in the laws of *niddah* that contradict Dorff's standards of theology and morality. He is driven by a connection to the law and the legal system but openly embraces the ability to reframe the reasons for the law and will even revert to earlier or biblical practices. Dorff is not a maximalist in the sense of upholding the entirety of the rabbinic law but he does find a balance between liberal values and less-stringent opinions within the tradition. The problem with this approach, though, is that it may end up seeming disconnected or a bit hypocritical in that he makes compromises for gays and lesbians but does not fully bring their rights to fruition. And yet, when issues like *niddah* come up that aren't as ethically compromising, though they have a basis in significant gender differences, Dorff upholds them.

Chapter 7: Joel Roth

I. Theory

Unlike Eugene Borowitz, Mark Washofsky, or Gordon Tucker, Joel Roth is a positivist. His interpretation of Jewish law maintains that a legal decision must come from within the laws that have already been posited. He values not just the decision in itself but its potential power for setting precedent. According to Roth and other positivists, the system itself is self-contained. He focuses on the systemic principles that govern the halakhic system. A *grundnorm* roots the system in a larger context; it is the validation for the existence of the system itself. For Roth, presupposing the sheer existence a *grundnorm* requires a leap of faith, and since faith is already at play, the question of whether or not the narrative of the *grundnorm* is historically true does not actually matter.¹²¹ True or false, Roth believes that any *grundnorm*-based legal system is rooted in some level of faith.

Thus, he explains that the halakhic system is based on this *grundnorm*: “The document called the Torah embodies the word and the will of God, which it behooves man to obey, and is, therefore, authoritative.”¹²² Yet if one does not have faith that the Torah is actually the word of God, the authority of the halakhic system is not diminished—the system can function properly by simply following the rules that were, at one point, derived from Torah, based on the supposition of the *grundnorm*. Because the system itself is all-inclusive, and governed by principles in addition to the initial notions of faith, it can hold itself together on its own.

¹²¹ Joel Roth, *The Halakhic System*. (New York: Jewish Theological Seminary of America, 1986), 9.

¹²² *Ibid.*

For Roth, there are two possible questions that someone engages with when he is making a halakhic decision: questions of law and questions of fact. Questions of law occur when the decisor is positive that the law applies to the situation at hand. The decisor investigates what the law prescribes and then follows it. Questions of fact are more complicated. They are questions that have not already been authoritatively determined by the law. Such questions exist when a new situation arises that does not clearly fit with the law—the decisor must determine whether or not the definition in the law can be applied to the actors in the new situation. Regardless of which type of question is being addressed, Roth believes that the system itself can provide guidelines for answering all issues. The data about a specific topic may come from outside, like the scientific information about whether a certain fish has fins or scales, but the halakhic system determines whether that information leads to a ruling of a kosher or an unkosher fish.

It is because of this all-encompassing nature that beliefs like modern ethics or social change are considered to be outside the system. Of the many principles and legal norms that guide the system, one of those principles address how ideas that are not necessarily inherent to the system might affect the decision making process. Unlike Elliot Dorff, who sees ethics and gender and other societal evolutions as internal to the tradition, Roth sees them as entirely external to halakhah, yet he does grant them a place in the halakhic process. Roth categorizes these extralegal factors as medical/scientific, sociological/*realia*, economic, and ethical/psychological.¹²³ While these factors can be used to abrogate legal norms, they cannot necessarily overturn clearly stated laws. Roth

¹²³ Ibid, 234.

is fairly clear about the limited amount of power that these extralegal factors hold in terms of altering a law. It is much more probable that they will successfully be able to limit the scope of a permissible practice than allow a practice that was previously forbidden. The latter occurs very rarely.

II. Roth as a Serious Jewish Thinker: Committing to Jewish Legal Practice

Shabbat is an essential commandment that originates in the Torah and becomes much more extensive in rabbinic law. Joel Roth believes in upholding Shabbat observance beyond the basic element of rest and refraining from work. He cares enough about the commandment not working on Shabbat that he created a lease document for a Jew to lease his company to a non-Jew for Shabbat so that it could not be a huge economic loss for the business on Shabbat and yet still be completely upholding Shabbat laws. The contract would begin a few hours before Shabbat and end a few hours afterwards¹²⁴. By creating such a mechanism, he finds a way to meet the needs of his constituents while also demanding that they keep Shabbat. Had he not had such a commitment to the legal construct itself, he simply could have said that rest is a significant part of Shabbat and that work must be avoided. Instead, he works within the law to create a space that still demands observance but also proves some flexibility within the law.

III. Roth as Serious Liberal Jewish Thinker: Overturning a Jewish Practice

Joel Roth will only overturn a practice if he can find a way to make the new practice still adhere to the laws as they stand. Like Borowitz, Washofsky, Dorff, Novak and others, he believes that Jews and non-Jews should be treated equally when addressing

¹²⁴ Norman Krivosha and Joel Roth, "Shabbat Lease Agreement" OH 243 1995a
http://www.rabbinicalassembly.org/law/teshuvot_public.html

issues of saving a life or helping one another. However, he is again approaching the issues from a positivist viewpoint. He does not extend that equality to other realms, like the synagogue. In fact, he actually states that even an intermarried Jew—someone who is Jewish yet has a non-Jewish partner—should not receive an aliyah to the Torah because that person’s marriage threatens the community.¹²⁵ He does not modify the laws to prove that Jews and non-Jews are equal in all aspects of life, but he does discuss the sociological/*realia* that might play into how someone interprets the law. When Jews and non-Jews live in a society in which they are equally protected and governed, the Jews should interact with and offer help to non-Jews just as they might offer help to us. Roth might say that as equal citizens, this reciprocity is something that we owe each other under *dina d’malchuta dina*. Like Novak, Roth would not have found this space within the law if there had not been a way to reinterpret the definitions that fit into the law. The value of equality could not supersede the law for either of them.

Roth still finds a way to overturn the rabbinic idea that women could not serve as rabbis, witnesses, or *shlichei tzibbur*. He does not go against this prohibition simply because of a value of egalitarianism, latent in either outside values or within Jewish values. Instead, he teaches that women can be rabbis if they assume all the obligations that a man would assume. He deals with the topic by finding a way for women to fit within the category of ‘men.’ That then allows them to not only take on all the obligations of men but also obtain the rights and societal roles of men.

Because women are not obligated to most positive time-bound mitzvot (*mitzvot shel zman grama*), their status is different than men. Men are obligated to pray daily so they

¹²⁵ Joel Roth, “Synagogue Honors for the Intermarried Jew: Holding Office and Aliyyot.” http://www.rabbinicalassembly.org/law/teshuvot_public.html

can act as the *shaliach tzibbur* (public prayer leader) for others, but if women are not obligated to fulfill the commandment of prayer, then they are not necessarily able to help others fulfill their obligation according to the halakhic framework. Roth asks that if women choose to perform the mitzvot to which they are not traditionally obligated, what is the significance of those actions? Can they recite the traditional blessings that state, “Blessed are You, God, Ruler of the Universe who commanded us to...”? Can opting into obligations ever evolve into being commanded? If women take on the obligations with the commitment that men do, then can they hold the same roles as men in the Jewish community? Would a woman’s self-imposed obligation hold the same authority as the obligations that men are committed to through biblical and rabbinic law?¹²⁶

This is the frame through which Roth examines the question of egalitarianism in Judaism. For him, it is a question of whether or not women can be obligated to the commandments that would enable them to fulfill the role of rabbi. If they can embody the legal status of men as interpreted within the halakhic structure, then they can be ordained as rabbis. He examines the opinions of Maimonides, Rashi, Ritba, Ravad, and many others in order to determine whether or not women can recite the blessings over self-imposed mitzvot and if their actions have any further significance. Ultimately, he decides that women who consider themselves obligated to all mitzvot—and understand that they would be sinning if they do not act upon them—would be able to hold the status of being legally obligated and therefore also be able to act with agency.¹²⁷ Being an agent of mitzvot allows someone to be able to count in a minyan and act as a *shaliach*

¹²⁶ Joel Roth, “On the Ordination of Women as Rabbis.” HM 7:4.1984b. 737.
http://www.rabbinicalassembly.org/law/teshuvot_public.html

¹²⁷ Ibid, 751-752.

tzibbur.

Without holding this status, women would not be able to perform many of the actions that rabbis commonly do. It must be noted, though, that even if a woman obligates herself in this way, she must first admit that according to normative halakhah, she is not commanded to follow these laws. Roth is essentially upholding a minority opinion within the tradition and opting to make it normative within the Conservative movement in order to create the space for women to not just observe and obligate themselves to mitzvot, but to use that obligation as a vehicle to hold the status of ‘rabbi.’

Roth also sees the ability to act as a witness for a marriage, divorce, conversion, etc, as a significant component of being a rabbi. Whether or not women can be witnesses is a separate question from whether or not they might obligate themselves from mitzvot and act as agents to fulfill another’s obligation to a mitzvah. While halakhic sources differ on the question of women obligating themselves to mitzvot that are not required of them, the sources all reject the idea of women counting as witnesses unless in extenuating circumstances.¹²⁸ Further, they assume that the prohibition against counting women as witnesses is *d’oraita* (biblical), which gives it much more force in Jewish law than if it were only *d’rabanana* (rabbinic). So again, Roth cannot simply dismiss this law. If he wants to overturn it, he needs to find a way to invalidate its logic based on a principle that already stands within the traditional halakhic system.

He uses the idea of *shinnui ha’itim* (changing times) and the notion that the description of women in biblical and rabbinic times no longer fit our current understanding of women’s role in society. Roth explains that women were seen as

¹²⁸ Ibid, 752.

unreliable, fickle-minded, and apt to embellish¹²⁹. These character traits would understandably make women non-ideal witnesses, but women in the 21st century are not conceived of in the same way. Today, women hold the same roles in society as men. They hold high governmental offices like secretary of state and speaker of the house, act as lawyers and judges, practice medicine, and are fully trusted as members of society at large. So Roth holds that this characterization of women is the only reason for the law—as opposed to something divinely-indicated about the judicial roles of men and women—and so assuming that characterization no longer holds, then the rule itself does not hold.

Additionally, he believes that such a change in the halakhic status of women is a positive change. It should be encouraged. Thus, “failure to attempt some halakhically justifiable remedy to an untenable situation reflects a lack of seriousness about halakhah rather than a commitment to it.”¹³⁰ This is what defines Joel Roth’s approach: a desire to move forward in integrating progressive and egalitarian values into Jewish practice while only doing so if the changes can be made in a halakhically justifiable way. He will manipulate the way we use a law or even abrogate a law itself but only if there is precedent for a similar elimination of law already within the system as a halachic principle. Unlike some of his colleagues, Roth is not willing to create a new principle. His “new” values, though, may move him to use old principles in new ways to create change.

He explains that the two significant challenges to women serving as rabbis are her being allowed to teach Torah and to serve as a judge. While the ability to judge and the ability to act as a witness are tied together, Roth claims that a woman could still judge

¹²⁹ Ibid, 755.

¹³⁰ Ibid, 758.

without being granted the status of a witness. Mishnah Niddah 6:4 states that “Whoever is fit to judge is also fit to testify, though some are fit to testify even though they are not fit to judge.” Though this likely means that one who cannot testify cannot judge, it might not indicate that this is definitively the case. The first clause correlates judging with testifying in a positive sense, and we are left to infer that one who cannot judge cannot testify, but even if that is the case, the reverse might not necessarily be true. One who cannot testify does not necessarily lose the ability to judge. So this does not pose an insurmountable problem. Since women are no longer thought to be untrustworthy or overly talkative as they were in earlier rabbinic times, they might be counted as witnesses. Similarly, once a woman commits herself to the positive time-bound mitzvot, then she can hold the role of *shlichat tzibbur* and count in a minyan.

Roth is unique in that he advocated for these changes in the role of women while, at the same time, maintaining that his motivation was not about achieving egalitarian practice. He clearly states in his teshuvah:

“[T]he issue of male-female equality plays no part in my thinking on the subject. I find no ethical objection to discriminate against an entire class, when the discrimination is justified and defensible. I have made it quite clear, I hope, that I would be opposed to any argument for women’s rights which was predicated on an *a priori* claim that men and women *must* be equal. Testimonial equality between men and women may be the *result* of grappling with the issue of women and testifying, but it is not the underlying motivation...the underlying motivation for the difficult struggle is the firm conviction that the grounds for the disqualification of women as witnesses...are no longer applicable.”¹³¹

This statement shows the extent to which positivism dominates Roth’s thinking.

Gender equality or ethical principles are not methods that operate within the halakhic system as Roth has defined it. Therefore, while such concepts might

¹³¹ Ibid, 768.

even affect a decision insofar as they act as external factors that weigh into one's process, they are not ideas that are the basis for a legal change. Instead, the legal change—in this case, the permission for women to be witnesses and even rabbis—comes from a realization that the category of women, as presented in the tradition, is not applicable anymore because of women's role in society. This distinction seems like it might not be anything more than a nuance, since the *shinnui ittim* itself—the societal change that has occurred—is that women have become trustworthy, valid, and active members of society outside of the home. That alone is a result of the secular feminist movement that has evolved over the past century. Though Roth does not see egalitarianism or feminism as a central part of the above issue, would he really have approached the topic without the outside push from women and their increasing status in the rest of society?

This lack of admission about the role that ethics and gender equality play here is detrimental to Roth's standing in comparison to the other thinkers. He seems to be restraining himself a bit too much from accepting the liberal ideals that he wants to hold and see through. And yet, on the other hand, we must admire his serious approach to the texts and opinions of prior generations of Jewish legalists. Even if he had allowed egalitarianism—stemming either from inside or outside of our Jewish tradition—to play an acknowledged role, he still would have maintained a very meticulously close relationship to precedent and principles within the current law. All of the scholars examined in this paper are serious scholars. All are trying to fuse our ancient legal tradition with modern society. Each one balances these areas differently.

While Roth's positivist approach to law is very much rooted in our past, it may not give enough space to grow into the future. Because it is only adapting the law, and not the legal understandings, it does not allow for change that embraces men and women in all spheres of life. Within his framework, women can only become rabbis if they become "halakhic men." They must place themselves into a legal mold that was created for someone else and acknowledge that it is not actually their mold to take. Where does that leave liberal maximalism?

IV. Maximalist? Examining the Question of *Niddah*

Does Joel Roth's positivist approach make him a maximalist? We have seen how he takes a minority opinion within the tradition and adopts it in order to create a looser framework within the current legal system. We have seen how he might alter definitions of categories but not eliminate the categories themselves. He wants the law to be upheld yet begins to admit the reality that many do not follow the law. Examining family purity law or *niddah* will shed more light on Roth's methodologies.

His understanding of *niddah* comes out in Susan Grossman's teshuvah on the topic. She references an interview with him and explains that he uses Rabbi Meir's opinion that a menstruating woman only needs to observe a total of seven days of abstinence¹³². She does not need to maintain the additional clean days after her period that many legalists do require. Roth is able to create this permissive stance because he finds a flaw or a loophole in the logic of the original command to hold both days during menstruation and clean days. There are two categories of impurity that are at play here:

¹³² Niddah 31b

niddah and *zivah*. *Niddah* is the impurity that results from bleeding during a woman's period. *Zivah* is very similar but it results from bleeding that occurs outside of the period itself. It is mid-cycle spotting—which is not something that happens for every woman every month.

Roth understands that because Rebbe declared the takkanah that claimed *niddah* and *zivah* blood to be indistinguishable, and thus held the extra clean days, in the village of Sadoth, the takkanah only needs to be applied to that particular community. Those women could not distinguish between the two types of bleeding and so this extra stringency became normative for them. Rashi supports this contextual explanation but does not eliminate the clean days¹³³. Roth just takes the next actionable step and eliminates them from our practice so that our historical explanation and our practice are in sync.

His reasoning for the change goes beyond this, though. Roth examines the tradition of Rabbi Zeira, who holds that women actually created the stringency of maintaining seven days for *zivah* as well as the original seven days for *niddah*. R. Zeira thus understands the conflation of the two categories as a tradition but not a law. A minhag is definitely a valid practice and even a normative practice within the community but it does not need to be enforced and upheld in the same way that a law does¹³⁴. Roth discusses the difference between law and custom at length in The Halakhic Process: A

¹³³ Susan Grossman, "Mikveh and the Sanctity of Being Created Human." September 2006. 11. http://www.rabbinicalassembly.org/law/teshuvot_public.html

¹³⁴ Ibid, 12.

Systemic Analysis¹³⁵, determining that relaxing a custom that had previously increased the strictness of the law is acceptable and has even precedent in our legal tradition.

By continuing to study this topic, Grossman and Roth unravel elements of both maximalism and liberalism. As Grossman continues to explain Roth's approach in order to explain her own modified viewpoint, she twice says that those who wish to be *mahmir* (stricter) and observe seven clean days can still do so.¹³⁶ This is an example of how the maximal principle of *middat chasidut* would work: there is a standard of how members of the Jewish community should practice but a separate set of guidelines for those who either wish to adhere to a more stringent set of practices. Such stringency might emerge from a sense of being commanded by God or by tradition to follow the most meticulous practice possible or from a desire to create a larger *siyag laTorah* (fence around the Torah). The impetus for such observance could arise from a desire to further separate oneself from the non-Jewish community or to further find rootedness in our tradition. Each of these elements might influence someone to become stricter with his or her observance.

However, maximalism also means maximally embodying the ideals that undergird our laws. For example, Judaism embraces the notion that relationships are holy. Relationships cannot exist without two individuals—they demand mutuality. Our relationship with God is a partnership. It comes with certain commitments for both parties, just like many of the other relationships depicted in our texts. One might think that marriage is different because a man traditionally acquires his wife as if purchasing an item. A wedding resembles, in some ways, a business transaction. But Joel Roth is not

¹³⁵ See Joel Roth, The Halakhic Process: A Systemic Analysis. Chapter 8.

¹³⁶ Susan Grossman, 13, 23.

satisfied in maintaining that inequality here in the realm of *niddah*. He and other rabbis “have taught for years that husbands should also go to mikveh before resuming sexual relations with their wives as an expression of the mutuality of their relationship and obligation for the sanctity of their relationship.”¹³⁷ Roth is clearly attempting to inject an element of mutuality or even equality into a practice that has thus far only applied to women.

What does that say about his theory, given that he so firmly stated that gender equality was not a factor in his teshuvah on women being ordained as rabbis? Perhaps he is willing to concede to values when creating a new tradition for men but not willing to do so when it involves overturning a seeming prohibition for women. No one has ever said that men could not use the mikveh before reengaging in relations with their partners. Or perhaps Roth sees a distinction between relational mutuality and gender equality. The equality or power dynamics between two people in a domestic relationship is not necessarily the same as interaction between men and women as groups in the collective public sphere. While that distinction does exist, I believe that mutuality and equality are very much connected. Where there is true mutuality between partners, gender equality in public would follow as a derivative.

¹³⁷ Ibid, 17.

Chapter 8: David Novak

I. Theory

Like Elliot Dorff, David Novak also believes that the covenant drives Jewish law. He specifically focuses on rights and obligations that each segment of the covenant must hold—what are our rights as Jews? What are God’s rights? What are the rights of the other nations of the world? And what becomes our duty as a result of those relationships? A covenant is not merely a relationship between two parties. It is more like a social contract in which each party gives up some elements of their rights in exchange for the benefits of being a part of a larger entity. Every action then has some affect on our rights or our duties. Reciprocity, between one person’s right to receive help and another person’s duty to provide it, is embedded within the concept of covenant. A right demands a certain duty of compliance that falls on someone else; without this relationship, there is nothing obligating the two parties to one another.

Novak offers the example of the poor person who has a right to his help. Because of this right, Novak then has a duty to help the person—he has an obligation to maintain the poor person’s rights, which he fulfills through performing his duty. He explains that without the rights-duty relationship, the poor person’s demand would simply be begging and Novak’s actions to help him would be “subjective largesse.” However, since this relationship does exist, a third party—society—can actually oversee it and make sure that it is operating effectively. According to Novak, law is actually the expression of the third party maintenance of duties and rights.¹³⁸

¹³⁸ David Novak, *Covenantal Rights*, (Princeton, New Jersey: Princeton University Press, 2000), 9.

While it might be easier for us to infer right from duties, like the notion that because Novak has a duty to help the poor man, the poor man must therefore have rights, the relationship actually functions in the opposite fashion. Duties are derived from prior rights, both in Jewish and non-Jewish law. A duty or a right can fall upon an individual, a community, or even God. So the individual Jew has duties to meet the rights of other individuals, of the community at large, and of God. Since no duty is without a correlated right, though, the individual also has many of her own rights that must be upheld by the other parties in the covenant.¹³⁹

Because of this inherent interconnectedness, Novak determines that autonomy cannot have a true place within this structure. He explains that, “Even autonomy is not wholly private because there is really nothing that we do that does not have an effect on other persons and things...[u]ltimately, one’s autonomy is going to come in to conflict with the covenant inasmuch as it includes practices that seem to be absurd in themselves.”¹⁴⁰ One person’s decision to avoid acting to fulfill a duty infringes upon their rights. It does not diminish the right, but it affects the entire social contract of being responsible for one another. All the more so, we learn that the rights of God are the foundation for all other rights and duties.¹⁴¹ Not only are rights connected to duties, but our rights are also connected to higher, inalienable rights. Any decision concurrently affects multiple parties. While God may not exercise God’s rights, all of our duties are directed both toward the person or community with whom we are interacting and

¹³⁹ Ibid, 31.

¹⁴⁰ Ibid, 200, 201.

¹⁴¹ Ibid, 53.

ultimately toward God as the originator of all rights, and therefore the recipient of all duties.

Natural law is also very significant to Novak's thought. It is having duties without necessarily holding onto rights. Instead of rights, natural law comes with the aspiration of achieving good in society. It is the basic sense that the moral laws that apply to one people also apply to all other peoples; norms that are both universal for society and universally able to be determined by rational thought.¹⁴² There is much debate throughout Jewish scholarship as to whether or not natural law is a part of Jewish law at all, but it is almost inherent to Novak's conception of Judaism. For him, it is an "internal structure, that is, what limits personal and communal pretensions."¹⁴³ It is like an organic negative law that comes from a moral structure that does not apply solely to the Jewish people. And yet, he sees the creation narrative and the Noahide laws as constructs within Jewish tradition that posit their own versions of natural law. He argues cogently for that and if he is correct, then natural law exists both inside and outside of Judaism, giving us our own unique connection to its universality.

Positive laws are entirely different. While natural law is the limitations on what cannot occur in a society or between individuals, positive law making deals with much, much more. They establish the cultural norms and religious practices that define a people. Natural law is essential to the approach that Novak takes to interacting with non-Jews. He understands our responsibility to them and to ourselves to also fit into the rights-based approach that he takes to covenant and community. Those rights that we

¹⁴² David Novak, *Natural Law in Judaism*. (New York: Cambridge University Press, 1998) 1.

¹⁴³ Ibid, 152.

must not let slip are the right to protection from harm, the right to public assistance, the right to social inclusion, and the individual's right against society.¹⁴⁴ Novak's theory of Jewish law encompasses rights and duties that arise out of covenant or social contract, natural law, and a very serious and stringent approach to adhering to Jewish law since it arises out of our duties to act upon God's rights.

II. Novak as a Serious Jewish Thinker: Committing to Jewish Legal Practice

Novak interprets our obligation to uphold the rights of God as our responsibility to follow the commandments that God has given us. We can exercise our rights to freedom, individual expression, and usage of possessions and monies, as long as we do not violate someone else's rights. God has rights that we cannot infringe upon. This is part of the mutuality of living in covenant. Novak provides the example of Jews spending money on Shabbat. Doing so would violate the rights of God.¹⁴⁵ It seems that God's rights include the ability for the Jewish people to refrain from financial actions—or other types of *melacha* or creative work—during the 25 hours of Shabbat. Then our commandment to keep Shabbat moves from simply being something that we must do because God commands it upon us to an action that is one of our many ways of honoring and maintaining the covenant that God has built with us.

The dual commandments to keep Shabbat has both a positive and negative aspect, which Novak describes as the relationship between fear and love in upholding such commandments: “Remember (*zakhor*) the Sabbath day to hallow it” (Exodus 20:8) is positive, tells us what we *should* do while “guard (*shamor*) the Sabbath day” (Deuteronomy 5:12) is negative, implies what we should refrain from doing—that is,

¹⁴⁴ Section titles within chapter VII of *Covenantal Rights*.

¹⁴⁵ Ibid, 139.

breaking the Sabbath.¹⁴⁶ The positive commandment is executed because of our love while, at the same time, we refrain from the negative commandment because of a fear of God. Yet this is not a fear of God that leads to hate. Novak explains that it is actually the only kind of fear that nurtures love; as we maintain a fear of upsetting God, then we will do what is in our power to avoid acts that might anger God or give us a reason to further fear God. While this is not generally the case between two people, that discipline will lead to a higher level of love.

When a negative commandment and a positive commandment conflict, like when Sukkot and Shabbat collide and we have both the mitzvah of not violating Shabbat (or leaving it unguarded) and the mitzvah of shaking the lulav and etrog on Sukkot, which implicitly involves carrying it, we forego the positive mitzvah for the negative one. We honor Shabbat and avoid abrogating its restrictions, which means that we must forego fulfilling the positive commandment of lulav on Shabbat. Adhering to such commandments is essential to Novak because they are crucial to the connection between rights and duties which come from the covenant.

III. Novak as Serious Liberal Jewish Thinker: Overturning a Jewish Practice

Novak must overturn several practices that differentiate in the treatment of Jews and non-Jews if he is truly going to embrace natural law and universal rights, as described above. Laws that allow breaking Shabbat to save a Jew but not a non-Jew would clearly have to be changed. Other laws and rabbinic texts list excuses for throwing a non-Jew into a pit and not help him out of it if you came upon him. These are entirely

¹⁴⁶ *ibid*, 51. Novak states that he is referencing *Commentary of the Torah*: Exod. 20:8, ed Chavel, 399. See the *Commentary on the Canticles attributed to Nachmanides*: Cant. 4:11, *Kitvei Ramban*, ed. C. B. Chavel (Jerusalem: Mosad ha-Rav Kook, 1963), 2:496f.

incongruous with Novak. It may seem obvious to many people that these laws cannot hold true today but Novak finds a philosophical approach that eliminates them. His theory of law does not go out of its way to make an exception for these unethical commands. It does not need to. This is a real strength of his approach, and yet it does not extend to egalitarian rights between men and women in prayer space or between homosexuals and heterosexuals in Jewish society. He does not quite see them as within the same category.

While natural law and rights-duties are inherent to Jewish thought according to Novak, feminism is outside of Judaism and is trying to fold itself into our law and practice. He argues that since the Jewish covenant was initiated by God and not by humans, then people are not able to grant authority to groups that were not originally granted certain types of authority. In this case, women cannot be authorities without that new power coming directly from God. Rabbis, according to Novak, have this sense of authority that women cannot obtain. It is “voluntaristic theology,”¹⁴⁷ which means that the individual claims control without receiving authority from an outside source such as God or covenant. Novak cites Korach as the first example of such a theology that brings power “down” to more of the people when he states, “you have too much, for the entire congregation, all of them are holy and the Lord is in the midst of them” (Numbers 16:3).

Further, he believes that a prohibition on this type of theology is sound because Judaism is a particularistic religion—if God chooses the human species, then Jewish people to be the bearers of Torah, then why can’t God choose men to have more authority than women in terms of the rabbinic role? He openly admits that this is not democratic

¹⁴⁷ David Novak, *Halakhah in a Theological Dimension* (Chico, California: Scholars Press, 1985), 64.

but does not waver. He firmly states that, “Judaism is theocratic not democratic: the rule of God not the rule of the humans.”¹⁴⁸ While Novak’s notion of covenant and its accompanying relationship of rights and duties bring about a compassionate view of non-Jews, the same covenantal idea also stops women from holding the right to equal authority.

Novak distinguishes between rights in the public and private spheres. He defines four political or social roles within the halakhic society: private participants, domestic participants, public participants, and authorities. The actions of private participants have no bearing on the larger community, so there is much more flexibility and autonomy in the private realm. For example, while women are exempted from most time-bound mitzvot, they are not prohibited from taking on those mitzvot as individuals. The domestic sphere is slightly more communal, as it involves one’s family or living space. In it, one’s roles and responsibilities of interacting with his or her partner are defined. How do family purity laws and marriage contracts affect the equality of the relationship? Traditionally, men are in more control than women here, while the woman’s role had often been seen as primarily mother or wife. This is not what concerns Novak, though. He is concerned with the public sphere and the role of authority.

He explains that women are not considered to be public participants in society, partially because they are not obligated to the same commandments that men are. They are either observers or private participants, but not public ones. Therefore, he tells us, they cannot be counted in a minyan, and thus cannot fulfill any of the functions that someone who counts in a minyan can fulfill like leading others in prayer, reading Torah,

¹⁴⁸ Ibid, 65.

or reciting marriage blessings¹⁴⁹. These are many of the typical rabbinic roles, but not all of them. Novak ultimately defines a rabbi as: “one who alone may be an authority in a religious court (*Beit Din*) dealing with matters of personal and familial status.”¹⁵⁰ For him, this is not a role that women can acquire within the confines of Jewish law. This leaves women without access to the rabbinate, and thus an unequal place in public Jewish society.

He disagrees with the moral imperative of Dorff, Washofsky, and others who say that egalitarianism is a moral imperative. Women and men may have equal civil and criminal rights but those are private rights. They cannot be transferred to the public sphere in order to demand equality in terms of anything larger. To Novak, the woman holds the primary domestic role in a household—Jewish lineage is traced through the mother not the father. Thus, Novak argues that the same notion of overarching egalitarianism that led the Reform movement to ordain female rabbis also later compelled the movement to trace one’s Jewish identification through either parent. Anything less, he says, would not be full egalitarianism.¹⁵¹ He believes if one is going to embrace egalitarianism, then he should not be hypocritical; he should embrace it fully. But Novak still disagrees with the philosophical notion that egalitarianism is natural to Judaism. He proposes that women could be learned teachers and take on a higher level of responsibility in the community without abrogating the tradition.¹⁵²

Though Novak’s intellectual argument is quite cogent in terms of women’s historical role in the different spheres, I cannot believe that at least some of the legal

¹⁴⁹ Ibid, 62-63.

¹⁵⁰ Ibid, 63.

¹⁵¹ Ibid, 67.

¹⁵² Ibid, 70.

private equality that he discusses cannot transfer into the public sphere. I see one as an extension of the other. If so much of Novak's theory is based on covenant—whether discussing women or non-Jews or the internal Jewish community—then it seems that women are not full partners in covenant. They are not given rights in the public sphere yet they are forced to abide by the rules of that sphere.

Jewish women are in covenant individually with God, with the Jewish community, and with the people outside the Jewish world. What then is the foundation for their agreement with the Jewish community? What can they offer the Jewish community on a collective level? The Jewish people's relationship to non-Jew does not face this same scrutiny because their covenant is not as proximate as the covenant of Jewish women. I believe that this covenant forms a demand for equality on the communal level. However, I am not sure that embracing full communal rights on the societal level and allowing women to become rabbis also demands that Jewish lineage be passed through both parents. If the private sphere can have different rules than the domestic or the public, why would we need to synthesize the rules of the domestic and the public in order to legitimately adopt egalitarianism in Jewish practice?

The status of a child born to a Jewish father and a non-Jewish mother can be changed: the child can convert. A woman, however, cannot become a man in order to serve the Jewish community as a rabbi. A gay or lesbian individual cannot simply decide to one day change his or her sexual orientation to fit into the traditional domestic Jewish boundaries. The potential unavoidable harm and inequality needs to be considered as well, for Torah teaches that we were created together: "male and female He created

them.¹⁵³”

IV. Maximalist? Examining the Question of *Niddah*

Based on Novak’s unswerving belief that women hold the dominant domestic role, he would hold that women should follow purity laws. He sees going to the mikvah as chance for a woman to fulfill some of the mitzvot that are obligated upon her. In this regard, yes, Novak is a maximalist. He does not object to the tradition here. He does not protest the burden that it may place between two partners when they cannot touch for over a week. He does not take issue with the inequality in that the woman must immerse herself on a monthly basis while men do not have an equivalent practice. It is simply a commandment and he believes that because it does not infringe upon anyone’s rights, it must be followed and upheld. That is how he understands his position as a traditional Jew.

Perhaps he sees such mitzvot that fall under the domestic realm as just as important, though quite separate, as those in the public sphere which men are called upon to fulfill. With Novak, is *niddah* really a question of maximalism? Maximalism seems to come into question when there is a mitzvah that a decision maker does not feel particularly compelled theologically or philosophically to uphold. For Dorff, *niddah* was a maximalism issue—he and others in the CJLS wrestled with how to temper the terms of *niddah* while still maintaining the general structure.

Novak does not take issue with it, though. While it poses challenges for many modern families to keep—in terms of being a monthly burden for the woman, a separation between the two partners, and a potential barrier to egalitarianism—it appears

¹⁵³ Genesis 1:27

to actually uphold the vision of domestic gender roles that Novak maintains in his discussion of why women cannot become rabbis. Moreover, he considers himself a traditional Jew who believes that the laws of the Torah and of normative Jewish law apply to himself. Therefore, he affirms the obligation for couples to observe *niddah*¹⁵⁴. For Novak, Torah-based and rabbinic laws, whether personal, communal, or domestic, apply to us regardless of challenges that may prevent someone from following them.

Why is *niddah* a maximal or challenging area of law for many people to uphold? First of all, on a sociological level, it is very minimally observed today, particularly in the non-orthodox world. It utilizes a very specific, perhaps unequal, set of gender roles. While it does not deny any rights to women, the notion of family purity implies that women become impure on a monthly basis and must become pure again before reuniting with their spouses. The same level of stringency is not applied to men; *niddah* laws portray women as capable of more impurity than men. *Niddah* can also be a significant burden on the couple and the woman in particular. Not only does it dictate when the couple can and cannot be together, but it also dictates that the woman must find time out of her busy schedule to go to the *mikveh* on a monthly basis.

Further, it stands apart from the other two topics examined here because it is the only solely domestic issue. Shabbat observance is personal: if one breaks Shabbat in the privacy of her own apartment or by getting in a car, it does not directly affect anyone else's observance. In contrast, the equality-based issues are communal. They affect our communal treatment of non-Jews, women, and LGBT individuals. Their rights are not something that affects just one person—both parties are affected. A decision that women

¹⁵⁴ Email exchange, December 17, 2008.

can become rabbi affects the entire community. However, *niddah* is a commandment that really only holds between the couple. No one else would know if they observed it or they didn't.

In some ways, that might make it a maximal commandment. There is not the same element of social pressure or social motivation. It is also very personal, since it is ultimately about a woman and her bodily functions. If she and her partner feel fully committed to the law, then they will be likely to follow the rules of *niddah*. But if she is frustrated by the gender inequality inherent in it or feels that it will be too much to inhibit her relationship with her spouse for up to 12 days per month, then she will think harder about observing *niddah*. If either of them feels that this is a rule that can be overturned because of its antiquity, then that might discourage them from keeping *niddah*.

Chapter 9: Conclusions

After analyzing the spectrum of theories and practical applications of Eugene Borowitz, Mark Washofsky, Rachel Adler, Tikva Frymer-Kensky, Gordon Tucker, Elliot Dorff, Joel Roth, and David Novak, I had hoped to arrive at my own theory of Jewish law. I have learned about a vast array of intellectually and spiritually driven approaches and am not yet ready to create my own. However, my understanding of the complexity of where liberal Judaism meets traditional legal systems has been greatly enhanced. The real crux for me is where communal obligation meets personal obligation. Over my years of taking on more and more mitzvot in a traditional sense (daily prayer, keeping Shabbat and Yom Tov without driving, cooking, or most other *melacha*, greater observance of kashrut), my choice to do those things as a way to get closer to God has evolved into a strong sense of obligation to do them and to continue to expand my practice. I feel commanded by God to embrace Jewish traditional practice but I also feel a commandment—or at least some sort of imperative—to dismiss or reconstruct the parts of Jewish law that seem to be unjust.

By injustice I do not mean something that is inconvenient or difficult or even theologically challenging. I believe that those things are the acts that we should find all the more incumbent upon ourselves. When I say injustice, I mean what Mark Washofsky and Eugene Borowitz and Gordon Tucker and Elliot Dorff discuss in terms of values: inequality of humanity, when one type of Jew is allowed access to Jewish opportunities or obligations from which another is excluded. Like Elliot Dorff and others, I believe that this sense of justice is rooted in Jewish texts. However, he, Roth, and Novak cannot see how this could override a command that is unjust by egalitarian standards yet also

d'oraita or biblical authority. Gordon Tucker, Rachel Adler, and Tikva Frymer-Kensky seem to have found a way to incorporate Robert Cover's conception of 'nomos and narrative' into Jewish law in order to create a new framework that would allow for such commands to be overturned. I do believe that if and when *d'oraita* laws are reinterpreted or disengaged, that only should happen when there has been serious examination with even more caution than might be invested into a *d'rabanan* practice. People should still study the command so that they understand the evolution of Jewish practice but it would no longer need to be practiced and upheld.

In large part, this is the model that I support but it does not yet encompass all of the issues that are enveloped in my question of systematizing an approach that holds maximalist observance in the same hand as maximal adherence to the pursuit of ethics within that observance. The narrative approach is a way of thinking but it is not a system. It leaves many questions. Who gets to interpret the valid or invalid narratives of a community? Can a narrative be binding on one individual but not another? And can the same narrative cause different practices so that both are acceptable, leading to a sort of pluralism within the same meta-framework? The narrative seems like a compelling way to argue out of a problematic law but not necessarily to compel people to uphold other laws.

It is more compelling for me than Joel Roth's answer of integrating new groups of people into traditionally limited roles. When he addresses the topic of whether women can act as rabbis, he does so from a positivist angle. He does not create the space for women to hold that role because he believes that egalitarianism is a significant piece of Jewish life, whether originating from inside or outside of Jewish tradition. Instead, he

works within the confines of the traditional legal structure and asks if there is a valid reinterpretation of categories that might grant women these privileges. By operating in this positivist framework, he makes his decisions based around the precedents and laws that have already been delineated in the tradition. This enables him to justify his decisions strongly in the system of halakhah but it does not necessarily allow his decisions to fully answer to the meta-principles of the law.

Tucker uses the term ‘positivist paralysis’¹⁵⁵ to indicate the standstill of the modern Orthodox community when its legal understandings cannot find a space for full egalitarianism because of their very strict positivist approach. I feel like the same paralysis exists, at least in some ways, in Joel Roth’s approach when dealing with women concerning the question of whether or not they can be full members of the clergy if they cannot necessarily (at least at the time when his teshuvah was written) count as witnesses¹⁵⁶ or if people of different sexual orientations can be granted some inclusion but not rights to their full sexual expression.

And yet, I want to maintain the positivist approach to law when the laws are dealing purely with ritual. When Shabbat or Yom Tov is at hand, my inclination is to hold a stricter observance than Dorff and Tucker when they allow for audio-visual recording not only because a recording may be considered a type of writing, which is *melacha*, but also because it seems to go against the vision of Shabbat that is about restricting oneself from work, society, and technology. The halakhah of Shabbat creates a narrative that is very forcefully building a *siyag l’Torah*—a fence around the sanctity

¹⁵⁵ Gordon Tucker, “Arguments Concerning Judaism and Homosexuality.” 22.
http://www.rabbinicalassembly.org/law/teshuvot_public.html

¹⁵⁶ See variety of responses to this question within the opinions and teshuvot of the Conservative movement, website in above footnote.

that emphasizes the separate nature of Shabbat from other days. While we might find separation in making Shabbat the only day of the week when we go to the movies with friends and family, or the only day when we refrain from checking our email. Even some level of change—particularly when it means avoiding something that happens all week—can bring a sense of holiness and Shabbat. We can't dismiss that idea and assume from the outset that Shabbat doesn't have an extra level of significance by refraining from the activities that are stated in our halakhic tradition. In that case, perhaps halakhah should form the narrative that guides our observance. Its discourse may serve as a vision of Jewish living.

Our practice should not be completely separate from our beliefs, though I must acknowledge how difficult it is to systematize one's practices and even more difficult to connect that fully with one's theology. I believe that I am commanded by God, and therefore obligated, to act in accordance with Jewish tradition as described above. I believe that my fellow Jews are also commanded by God because of our shared covenant at Sinai, which unites us as a community in our experiencing God's revelation. However, I also believe that my interpretation of revelation and its translation into a definition of how God's commandment obligates me to act may not be the same as your notions of revelation and commandment because you and I are not the same nor are our experiences of God¹⁵⁷.

Similarly, our views of Jewish law are not identical but we are both commanded to wrestle with them and to adhere to as much as we find uncompromising to our sense of justice. That sense of justice must come from the texts. We may favor one source over

¹⁵⁷ My understanding of revelation is rooted, at least partially, in Franz Rosenzweig's thought.

another and ultimately end up with different practices but they must be rooted in Judaism. Perhaps it is the serious thinking of each individual that will characterize this liberal *middat hasidut* just as much as the serious actions of each individual.

The goal of this project is determining a liberal *middat hasidut*, a decision-making practice that is for those who choose to be the ‘pious’ of today’s liberal Jewish society. While this is still a work in progress, I offer the following criteria for someone who wishes to adhere to such a system to consider the following when determining their practice:

1. Precedence: What do the sources say and what has been done in the past?
2. Justice: Does this practice conflict with the notion that there is equality among all Jews and at least relative equality between Jews and non-Jews in terms of ethics and moral principles?
3. Narrative: Does this fit within your story and the story of at least one subset of the Jewish people?
4. Commandment, Covenant, Relationship with God: Do you feel a sense of obligation toward Jewish traditional practice? What is your obligation to God and to the broader Jewish community in terms of covenant? How might that move you to act in accordance with or against the halakhic system and its outcomes? Do you see an opportunity to become closer to God or to community through this act, even if that connection might be years away or have its own ebb and flow?
5. Honor of self, but not of meaning: In the context of the covenants that you hold between yourself and God, between yourself and the Jewish people, and the Jewish people and God, where is your own voice? Even though it is tempting to

say that a certain practice need not be part of your lifestyle because it may not be meaningful to you, how are you to know that it may not become meaningful to you tomorrow? In contrast, if you only act when something seems meaningful, do you stop that practice when its routine makes it meaningless at times? Or do you press on, because of commandment and in hopes that the notion of *na'aseh v'nishma*¹⁵⁸ will hold up and you will eventually find meaning or understanding after having performed the act?

¹⁵⁸ Exodus 24: 7

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