



**“TRADITION vs. MODERNITY:  
THE CJLS AND THE SHAPING OF  
CONSERVATIVE HALAKHAH.”**

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## Thesis Digest

The Committee on Jewish Law and Standards serves as the “official” *halakhic* voice of the Conservative Movement, and is invested with the power to attempt reconciliation between the poles of tradition and modernity. Do the CJLS’s *responsa* truly “combine a commitment to tradition with an *equal* commitment to modernity; a commitment to the traditional halakhic sources along with the use of critical methodologies . . . and an equal commitment to both Jewish rituals and Jewish ethics”?<sup>1</sup> Does the Committee follow a consistent *halakhic* process to achieve this balance? Does the Committee lean toward “tradition” or toward “modernity” in order to resolve disagreements between differing *halakhic* interpretations? How have the political and social climates of the United States affected the Committee’s decisions? What are the implications of a Conservative *takanah* instead of a *responsum*? Therefore, to answer these questions, the exploration of particularly sensitive issues in the Conservative Movement is warranted in order to analyze the attempted balance between Judaism and Americanism, between sectarianism and *klalism*, and between the rule of law and the need for change. These issues may be called “sensitive” and deserve careful attention because they appear to set up a conflict between traditional Jewish observance and the demands of life in contemporary North American society. The only way to understand the Conservative Movement’s resolution of this tension is to examine the *responsa* of the CJLS to see how halakhic theory has been put into practice.

Therefore, how does the committee reconcile tradition and modernity? Rabbi David Golinkin answers, “[T]he Conservative movement is following in the footsteps of

Hillel and Rabban Gamliel, of Rabbis Modena and Emden, of Rabbis ben Shimon and Hazan. Unlike the Reform movement, it considers the halakhah binding and obligatory. Unlike Orthodoxy, it rejects the slogan that 'anything new is forbidden by the Torah' and allows the halakhah to change and develop in a natural, organic fashion."<sup>2</sup> This natural, organic fashion is determined, first and foremost, by the will of the people: the practices and desires of a committed group of Conservative Jews called "Catholic Israel." Then, after the Committee on Jewish Law and Standards of the Conservative movement has determined the new moral or ritual demands of its members, its *poskim* attempt to defend permissive leniencies through an *halakhic* process that places great emphasis on the historical study of Judaism in conjunction with the use of as much contemporary scientific knowledge as possible. Finally, the rabbis put clear limits on the extent to which Conservative Judaism may go to satisfy the demands of modernity. This decision will be sent to local congregational rabbis, who hold the ultimate power to initiate or to slow change among members of their individual Conservative synagogues. Of course, in the end, personal autonomy remains the final arbiter for the behavior and practice of each individual Conservative Jew.

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<sup>1</sup> David Golinkin, introduction, *Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970* ed. David Golinkin (Jerusalem: The Rabbinical Assembly and the Institute of Applied Halakhah, 1997) vii.

<sup>2</sup> David Golinkin, *Halakhah For Our Time: A Conservative Approach to Jewish Law* (New York: United Synagogue, 1991) 28.



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**For Rebecca, with deep thanks and love.**

*"Many women have done well, but you surpass them all."*

Proverbs 31:29

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## Introduction

According to Rabbi Walter Jacob, former chairman of the Reform movement's *Responsa* Committee: "no consistent philosophy of Conservative halakhah has yet emerged."<sup>1</sup> Yet, throughout the history of the Conservative movement, an official committee for reviewing difficult *halakhic* questions and advising Conservative rabbis on such matters has proven to be an integral component of Conservative Judaism. In 1939, Rabbi Louis Epstein, chairman of this committee, presented his own philosophy of Conservative *halakhah*: "We can do the greatest disservice to our people by hasty action that may lessen the sanctity of the Law and disrupt the unity of Israel. That means," he explains to his colleagues, "that the important thing is not a liberal decision in a specific law, but a liberal tendency injected in the operations of law in Jewish life."<sup>2</sup> This notion, however, of a "liberal injection" appears a far cry from later chairman Rabbi Benjamin Kreitman's statement from nineteen years later, that "Change is a significant and characteristic property of Jewish law." Kreitman continues, "The *halakhah* was born out of a meeting of a people with life. It was this organic relationship that enabled Jewish law to guide the course of men's lives. Jewish law can be renewed and made more effective and more relevant."<sup>3</sup>

More recently, Jewish Theological Seminary's Professor Neil Gillman offered his own observations on the philosophy of Conservative *halakhah*, arguing that the Conservative movement takes a centrist position between the two poles cited by Epstein

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<sup>1</sup> Walter Jacob, "Philosopher and Posek: Some Views of Modern Jewish Law," Liberal Judaism and Halakhah ed. Walter Jacob (Pittsburgh: Rodef Shalom Press, 1988) 100.

<sup>2</sup> Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970, ed. David Golinkin (Jerusalem: The Rabbinical Assembly and the Institute of Applied Halakhah, 1997) 108.

<sup>3</sup> Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970 416.

and Kreitman. Gillman writes, Conservative Jews are “searching for a way to be both authentically Jewish and thoroughly in tune with modernity.”<sup>4</sup> An exploration of particularly sensitive issues in the Conservative movement is warranted in order to test if any of these three philosophies of Jewish Law is the one actually followed—and whether it is followed consistently. The issues chosen may be called “sensitive” and deserve careful attention because they appear to set up a conflict between traditional Jewish observance on one side and the demands of life in contemporary North American society on the other. More specifically, the exploration contained in the following pages will analyze the actual balance achieved between Judaism and Americanism, between sectarianism and *klalism*, and between the rule of law and the need for change. As such, the most pressing issues faced over the last fifty years by the Committee on Jewish Law and Standards (CJLS), the Conservative movement’s official *halakhic* voice, include the problems of the *agunah*,<sup>5</sup> riding to the synagogue on Shabbat, the role of Jewish women in ritual, *kashrut*, and homosexuality. Exploring these sensitive issues will help to elucidate the characteristics that define the Conservative *halakhic* process and confront Walter Jacob’s challenge to the consistency of Conservative Jewish legal philosophy. Truly, the only way to understand the Conservative movement’s resolution of the tension between tradition and modernity, and to test whether the Conservative movement follows a consistent philosophy of *halakhah*, is to examine the *responsa* of the CJLS to see how *halakhic* theory has been put into practice.

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<sup>4</sup> Neil Gillman, *Conservative Judaism: The New Century* (West Orange: Behrman House, Inc., 1993) 3.

<sup>5</sup> An *agunah*, or “tied” wife, is a woman whose husband is presumed dead but no witnesses have come forth to verify his death or whose husband refuses to grant her a divorce. In both cases, Jewish law dictates that the woman remains bound to her missing or recalcitrant husband and therefore is unable to remarry.

Thus, this thesis strives to understand what makes a particular *teshuvah* "Conservative," both in philosophy and methodology. How does the Committee on Jewish Law and Standards reconcile tradition and modernity? Does the Committee lean toward "tradition" or toward "modernity" in order to resolve disagreements between differing *halakhic* interpretations? How have the political and social climates of the United States affected the Committee's decisions? What are the implications of a Conservative *takanah* (legislative enactment) instead of a *responsum*? Moreover, as Rabbi David Golinkin argues, do the CJLS's *responsa* truly "combine a commitment to tradition with an *equal* commitment to modernity; a commitment to the traditional *halakhic* sources along with the use of critical methodologies . . . and an equal commitment to both Jewish rituals and Jewish ethics"?<sup>6</sup> Through an analysis of a selection of CJLS *responsa*, minutes from CJLS meetings, and secondary sources discussing the movement's dynamic interplay between traditional Jewish legal doctrines in relation to modern attitudes and situations, this thesis seeks to determine the extent to which the Conservative movement follows a consistent philosophy of *halakhah*. In addition, more than just defining a movement, the successes and failures of the *responsa* of the CJLS serve as a guidepost to all those looking to understand the struggle between the Jewish legal tradition and modernity in North America.

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<sup>6</sup> David Golinkin, introduction, *Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970*, vii.

## **Chapter 2**

### **Toward a Brief History of the Committee on Jewish Law and Standards**

"It is not yet possible to write a history of the CJL/CJLS since much of its work remains unpublished," comments David Golinkin, editor of the Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970.<sup>1</sup> A brief discussion, then, will have to suffice.<sup>2</sup> The history of every aspect of the Conservative movement ought to begin with the founding of its flagship institution, the Jewish Theological Seminary of America, on January 2, 1887.<sup>3</sup> "The Seminary believed that, because of its commitment to avoiding divisive ideologies by defining none and its conviction that a broad middle ground existed that could accommodate most American Jews, it could provide a meaningful religious experience that compromised on neither Judaism or modernity."<sup>4</sup> Fourteen years later, the graduates of that institution gathered together in June of 1901 to form the Alumni Association of JTS; then, less than twenty years later, that alumni association transformed into the Rabbinical Assembly of JTS.<sup>5</sup> Of the five goals listed at the Association's outset, not one of them included any mention of Jewish Law.

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<sup>1</sup> Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970 ed. David Golinkin (Jerusalem: The Rabbinical Assembly and the Institute of Applied Halakhah, 1997) iv.

<sup>2</sup> Golinkin references a typescript paper by George Nudell, entitled "The Clearing House: A History of the CJLS [1927-1979]", 1980, 43pp. However, Rabbi Nudell explained that this was a paper he wrote while a student at JTS and he was unsure whether he would be able to find it. As of the writing of this thesis, Rabbi Nudell has yet to contact me again. As a result, most of the material in this section has been culled from A Century of Commitment: One Hundred Years of the Rabbinical Assembly ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000). Numerous books make mention of the Committee on Jewish Law and Standards and briefly explain its procedures, but Fierstien's book is the only one that contains information of the historical development of the Committee.

<sup>3</sup> Hasia Diner, "Like the Antelope and the Badger," Traditional Renewed: A History of the Jewish Theological Seminary of America Vol. 1 ed. Jack Wertheimer (New York: The Jewish Theological Seminary of America, 1997) 3.

<sup>4</sup> Wertheimer, 6.

<sup>5</sup> Robert E. Fierstien, "A Noble Beginning," A Century of Commitment: One Hundred Years of the Rabbinical Assembly ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000) 1.

As such, by 1911, the United Synagogue of America had formed a five-person Standing Committee on Jewish Law to field *halakhic* questions.<sup>6</sup> In 1917 this committee became the United Synagogue Committee on the Interpretation of Jewish Law, and Professor Louis Ginzberg, "who made certain that only halakhically defensible decisions were rendered by his committee," was appointed chairman.<sup>7</sup> Early on, the Committee—and many members of the Seminary, the RA, and United Synagogue—refused to consider the Conservative movement a separate stream of Judaism. According to Ginzberg's son, the Seminary professor "saw little point to developing a solution [to halakhic problems] that would not be acceptable beyond the confines of the Rabbinical Assembly. He wanted no part in further splintering authority."<sup>8</sup> Moreover, Ginzberg "hesitated at change because he knew that no matter how great his own learning, he would never be able to convince the great rabbis of Eastern Europe whose life and experiences differed so greatly from his own. And he saw little point in developing new law for American Jews, most of whom had long ago denied its authority."<sup>9</sup>

By 1922, then, a group of liberal-minded rabbis grew frustrated with this tendency to become "seemingly hopelessly mired down in traditionalist inertia."<sup>10</sup> These individuals went so far as to call for a conference of rabbis working in Conservative synagogues to gather together in opposition to United Synagogue. Apparently, though, the new conference petered out rather quickly. The United Synagogue's Committee on the Interpretation of Jewish Law continued with its work, mainly addressing requests

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<sup>6</sup> Fierstien reports that the chair of the Committee, Abraham Hershman, had taken under consideration ritual questions "concerning domestic relations." The specific nature of these questions, however, is unknown (Fierstien, 15).

<sup>7</sup> Herbert Rosenblum, "Emerging Self-Awareness," A Century of Commitment: One Hundred Years of the Rabbinical Assembly ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000) 31.

<sup>8</sup> Fierstien, 34.

<sup>9</sup> Fierstien, 35.



from among the new Conservative congregations for the acceptance of certain normative practices.

"It soon became clear that the committee was merely restating existing Jewish legal precedents and resisting breaking the type of new ground that the emerging congregations of the movement were anxious to see."<sup>11</sup> In 1927, then, the RA and United Synagogue came to an agreement that the responsibility for serving as a clearinghouse for halakhic matters ought to rest with the Rabbinical Assembly. A Committee of ten men was appointed "to act in an advisory capacity to the members of the Assembly in matters of religious and legal procedure."<sup>12</sup> Unanimous decisions became binding on members of the Assembly; in the case of a split decision, both the majority and minority opinions were sent to the inquirer for him to make the final decision as *mara d'atra*.

Within the next five years, the new Committee on Jewish Law would face its most challenging issue for decades to come. The troubling status of the *agunah* forced the new Committee to attempt to define itself—both with regard to *halakhah* in general and in relation to the other streams of Judaism. The idea that a recalcitrant or missing husband could block his wife from re-marriage seemed anathema in this new age of modernity. For some, the attempt to reconcile the problems of the *agunah* with modern sensibilities had even greater significance. According to Wolf Kelman, former executive vice-president of the RA, "Many of us feel that the problem of the *agunah* is symbolic of

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<sup>10</sup> Fierstien, 26.

<sup>11</sup> Fierstien, 42.

<sup>12</sup> Neil Gillman, Conservative Judaism: The New Century (West Orange: Behrman House, Inc., 1993) 94.

our relationship to halachah. We are married to it. Some of us don't want to live with it, but we don't want to divorce it."<sup>13</sup>

This tension came out in 1933 as well, when Chairman Julius Greenstone concluded his report to the RA by admitting that the Committee had yet to decide whether to function as an interpretive body or as a legislative one. By the end of the 1930s, Louis Epstein had submitted a proposed halakhic remedy to the *agunah* problem, approved both by the Committee and the RA as a whole, only to have that solution succumb to both internal and external pressures—especially from Professor Ginzberg and his supporters. Despite its change in leadership, the Committee on Jewish Law of the RA went no farther in reflecting a belief in dynamic *halakhah* than did its predecessor in the United Synagogue.

Epstein's proposal consisted of an addendum to the traditional marriage contract, in order to provide the wife with the authority to write her own *get* should the husband refuse to do so or be unable to do so. The CJL sought to build a *beit din* to authorize and implement this change, so they looked for two other great halakhic scholars to serve along with Louis Ginzberg. None of Ginzberg's Seminary colleagues would agree. As a result, Rabbi David Aronson attempted to go around the system. He brought Epstein's proposal out of the Committee and to the RA as a whole, calling on the Assembly to establish its own *beit din* to adjudicate on behalf of the *agunah*. The CJL protested, and the RA caved in. Historian Pamela S. Nadell explains,

Although technically a body of the Rabbinical Assembly, [the CJL] remained dominated by the Seminary and the most traditional spirits within the Conservative movement, those reluctant to make any but essential accommodations to ease the dilemma of rabbis determined to live

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<sup>13</sup> Pamela Nadell, "New and Expanding Horizons," A Century of Commitment: One Hundred Years of the Rabbinical Assembly ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000) 92.

personally within and to steer their congregants and congregations toward halakhah.<sup>14</sup>

Interestingly, the onset of World War II led Louis Ginzberg himself to propose a solution to the *agunah* problem not unlike Epstein's. Ginzberg and the Committee, however, were quick to note that this was a temporary solution brought on by a world war and in no way suggested a permanent *halakhic* solution to the situation of the *agunah*.<sup>15</sup>

Nevertheless, the 1940s saw a real transformation within the mindset of the members of the RA. In 1940 it changed its name from the Rabbinical Assembly of the Jewish Theological Seminary of America to, simply, the Rabbinical Assembly of America. By the end of the decade, the RA had gone well beyond a mere name change to distance itself from the professors of JTS. The question of interpretation versus the power to legislate came to a head. At their Chicago convention that year, Louis Epstein once again gained the ears of the members of the Rabbinical Assembly. Concerned about the direction the movement was headed in, he proposed a resolution that demanded, "The Committee shall be instructed to hold itself bound by the authority of Jewish law and within the frame of Jewish law to labor toward progress and growth of the Law and to the end of adjusting it to present day religious needs and orientation, whether it be on the side of severity or leniency."<sup>16</sup> The RA rejected the resolution. These Conservative rabbis also rejected proposals from Epstein that clergy who veer from unanimous decisions by the committee undergo disciplinary action, as well as an idea that no new "legislation" or *takanot* from the Committee possess legal force unless agreed upon by 2/3 of the Assembly as a whole. The voice of the RA rang loudly and clearly. As Nadell explains,

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<sup>14</sup> Fierstien, 84.

<sup>15</sup> Fierstien, 85.

<sup>16</sup> Fierstien, 86.

"Halakhic experts, isolated behind Seminary walls, could demand modern Jews to be bound by halakhah. But the rabbis out in the field knew better."<sup>17</sup>

Due to the decline in anti-Semitism that followed World War II, American Jews witnessed a freedom like never before. Though membership in Conservative synagogues increased significantly during the 1950s and 1960s, commitment to ritual observance waned. The Conservative rabbis who dealt first hand with this phenomenon demanded that the RA address the issue; as a result, a new committee: the Committee on Jewish Law and Standards was formed. Its goal, according to RA president David Aronson, was to raise "the standards of piety, understanding, and participation in Jewish life" among the members of Conservative synagogues—even if that meant the CJLS needed to assume "extra-halakhic" powers, including the authority to legislate.<sup>18</sup> Additionally, at least for Mordecai Kaplan, the name change signified "that the task of the Committee would be not only to rule on questions of law, but also to deal with areas of Jewish practice [and] custom which for some members of the committee [do] not properly belong under the heading of Jewish law."<sup>19</sup> Under the new leadership of Detroit rabbi Morris Adler, the CJLS expanded to twenty-five members (five of the members' terms expiring every year), and intentionally excluded JTS faculty from participating unless the faculty member served a pulpit as well. Now, members of the Committee were appointed by each of the three branches of Conservative Judaism: the RA (fifteen appointed by its president), the Seminary (whose chancellor appoints five), and United Synagogue (whose

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<sup>17</sup> Fierstien, 87.

<sup>18</sup> *Ibid.*

<sup>19</sup> David Golinkin, "The Influence of Seminary Professors on Halakha in the Conservative Movement: 1902-1968," Tradition Renewed: A History of the Jewish Theological Seminary of America Vol. 2 ed. Jack Wertheimer (New York: The Jewish Theological Seminary of America, 1997) 456.

president appoints five).<sup>20</sup> Greater authority was given to local congregational rabbis as well. In 1949, the CJLS announced that it would circulate signed minority and majority opinions; a congregational rabbi, as *mara d'atra*, could decide to follow either opinion.<sup>21</sup>

As part of the Sabbath Revitalization Campaign, then, the CJLS took advantage of its new powers to give permission to Conservative Jews to use electricity on the Sabbath and to drive to synagogue on Shabbat as well. "The responsum revealed that the rabbis viewed halakhah as a tool for enriching Jewish spiritual life."<sup>22</sup> Also, the role of women in the synagogue was looked at anew, and women were granted the right to an *aliyah*. In 1951, the CJLS looked to push through the Epstein solution to the *agunah*, when the Seminary stepped in again. JTS chancellor Louis Finkelstein conceded the ability of rabbis to regulate matters of synagogue ritual, but when it came to the question of personal status that would affect all of Jewry, Finkelstein grew concerned. As a result, in 1953, the RA and the Seminary formed a Joint Law Conference empowered to deal with issues of marriage and divorce. More significantly, however, the Conference created a national *beit din* and claimed the authority to issue *takkanot*. This self-invested power allowed JTS professor Saul Lieberman—successor to Louis Ginzberg as the movement's halakhic authority—the opportunity to turn the *ketubah* into a civilly binding contract. As such, should the husband refuse or be unable to deliver a *get*, civil courts could ensure compliance. The difficulties surrounding the status of the *agunah* in Conservative Judaism had been solved—provided that the bride was married under the auspices of a Conservative rabbi who agreed with the halakhic validity of the Lieberman clause.

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<sup>20</sup> In 1989, five lay non-voting members were added as well. Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1986-1990 ed. Kassel Abelson (New York: The Rabbinical Assembly, 2001) ii.

<sup>21</sup> Fierstien, 88.

Mostly though, the CJLS spent the 1950s and 1960s dealing with more routine questions. They addressed issues of *kashrut*, the synagogue, and life-cycle events in order to attempt to reconcile traditional practices with modern sensibilities. "Yet, with more than 170 questions submitted in a single year," Nadell explains, "the Committee spent most of its time responding to specific questions. That left little time to initiate the kind of inquiry that had led to what the RA had deemed its path-breaking responsum on the Sabbath."<sup>23</sup> Nevertheless, even in these small steps, the CJLS of the 1950s helped to define Conservative Judaism as a unique, separate stream within Judaism.

As a result of the frustration felt by some that the CJLS should be more proactive, new chairman Rabbi Benjamin Kreitman (1966-1972) took an activist stance. Under his leadership, the Committee permitted bingo in the synagogue and the eating of fish in non-kosher restaurants; it allowed a swimming pool to be used as a *mikveh* and *kohanim* to marry converts. During the 1960s, the CJLS made *yom tov sheni* optional and expanded the scope of *kashrut* to include gelatin, swordfish, and hard cheeses. Once again, though, the Committee confronted the nagging issue of the *agunah*. After allowing the Joint Law Conference with the Seminary to disintegrate, the RA proposed in 1968 that a conditional agreement be added to the marriage ceremony. Now, should a civil divorce occur, rabbis could annul the marriage and render the *get* unnecessary! This assumed power was actually put to use in 1969, when a special *beit din* annulled the marriage of a woman whose husband had refused to give her a *get* for eighteen years. Finally, the Conservative movement closed the book on the troubles of the *agunah*.<sup>24</sup> "From the past the RA thus preserved loyalty to halakhah and the maintenance of the rabbinic prerogative of

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<sup>22</sup> Fierstien, 89.

<sup>23</sup> Fierstien, 91.

reinterpretation. But true to the present, they took for their agenda the leading social and intellectual issues of the contemporary scene."<sup>25</sup>

By 1970, the rapid growth of Conservative synagogues had come to a virtual halt. Additionally, "twenty years of halakhic rulings designed to ease the way to observance of Jewish law did not seem to be bearing fruit."<sup>26</sup> On the right, Orthodox Judaism expanded its claims to be the only authentic, legitimate Judaism. On the left, religious liberals pointed to the collapse of ritual observance among American Jews and demanded a more creative approach to *halakhah*. Conservative Judaism, as the centrist movement, appeared headed for oblivion. On December 2, 1970, sixteen rabbis resigned from the CJLS to protest procedural difficulties.<sup>27</sup> Many complained that the Seminary still exerted too much authority. In response, the 1971 RA convention provided for change within the Committee. Now, only a minimum of six votes was needed in order for a *teshuvah* to serve as an official opinion, and the constant push for consensus fell by the wayside.

This new procedural change led to another open door for women in the synagogue as well. In 1973, the CJLS granted permission to synagogues to count women in the prayer quorum. Once again the Committee served as a testing ground for the limits of *halakhic* flexibility. CJLS chairman "Seymour Siegel's statement that counting women to the minyan could not be defended on strict halakhic grounds, but that it was an ethical imperative, and thus part of a 'higher halakhah,' recharged the tension between ethics and

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<sup>24</sup> Fierstien, 92-93.

<sup>25</sup> Fierstien, 94.

<sup>26</sup> Michael Panitz, "Completing a Century," A Century of Commitment: One Hundred Years of the Rabbinical Assembly ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000) 100.

<sup>27</sup> Fierstien, 102.

halakhah.”<sup>28</sup> The CJLS’s landmark decisions relating to women, followed eventually by JTS’s admission of women into the rabbinical program, helped to distinguish the Conservative movement from Modern Orthodoxy on its right. Additionally, its formal commitment to the halakhic process separated it from the Reform movement on its left. These borders, however, remain quite porous, and the desire from Conservative Jews for self-definition has not always been pronounced. Yet, even as early as 1927, Rabbi Israel Goldstein had already proclaimed:

It is a confusing situation, which is bound to work to the detriment of the Conservative party. As Orthodoxy becomes more and more de-Ghettoized and Reform becomes more and more Conservatized, what will be left for the Conservative Jew to do? How will he be distinguished from the other two? With both his wings substantially clipped he will surely be in a precarious position.<sup>29</sup>

Perhaps more than any other group of people within the Conservative movement, the CJLS holds the power to reevaluate and redefine the meaning of Conservative Judaism, and to ensure its continuity into the new millennium.

As such, after the liberalizing trend toward the role of women in Judaism championed by the Conservative movement in the 1970s and 1980s, some rabbis grew weary that Conservative Judaism was on a path to merge with Reform. In 1984, then, at the RA’s annual gathering, a large majority of rabbis literally stood together to display their affirmation of the matrilineal principle, in contradistinction to the Reform movement’s recent resolution on patrilineal descent.<sup>30</sup> In 1985, this show of solidarity became a “Standard of Rabbinic Practice”<sup>31</sup> for members of the Rabbinical Assembly.

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<sup>28</sup> Fierstien, 105.

<sup>29</sup> Fierstien, 51.

<sup>30</sup> Fierstien, 117.

<sup>31</sup> An opinion becomes a Standard of Rabbinic Practice when a two-thirds majority of those present at an RA meeting vote in favor of a proposition declaring it as such. To date, only three negative statements exist as Rabbinic Standards. Aside from the issue of patrilineal descent, other Standards of Rabbinic



More specifically, "a rabbi who accepted as Jewish the unconverted child of a Jewish father and Gentile mother would be subject to censure and even expulsion from the organization."<sup>32</sup> This desire for self-definition appears a far cry from the Seminary founded to avoid "divisive ideologies by defining none."<sup>33</sup>

After the rejection of patrilineal descent, the Conservative movement found another issue with which to distinguish itself from the Reformers: homosexuality. On this topic, the CJLS played the dominant role. In 1976, like the Reform movement, the CJLS rejected the notion that homosexuals should set up their own, separate, synagogues. Fourteen years later, in spite of the 1976 ruling, a New York congregation that served homosexuals requested help from the movement in finding a rabbi. The RA refused. In response, Rabbi Bradley Shavit Artson submitted a *responsum* to the Committee on Jewish Law and Standards demanding that the Conservative Movement take a renewed look at its stance regarding the issue of homosexuality.<sup>34</sup> Artson argued that the Torah's prohibition against homosexuality did not apply to, what he called, "constitutional" homosexuals—gays and lesbians in committed, monogamous, relationships.<sup>35</sup> He went so far as to suggest that Conservative rabbis should offer a commitment ceremony for constitutional homosexuals on the pattern of heterosexual marriage ceremonies.<sup>36</sup> The

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Practice include not performing a marriage for a divorcee unless that person has obtained a *get* and not performing or even being present at an intermarriage. Responsa 1991-2000 ed. Kassel Abelson and David J. Fine (New York: The Rabbinical Assembly, 2002) xi.

<sup>32</sup> *Ibid.*

<sup>33</sup> Wertheimer, 6.

<sup>34</sup> Fierstien, 119.

<sup>35</sup> Rabbi Joel Roth, "Homosexuality (EH 24.1992b)," Responsa 1991-2000: The Committee on Jewish Law and Standards of the Conservative Movement ed. Kassel Abelson and David J. Fine (New York: The Rabbinical Assembly, 2002) 621.

<sup>36</sup> Fierstien, 120.

Law Committee, however, rejected Artson's *responsum* and sat on the issue for two years.<sup>37</sup>

In 1992, then, CJLS chairman Rabbi Joel Roth submitted a lengthy *responsum* entitled "Homosexuality," but received the endorsement of only fourteen of his CJLS colleagues, with seven members in opposition and three abstentions. Roth concludes that, while no one is fully able to control his or her thoughts, love, or fantasies, homosexuals should either attempt to become heterosexuals or they should practice strict abstinence. Furthermore, an open, active homosexual should not be allowed into the clergy (rabbi or cantor), and the local rabbi—as *mara d'atra*—must seriously consider whether s/he will permit an active homosexual to take a leadership or educational position within the synagogue. Nevertheless, Roth writes, gays and lesbians must be welcomed into the synagogue, and the U.S. government should offer them protection and full rights as individuals.

In the same year that Roth's *teshuvah* was accepted by the CJLS, the RA as a whole voted to reverse precedent and authorize rabbis to serve a congregation regardless of its members' sexual orientation. A consensus statement released by the CJLS left the final decision about homosexuals serving in professional leadership positions for children to the local congregational rabbi. At the 1993 RA convention, Harold Schulweis recalled the words of Seymour Siegel before him, criticizing his colleagues for setting aside the ethical for the traditional *halakhah*.<sup>38</sup> JTS chancellor Ismar Schorsch struck back, accusing rabbis who supported Jewish rights for homosexuals of failing to do their part to ensure Jewish continuity. Schorsch threatened that if these rabbis continued to support

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<sup>37</sup> *Ibid.*

<sup>38</sup> Fierstien, 122.

homosexuals they would "throw the RA into an ideological civil war in which there [would] be no winners."<sup>39</sup> Indeed, the ordination of women by JTS caused a break-off from the Conservative movement, and a liberal trend vis-à-vis homosexuality holds potential for the same. To this date the debate continues, but the CJLS has already decreed where it stands on the issue.

According to Conservative historian Michael Panitz, the CJLS's halakhic decisions over the last thirty years demonstrate a commitment to and an expansion of individual opportunities—a signpost of liberal religion. Additionally, it has helped to modernize traditionalism in an effort to reach out to an individual's desire for spirituality and meaning. Moreover, "Unlike Reform, Conservative halakhic decisions have underscored the vital importance of remaining identifiably one with the entire Jewish community . . . Unlike Orthodoxy . . . Conservative Judaism emphasizes receptivity to selected aspects of general ideas and behavioral norms [from the society in which we live.]"<sup>40</sup> Indeed, the entire history of the CJLS serves as both a microcosm and a fountainhead for the struggle for self-definition experienced by Conservative Judaism in the twentieth century. As Neil Gillman writes, Conservative Jews "are searching for a way to be both authentically Jewish and thoroughly in tune with modernity."<sup>41</sup> At the same time, they are made insecure by traditionalists on the right and they want to distance themselves from the Reform movement on the left.<sup>42</sup> These areas of tension play important roles within the halakhic opinions of the Committee on Jewish Law and

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<sup>39</sup> *Ibid.*

<sup>40</sup> Fierstien, 133.

<sup>41</sup> Gillman, 3.

<sup>42</sup> Fierstien, 117.

Standards of the Conservative movement, and pull much weight in the persistent struggle between tradition and modernity.

## **Chapter 3**

### **The Question of Kosher Wine**

## **The Permissibility of Non-Jewish Wine (1964)**

In 1964, Rabbi Israel Nissan Silverman sought to justify the widespread practice by Jews in America of drinking wine produced by non-Jews. He utilizes questions regarding the permissibility of champagne as a pretext to expand upon the broader issue since, as the author explains, champagne—despite the fact that it has bubbles—is made from grapes just as ordinary wine is, and thus it is subject to the same qualifications as other wines.<sup>1</sup> From here Silverman has an entry point to a discussion of *ye'en nesekh* and *s'tam yenam* in an American context.

The twentieth century Conservative rabbi begins with a quotation from Rabbi Moses Isserles, in which the Rama was asked about 16<sup>th</sup> century Moravian authorities' leniency toward the consumption of *s'tam yenam*. Isserles refers back to B.T. Baba Batra 89b,<sup>2</sup> in which Yochanan ben Zakkai is pressed into reacting to the knavery of gentile merchants with whom Jews of that era did business. In that Talmudic citation, Ben Zakkai acknowledged the trickery, despite his fears that a discussion of such matters could prompt others into the same practice, in order to alert people that the rabbis were aware of such behavior. Thus Rabbi Silverman, in a parallel manner to Isserles and ben Zakkai before him, recognizes the fact that Jews are drinking non-kosher wine and senses

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<sup>1</sup> It is important to acknowledge that Silverman reveals that he visited several wine producing and distilling plants, read thoroughly in published materials relating to the production of wine, and consulted many experts along the way to preparing his *responsum*. "As a result," he writes, "I believe I am well informed about the technical aspects of wine production in this country" (Silverman, 1311). Even more so, Silverman acknowledges that a variety of wine-making practices exist, as so limits his *responsum* to wine made only by machinery of large wine companies.

<sup>2</sup> In B.T. Baba Batra 89b one finds, "Concerning all these [sharp practices of traders], R. Johanan b. Zakkai said: Woe to me if I should speak [of them]; woe to me if I should not speak. Should I speak [of them], knaves might learn [them]; and should I not speak, the knaves might say, 'the scholars are unacquainted with our practices' [and will deceive us still more]. The question was raised: Did he [R. Johanan] speak [of these sharp practices] or not? R. Samuel son of R. Isaac said: He did speak [of them]; and in so doing [he based his decision] on the following Scriptural text: For the ways of the Lord are right, and the just do walk in them; but transgressors do stumble therein."

an obligation to confront the issue. "I share the sentiments of Rabbi Moses Isserles," Silverman writes, "as I approach the task of finding a *heter* for drinking non-Jewish wines currently produced in America—'Woe to me if I say it [leniency], woe to me if I do not say it.'"<sup>3</sup>

Silverman's argument commences with a brief rejection of the notion that wine produced by American non-Jews qualifies as *ye'en nesekh*. He refers to writings from the *geonim* and other later authorities to suggest that modern non-Jews do not qualify as experts in idolatrous uses of libation.<sup>4</sup> Silverman's footnote refers readers to Avodah Zarah 14b, in which it is written, "Said R. Hisda to Abimi: There is a tradition that the [Tractate] Avodah Zarah of our father Abraham consisted of four hundred chapters; we have only learnt five, yet we do not know what we are saying." If the lessening of idolatrous practices was evident already by the time of the Talmud, then all the more so is it not present in twentieth-century America's major wine-producing companies. Silverman concludes, "Therefore, all wines produced by non-Jews in America are classified not as *ye'en nesekh* but as *s'tam yenam*, 'non-Jewish wine.'"<sup>5</sup>

The leniency regarding *s'tam yenam*, however, allows for a Jew to benefit (financially) from such wine, but the question still remains as to whether one may drink it

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<sup>3</sup> Israel Silverman, "Are All Wines Kosher," *Yoreah Deah 123:1* trans. David Golinkin, Proceedings of the Committee on Jewish Law and Standards 1927-1970 vol. III, ed. David Golinkin (Jerusalem: The Rabbinical Assembly and The Institute of Applied Halakhah, 1997) 1305.

<sup>4</sup> Silverman provides a thorough citation in his third footnote to his responsum elaborating on the moot nature of the category of *ye'en nesekh*. The Tosaphot write in Avodah Zarah 57b, "The Rashbam and the Ravan explained in the name of Rashi that it is written in the responsa of the *Gaonim* that in these times there is no prohibition against deriving benefit from wine which was touched by a non-Jew since in these days they are not accustomed to making libations before idols, and they are considered as those who are not knowledgeable about idolatry and the cult connected with it, and they have the same status as newborn babes, and we rely on this to take the wines of non-Jews as payment for their debts." Isserles acknowledges this point as well, in his comments of Yoreh Deah, 132.

<sup>5</sup> Silverman, 1306.

as well.<sup>6</sup> The author's answer to the question on consumption begins with a passage from Mishnah Avodah Zarah (2:6).<sup>7</sup> The rabbis permitted Jews to benefit economically from bread, oil, stewed and pickled vegetables, but the Mishnah forbid consumption of such things. The Gemarrah expounds upon the consumption of alcohol prepared by non-Jews: "It has been stated: Why has beer of heathens been forbidden? Rami b. Hama said in the name of R. Isaac: Because of marriages."<sup>8</sup> Rashi elaborates on this in his commentary to Avodah Zarah, explaining that permission for a Jew to consume an alcoholic beverage of a non-Jew would lead to Jews attending parties at the houses of non-Jews (idol-worshippers, really). Such attendance could lead to a Jew becoming attracted to the daughter of a gentile, and eventually intermarriage. Thus through the "slippery-slope" argument, Jews ought not to consume the alcoholic beverages of non-Jews so as to prevent intermarriage. Since American non-Jews do not perform acts of libation, then, this fear of a Jew marrying a gentile remains the sole factor barring consumption of an alcoholic beverage prepared by a non-Jew.

Instead of addressing the issue of intermarriage, Silverman refers back to the Mishnah (Avodah Zarah 2:6) to remind his readers that with the exception of wine, the other products, when prepared by non-Jewish sources, have become acceptable. The Mishnah itself comes to permit oil. The Jerusalem Talmud (Avodah Zarah 41d) reveals

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<sup>6</sup> In his fourth footnote to the *responsum*, Silverman provides a quotation from the Tosaphot to Avodah Zarah 57b: "[B]ecause the non-Jews are not knowledgeable in the nature of libations, it is enough that their wine should be considered in the same category as their oil and their bread or their cooked vegetables, and therefore it would be prohibited from drinking, but not from having any benefit from it.. 'But he who is stringent may he be blessed.'"

<sup>7</sup> "These things of the gentiles are forbidden, but it is not forbidden to have any benefit at all from them: milk which a gentile milked when no Israelite watched him; their bread and their oil (Rabbi and his court permitted the oil), stewed or pickled vegetables into which it is their custom to put wine or vinegar . . . Lo, these are forbidden, but it is not forbidden to have any benefit at all from them." *The Mishnah* trans. Herbert Danby, (Oxford: Oxford University Press, 1933) 439.

<sup>8</sup> B.T. Avodah Zarah 31b.



that though the bread of non-Jews should not have been eaten, the Jews permitted such consumption "because it was a necessity of life."<sup>9</sup> With regard to vegetables, the *Kitzur Shulkhan Arukh* (38:6) teaches, "[A]ny foods which may be eaten raw or which are not important and are not fit to be served on a king's table is not considered to be 'gentile cooking.'"<sup>10</sup> Silverman surmises, "In our own day, as we know, the custom of being lenient has spread to almost all Jewish homes in regard to the prohibition against 'foods cooked by non-Jews,' to a greater extent than the Rabbis permitted."<sup>11</sup> For the Conservative author, this "fact" is an important determinant in his eventual permission of the consumption of gentile wine.

This pattern of leniency, Silverman writes, may also be seen in the laws pertaining to the use of wine. Initially both the consumption of and benefit from wine was strictly prohibited, but, as earlier demonstrated, when modern gentiles were no longer considered "experts on libations," Jews were allowed to benefit from non-Jewish wines. "This was especially true in France, where Jews were very prominent in the production of wine for sale, and where it was customary for Jews to accept non-Jewish wine as payment for debts."<sup>12</sup> By extension of this leniency, then, and the fact that a majority of Jews drink such gentile wine, Silverman comes to permit the consumption of wine produced in large factories. He bases his decision on three factors: the use of machinery in wine production, the boiling of wine, and wine used in gentile religious ceremonies is wine made specifically for those ceremonies—not wine mass-marketed.

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<sup>9</sup> Silverman, 1306.

<sup>10</sup> Shlomo Ganzfried, *Kitzur Shulchon Oruch*, Vol. 1 trans. Eliyahu Touger (Brooklyn: Moznaim Publishing Corporation, 1991) 167.

<sup>11</sup> Silverman, 1307.

<sup>12</sup> *Ibid.*

Silverman argues that the machination of wine production represents an important advancement toward permitting gentile wine. He cites the sixteenth century Egyptian author Rabbi Yaakov Castro, who wrote that Karaite wine is permissible so long as the Karaite swears an oath that no non-Jew touched the wine during the production. Silverman then adds to this statement that even if a gentile used a utensil in the wine, it would still be permissible.<sup>13</sup> Like Castro, who recognized the rabbinic statements that gentiles are no longer experts in libation, eighteenth century Rabbi Raphael ben Eleazar Meldola also permitted the consumption of wine made by a non-Jew, even if a utensil was used in its production. So too do did fifteenth century rabbis Levi ibn Habib and Jacob Weil permit wine even if a utensil touched by a non-Jew was used in its production, and Rabbi Moses Isseles echoed the same sentiments.<sup>14</sup> The fact that in the large, modern wine-producing factories virtually no humans come into contact with the wine except to touch valves and switches, and occasionally to use a utensil to try the wine, it should therefore be considered permissible.

Even though he has already discussed at length the rabbis' ruling that modern gentiles are not experts in libation, still Silverman's second point rests on the premise that in the Talmud both Rabbah and Rabbi Joseph declared that boiled wine is not suspected of idolatrous uses.<sup>15</sup> Since all wine goes through the process of pasteurization, then, it may be considered "boiled wine" and thus not suspect. Silverman adds again, "Therefore, from this point of view, it is possible to permit the drinking of wine produced

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<sup>13</sup> Silverman, 1308.

<sup>14</sup> Silverman, 1308-1309.

<sup>15</sup> In B.T. Avodah Zarah 30a, it states, "Rabbah and R. Joseph both of them said that diluted wine does not become forbidden through being left uncovered; nor is boiled wine to be suspected of idolatrous use." And later is found, "Samuel and Ablet were sitting together when boiled wine was brought up for them and [the latter] withdrew his hand, but Samuel said to him: Behold, it has been said that boiled wine is not to be suspected of idolatrous use!"

by non-Jews in America today.”<sup>16</sup> One might assume, then, that this ruling applies to both *stam yeinam* and *yein nesekh*, since boiling wine relieves all concerns.

For his third point, Silverman asserts that Christians who use wine in religious ceremonies use wine specifically made for that purpose. They also use bread and oil, he reminds—two items about which the rabbis long ago practiced leniency. Nevertheless, the fact that wine mass produced in American is not being used for Christian religious functions exists as an important element of Silverman’s argument.

However, to wrap up his paper permitting the consumption of non-Jewish wine, the author adds three caveats to his *heter*. First, “it is a special mitzvah for every Jew, wherever he resides, to purchase the wines produced in our ancestral homeland, which are kosher without question.”<sup>17</sup> Second, when wine is being used for Jewish rituals (such as *kiddush*, *Havdallah*, at weddings, and circumcisions), “it is proper to use Jewish wine, and especially wine produced in Israel.”<sup>18</sup> Last, this entire *responsum* granting permission for the consumption of gentile wine does not apply on *Pesach*. Thus, in essence, non-kosher wine may be consumed but only for the sake of social drinking and not during the eight days in which *chametz* is forbidden.

While Silverman raises the issue of the consumption of non-Jewish wine leading to intermarriage, he never addresses the problem. He remains content to rely on a pattern of lenient minority rulings established by earlier rabbis who permitted such consumption regardless of the company with whom one imbibes. Additionally, it is noteworthy how the modern methods of wine making—mass production and fermentation—have come to circumvent the rabbis’ concerns that a gentile might tamper with it or that it was made for

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<sup>16</sup> Silverman, 1310.

<sup>17</sup> Silverman, 1311.

the purpose of idolatrous libations. However, permission to drink boiled wine does not address the concerns stemming from inter-religious socialization.

Additionally, Silverman's three qualifications on the consumption of gentile wine render this a truly Conservative opinion. Jews who follow this *responsum* are permitted to engage in an act widespread in modern America—social drinking—and are permitted to do so with both Jewish and non-Jewish friends. In fact, the very reason that the author decided to write this *responsum* is because he knew that Conservative Jews were drinking non-Jewish wine to begin with. Also, the fact that Jews are now permitted to eat gentile bread and drink non-Jewish beer would beg the question of why an *issur* on gentile wine should continue. However, this liberal ruling is tempered by conditions that separate a Jew's religious life from his secular activities. By requiring kosher wine for ritual usage and everyday on Passover, as well as encouraging the consumption of Israeli wine, the Conservative movement maintains a middle ground between the Reformers and the Orthodox. It permits itself to take the trend of leniency with regard to *kashrut* one step further than did the medieval rabbis, but refrains from granting blanket permission to disregard kosher wine altogether. It is obvious that Silverman attempted to balance the competing forces of modernity and tradition, though his statement in honor of Isserles—"Woe to me if I say it [leniency], woe to me if I do not say it"—represents a self-perception of hyper-piety not present in his *responsum*. Nevertheless, his *responsum* on wine remains a symbol of the Conservative *halakhic* process.

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<sup>18</sup> *Ibid.*

## The Permissibility of Non-Jewish Wine (1985)

Twenty-one years after the acceptance of Rabbi Israel Nissan Silverman's *responsum* on the permissibility of consuming non-Jewish wine, Rabbi Elliot Dorff and the Committee on Jewish Law and Standards decided to revisit the issue. Apparently, as a result of updated technology in the fields of both wine-production and chemical analysis, concerns arose over the *pareve* status of non-kosher wine. Not only does Rabbi Dorff affirm some of those concerns, but also he rejects 2/3 of Silverman's 1964 *responsum*. Nevertheless, as a result of the previous *responsum*, Dorff must come to permit the consumption of gentile wine. Dorff admits,

One must also recognize that many Jews who otherwise observe the laws of kashrut drink rabbinically uncertified wine. In other words, whatever one may think of the halakhic status of the prohibition based on the sources, the fact is that for many the prohibition has fallen into disuse. In the operation of any legal system, Jewish law included, when that happens those in charge of the law must decide whether to lament and combat the widespread transgression or to accept it, recognizing that a specific law has fallen into disuse and that there is no strong reason to fight for it. Even if we decided that we wanted to maintain *stam yeinam* as part of the law, I doubt that it would be very high on our list of educational and halakhic priorities. We are better off acknowledging the fact that this prohibition has fallen into disuse and letting it be.<sup>1</sup>

In other words, Dorff admits the need to arrive at a particular conclusion to a halakhic question as a result of communal pressures and concerns.

Dorff's 1985 opinion, however, which received the support of thirteen members of the Committee (two opposed),<sup>2</sup> does represent a step (albeit slightly) to the right. As the author concludes, "Part of our ideology as a Conservative movement provides that maintaining the tradition is always a valid position when there is no moral or social

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<sup>1</sup> Elliot Dorff, "The Use of All Wines," Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1986-1990 (New York: The Rabbinical Assembly, 2001) 218.

<sup>2</sup> Editor's note, 203.

imperative for changing it.”<sup>3</sup> As such, those who are *really* concerned about *kashrut* ought to drink only *hekshered* wines at home—though those less concerned may uphold the 1964 decision, and, additionally, synagogues should consider stocking kosher wines for all occasions, not just religious ones. Yet, as Dorff reminds, “those who use uncertified wines in their homes should not thereby be considered Jews who do not keep kosher just as those who take the more stringent stand should not be branded as fanatics.”<sup>4</sup>

Rabbi Dorff divides his *teshuvah* into three major sections: issues of *kashrut* in the making of wine including halakhic principles and precedents, a review of Silverman’s 1964 *responsum*, and a three-part conclusion. Dorff begins not with a conversation about the theoretical issues relating to *s’tam yenam*, but with a detailed account of the process of wine production. This is in contrast to Silverman’s *responsum*, in which the author began with the *halakhic* permissibility of *s’tam yenam* but assured his readers in a footnote that he thoroughly researched the issue of modern wine production and could be trusted in his knowledge of the procedure. Here, in the 1985 *responsum* from Rabbi Dorff, it is the exact process of modern wine production that is called into question. The petitioner points out that “there is a negligible residue of the fining agents left in the wine after they trap the particles suspended in the wine and [those particles] settle down to the bottom.” Since many of the fining agents used are of a dairy-base, “must we not assume that without someone actually standing on the site watching the ingredients which are added to the wines, the wines are, at best, dairy and, at worst, unkosher?”<sup>5</sup>

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<sup>3</sup> Dorff, 221.

<sup>4</sup> *Ibid.*

<sup>5</sup> Dorff, 203.

Dorff offers a thorough presentation on the fining process.<sup>6</sup> While beef blood is used for such purposes in Europe, the U.S. government does not approve of such practices. Casein salts (dairy) are often used in fining white wines, and gelatin (both vegetable and animal) is used in red wines. "Rabbi Isaac Klein wrote a *responsum* permitting the consumption of animal gelatin,"<sup>7</sup> Dorff reminds, "but there are some in our movement who do not want to take advantage of the permission therein granted."<sup>8</sup> Yet, of the top ten largest wineries in 1985, none of them used animal gelatin in the fining process. Additionally, the federal government mandates that none of the fining agent remain in the wine, though the Chairman of the Department of Viticulture and Enology at the University of California, Davis, told the *responsum*'s author that some of the agents are left in the wine after settling, despite the government's policy. Furthermore, Dorff explains that because the agent residue contains no taste, it may not be nullified on the grounds of *notein ta'am lifgam*.<sup>9</sup> Though Dorff does say that other red wines do not use gelatin in their fining process, his overall message appears to be suggesting already that it is preferential for those who keep a more traditional level of *kashrut* to drink only *hekshered* wines in order to avoid any concern over the *kashrut* of the beverage.

<sup>6</sup> Dorff goes into, at length, the process of wine production. "Fining" wine is the process of clearing the beverage of excess grape solids that still remain after the use of other wine-clarifying procedures in order to remove remaining astringency or bitterness (Dorff, 204).

<sup>7</sup> "To sum up," Klein writes, "Gelatin that is made from bone or hides is kosher." This *responsum*, endorsed by the CJLS, may be found in Responsa and Halakhic Studies by Isaac Klein, (New York: Ktav Publishing House, Inc., 1975) 59-74.

<sup>8</sup> Dorff, 205. Klein, himself, writes, "Psychologically, and logically too, there is a resistance to allowing a *davar issur* to be transformed into a *davar heter*. Now with the new science of food processing where such a transformation often takes place, a new area of *heterim* will open . . . [and] people will say that it is a matter of caprice with the rabbis whether a thing is permitted or not . . . I heard well-meaning lay people say in such cases that the rabbis can twist and turn such decisions to suit their fancy. And yet a sense of responsibility gives us no choice but to follow the halakhic conclusion." [Isaac Klein, Responsa and Halakhic Studies (New York: Ktav Publishing House, Inc., 1975) 74].

<sup>9</sup> Shulkhan Arukh *Yoreh Deah* 103:1, ff. If a forbidden food product falls into a permissible food and imparts a flavor that is disgusting to taste, there is no need to annul that food by sixty times the volume of

Moreover, the author suggests that while since the 1950s the use of filtration to remove such particles has spread, 99.5% of wines sold commercially in the U.S. are fined in some manner.<sup>10</sup> This modern technique of filtration leads Dorff to reflect upon the long history of wine production and the role that filtration and fining has always played—a role often permitted by Jewish authorities. “Since most of the fining agent settles to the bottom, and since the remainder is undetectable by the naked eye, it is quite possible that Jews learned these techniques from the Christian neighbors and used them without fear of violating the laws of kashrut,” he writes.<sup>11</sup> Dorff uses his own family as an example. “During Prohibition my father-in-law’s father made wine for sacramental purposes using a technique he learned from a wine maker from the Zanz community of Hasidim. They curdled some wine with skimmed milk and poured the remaining wine through a funnel laced with the curdled mixture. They were confident,” Dorff explains, “that the wine contained no milk because they could not see any in it.”<sup>12</sup> Today, though the process of fining and the ingredients in fining agents vary among individual wine makers, it is certain that very small amounts remain even after the most thorough of cleansing processes.

However, even though these amounts are less than one-sixtieth of the volume of the wine, the principle of *bateil beshishim* does not apply because the agents are not added accidentally (though the fact that they remain there *is* accidental).<sup>13</sup> In order to

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the forbidden food. [Isaac Klein, A Guide to Jewish Religious Practice (New York: The Jewish Theological Seminary of America, 1979) 376.]

<sup>10</sup> Dorff, 207.

<sup>11</sup> Dorff, 208.

<sup>12</sup> *Ibid.*

<sup>13</sup> B.T. Chulin 97b: “Where substances of like kind were [accidentally] mixed together, in which case it is impossible to discern whether one imparts a flavor to the other; or where substances of different kinds, one of which was forbidden, were mixed together, and no [gentile] cook is available, then the test is sixty [to



eliminate the particles of milk that remain in it (since a non-Jew's milk is forbidden), one may intentionally cook the butter. According to Maimonides, even the little milk that still remains is null and void because the person's intention is to remove the particles of milk.<sup>14</sup> Dorff then cites this as a precedent to an earlier ruling also on the issue of wine. Ezekiel ben Judah Landau permitted the Jews of Poland in the eighteenth century to continue fining wine with an unkosher fish. Landau wrote, "[I]t seems that it is permitted to put *Heusen Bleusen* (the bladder of an unkosher fish called *Heusen*) into the wine or the drink which they call *med* in Poland because the intention is not to nullify but only to clarify the drink."<sup>15</sup> Dorff takes this ruling into account along with his own personal example to declare, "Consequently there are halakhic grounds to say that wine is kosher no matter what fining agent is used: it is legally nullified since the one adding the fining intends to clarify the wine and not to nullify the fining."<sup>16</sup> Yet the Shulkhan Arukh's ruling has to do with intentionally adding a non-kosher element for whatever reason; Dorff, following the precedent of Maimonides and Landau, rereads this law to apply it only in the case of a non-kosher item added specifically for the sake of nullification. If the non-kosher item is added for a different purpose (such as clarifying), then it is acceptable! This seems to represent quite a creative attempt at legal reasoning.

To be fair, the twentieth century rabbi presents opposition to the rulings by Maimonides and Landau as well. The twelfth century Rabad (Rabbi Abraham ben David

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one]." The Shulkhan Arukh Yoreh De'ah 99:5 clarifies, "*Ein mevatin isur lechatkhilah*: one does not take an action intentionally to nullify a forbidden substance that is mixed with a permitted one."

<sup>14</sup> Maimonides, in his *Mishneh Torah* (*Hilchot Ma'achalot Assurot* 3:16) writes, "It appears that if one purchased butter from gentiles and cooked it until the drops of milk in it disappeared, it is permitted. For if one will say that [drops of non-kosher milk] were mixed with the butter and it was all cooked together, they became insignificant because of the small quantity [involved]." The *Kessef Mishneh* affirms that this is the case both *l'hatchilah* and *b'diavad*. [Maimonides, *Mishneh Torah*, trans. Eliyahu Touger (New York: Moznaim Publishing Corporation, 2002) 312.]

<sup>15</sup> Dorff, 211.

of Posquieres) and the thirteenth century Rashba (Rabbi Solomon ben Abraham ibn Adret) both protest the acceptance of unkosher substances in food. Rabad proclaims, "[H]ow ugly is the fact that the worry about eating forbidden foods has left them because of its nullification in the majority substance!"<sup>17</sup> The Taz, David ben Samuel Halevi, 1586-1667) offers what might be considered a middle ground. Thus, with regard to wine, he would argue that since there is another way to remove the excess grape solids—such as by settling, filtration, centrifuging, or the use of kosher and pareve fining agents—then to choose otherwise would negate the possibility of calling that wine kosher. If, however, there were no other alternatives, then the use of non-kosher substances in wine-fining would be permitted. While presenting these stringencies, Dorff recognizes that Landau's ruling was "creative" and spurred by socio-economic goals as well. "And one wonders," he writes, "whether even Rabbi Ezekiel Landau would have permitted the fining of wines with unkosher materials if he knew the Jewish wine industry could be saved through the use of equally effective methods of fining which did not involve halakhically questionable substances."<sup>18</sup> Silverman threw in at the end of his 1964 *responsum* the notion of supporting the Jewish industry. In 1985, Dorff adds emphasis to this idea by placing this line of argumentation along side the halakhic reasons as an additional, equally important factor to consider.

Having addressed the salient points of the *sh'elah*—namely, the role of fining agents in the pareve or even kosher status of wines, Dorff moves on to present a review of Silverman's 1964 *responsum* and addresses each of Silverman's three main points. First, in 1964, Silverman argued that the wine produced for sacramental purposes, such as

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<sup>16</sup> *Ibid.*

<sup>17</sup> Dorff, 212.

for Catholic rites, is not sold on the open market. Even more so, since the sages long ago permitted the consumption of non-Jewish bread and oil by Jews, which Catholics use in their worship ceremonies as well, so too should such wine be permitted. Dorff researched the issue as well; he found out from the Novitiate of Los Gatos in Los Gatos, California that some wine, processed in accordance with Canon Law, which is not purchased by the Church, is sold commercially to the public. Dorff offers this not as an objection to Silverman's ruling, but as a clarification that while the wine itself is not used for sacramental purposes, it very well could be.

Dorff does, however, reject Silverman's second argument to permit leniency toward non-kosher wine as a result of modern changes in wine manufacturing. Apparently, the pasteurization process practiced in the 1960s—which Silverman used to deduce that wine is “cooked” and thus permissible<sup>19</sup>—has been abandoned because a “cooked aroma and taste” result from it.<sup>20</sup> Dorff, then, evaluating the common practice of non-Jews serving wine at kosher functions, remarks, “[E]ven rabbinically certified wine must be confirmed as “cooked” in order to permit this practice.” Otherwise, the suspicion with regard to uncovered wine being susceptible to idolatrous use remains.

Dorff takes even greater issue with Silverman's ruling that, because the modern method of making wine entails the use of machinery and such wine often remains untouched by human hands, there is no conflict with the issue of *s'tam yenam*. Rather, “The fact that wine made in this country is machine made is therefore true but irrelevant if the winery is owned by a gentile.”<sup>21</sup> In Dorff's opinion, all wine produced by gentiles

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<sup>18</sup> *Ibid.*

<sup>19</sup> See B.T. Avodah Zarah 30a as discussed in my analysis of Silverman's *responsum*.

<sup>20</sup> Dorff, 214.

<sup>21</sup> Dorff, 215.

is unkosher by the definition of *s'tam yenam*. He even cites the example of Manischewitz, which is now owned by a conglomerate. By special arrangement, only Jews handle the wine from beginning to end so that no gentile comes into contact with the product, and no question of *s'tam yenam* may be raised. The difference of opinion with regard to such leniency results from Silverman's reading of Moses Isserles's opinion. According to Dorff, the only reason that Isserles permitted the consumption of gentile wine was to protect the reputation of the Moravian rabbis who ruled such wine acceptable. The Rama sought not to grant blanket permission for the consumption of gentile wine. On the contrary, he looked to ensure that other communities classified the Moravian rabbis as "only" those who stumble in understanding the Torah, *not* as those who knowingly lead others astray. Thus he found a "slight" reason to permit the wine, but warned that it was contrary to custom and law, and other communities ought not to follow.<sup>22</sup> For Dorff, the 1964 *responsum* fails to grant a halakhically-justifiable reason to permit the consumption of gentile wine.

Having rejected Silverman's basis for allowing Jews to drink wine made by non-Jews, Dorff begins to present his own justification. Similar to the 1964 *responsum*, he must discuss the applicability (or lack thereof) of the concept of *ye'en nesekh* to the twentieth century. In fact, he does more than that: declaring that Jews of today need no longer concern themselves with prohibitions against drinking wine made by gentiles.<sup>23</sup> Like Silverman, Dorff explains that the Tannaitic prohibition against the consumption of wines used for libations in idol worship was intended to prevent the Jews from intermingling with idolaters. Maimonides removed Muslims from the forbidden list, and

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<sup>22</sup> *Ibid.*

<sup>23</sup> Dorff, 216.

Isserles later removed Christians. Following the logic that such religions do not worship idols, Dorff, then, extends this leniency to all non-Jews who live in the "modern, largely secular world"—with the exception of a few small cults who do not produce wine anyway.<sup>24</sup>

The 1985 *responsum*, however, picks up next with a topic alluded to but never thoroughly discussed in the 1964: the concerns about intermarriage that rested at the heart of the Talmud's ruling on *stam yeinam*. "If anything, that problem [of intermarriage between Jews and gentiles] is more acute in our day than it was in Talmudic times," Dorff writes. "If I thought for one minute that prohibiting wine made by Gentiles would have the slightest effect on diminishing the number of mixed marriages, I would drop all other concerns and opt for prohibiting it on that basis alone."<sup>25</sup> First, the author suggests that the initial interactions between a Jew and a non-Jew often occur at cocktail parties, and other alcoholic beverages have long been permitted. Second, people who would consider inter-dating and intermarriage most likely do not concern themselves with laws of *kashrut* anyway. Furthermore, as Dorff writes, part of the modernity upheld by the Conservative movement is the positive results that can come from the intermingling between Jews and gentiles (short of mixed marriage). He therefore permits the consumption of gentile wine, but not because of boiling or the machination of the wine industry. Rather, "[A]ll of the other prohibitions designed to inhibit social intercourse between Jews and Gentiles have been dropped in the course of history . . . [and] Maintaining the prohibitions against wine alone will not prevent mixed marriages," so the

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<sup>24</sup> *Ibid.*

<sup>25</sup> Dorff, 217.

initial justification for the categories of *s'tam yenam* and *ye'en nesekh* no longer apply.<sup>26</sup> Through this ruling, Dorff looks to demonstrate that modern sociological factors negate the original reasons for the prohibition against consumption of non-Jewish wine, and so concerns about wine ownership need not be perpetuated.

Dorff, based on his personal observations, adds other sociological factors as well. He reminds that even those who still produce kosher wine for Jews must invent legal fictions to undermine the fact that every aspect of wine production, down to the grapes themselves, is actually controlled by non-Jews. Also, some uncertified wine most likely will be produced on the Sabbath. But, since the people running the wine production are gentiles and are not making the wine primarily for Jews, no concerns need about this need to continue to exist. Additionally, the fact that many people who observe the laws of *kashrut* drink non-*hekshered* wine demonstrates that the concerns regarding *s'tam yenam* and *ye'en nesekh* have already fallen into disuse. "In the operation of any legal system, Jewish law included, when that happens those in charge of the law must decide whether to lament and combat the widespread transgression or," as this *responsum* decides, "to accept it, recognizing that a specific law has fallen into disuse and that there is no strong reason to fight for it." Dorff and the Committee on Jewish Law and Standards have decided to accept the fact that not only is the law no longer practiced, the original fear that led to the law—namely, intermarriage between a Jew and an idol-worshipper, no longer applies. Instead of the identity of the wine producer standing as the utmost concern, a renewed attention must be devoted—as the *shoel* suggests—to the materials used in such production.

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<sup>26</sup> *Ibid.*

After responding to the initial question regarding the *pareve* and kosher status of certain aspects of fining wine, and constructing his own reasons for permitting the consumption of non-Jewish wine in general, Dorff's conclusion addresses the three situations to which this *responsum* applies: individual Jews, Conservative synagogues, and other Jewish communal institutions. First briefly summarizing his initial arguments, Dorff then asserts that it is preferable, as the Taz would suggest, for the individual to select wines that have been fined without the use of halakhically-questionable substances. Rabbinically certified wines fall into this category, and are therefore preferable. However, he suggests that if one is concerned particularly about one wine, a simple phone call to the manufacturer can reveal the ingredients and therefore answer any questions about *kashrut*. Also, if one finds himself in a business or social setting in which non-kosher wines represent the only option, s/he may consume such wine on the basis of permitting the nullification of forbidden foods "*ab initio* when that is not the intention."<sup>27</sup> The author then adds that while restricting one's home to only kosher wines is preferable, those who do so have no right to criticize those who do not. The opposite is true as well. Finally, Dorff repeats Silverman's admonition about the appropriateness of drinking only certified-kosher wines for sacramental purposes, and especially Israeli wines at that.

In terms of Conservative synagogues, however, Dorff encourages caution. Since Conservative communities contain a heterogeneous population in terms of commitment to *halakhah*, the author encourages synagogues to use *hekshered* wine only so as to make everyone welcome. However, a local rabbi, as *mara d'atra*, still holds the final say. Dorff, in his *responsum*, presents examples of rabbis' concerns that forbidding the

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<sup>27</sup> Dorff, 220.

consumption of wine lacking formal rabbinical approval could turn congregants away from holding social functions at the synagogue. These rabbis fear the stigma of seeming “overly” conservative in the eyes of a congregation that might prefer to offer its guests a variety of quality wines instead of the limited supply of *hekshered* wines. Dorff speaks on behalf of the CJLS and Conservative movement as a whole when he writes, “We clearly are more interested in encouraging Jews to have kosher events and to schedule their life cycle celebrations in the synagogue than we are on insisting on rabbinically certified wine.” He reasons, “for the latter is only a higher degree of observance, while the former goes to the heart of what we want in Jewish practice.”<sup>28</sup>

This explanation, however, seems to pave the way for a slippery slope the movement might not be interested in setting up. If keeping Jews in the synagogue is the ultimate aim of Judaism—as opposed to the strict observance of traditional *halakhah*—then where is the line to be drawn? On the other hand, as Alexander Kohut—one of the founders of the Conservative movement—argues, *halakhah* is a fluid system that relies fundamentally on the community’s approval. In response to the question of who has the authority to decide which laws are kept and which are discarded, Kohut does not believe that this task necessarily falls to a committee of rabbis. Rather, the obligation is on the community to decide “that which still has a hold upon the hearts of men and women, which still retains vitality, [and which] should be preserved as sacred.”<sup>29</sup> Dorff concludes, then, that it is preferable for synagogues to offer only rabbinically certified wines, but if the local rabbi senses that to do so would be “unacceptable” to his congregation, then he may choose to disregard the suggestion.

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<sup>28</sup> Dorff, 222.

<sup>29</sup> Neil Gillman, Conservative Judaism: The New Century (Behrman House, Inc., 1993) 30.



Finally, Dorff argues that those communal institutions serving the entire Jewish community or simply the Conservative movement's institutional bodies alone ought to serve only *hekshered* wines. Once again, the reason is that occasions in which such wine might be consumed the organizations need to welcome people across the spectrum of traditional observance. "While a rabbi of an individual synagogue may know his/her congregants sufficiently well to find reason to permit the use of uncertified wine," Dorff writes, "no national or regional leader can presume that knowledge for the entirety of the Movement . . ."<sup>30</sup>

Though Rabbi Elliot Dorff disagrees strongly with the reasoning employed in Rabbi Israel Nissan Silverman's *responsum* on the permissibility of consuming non-Jewish wine, the results of his decision remain the same. Namely, individuals may choose for themselves which type of wine to drink and, even if the non-certified wine is selected, they are still considered to be observant of *kashrut* laws. However, for ritual purposes, only rabbinically certified wine ought to be consumed and Israeli products are preferable to non-Israeli ones. Additionally, a rabbi as *mara d'atra* may choose for his/her own synagogue which type of wine to stock, and the rabbi ought to be aware of the desires his/her respective congregation holds. In the case of the consumption of non-certified wines, the CJLS allows a broad range of practices. The 1985 *responsum*, composed by Elliot Dorff, demonstrates, "[T]he Conservative movement is fully modern in its mindset, in the sense that its members hold personal autonomy to be a key value. Even when they accept a particular halakhic stricture, it is not at the expense of personal

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<sup>30</sup> Dorff, 223.

autonomy, but rather because they are choosing to abide by it, in their quest for spiritual fulfillment."<sup>31</sup> For the Conservative movement, one's wine remains a personal matter.

Yet the process by which Dorff establishes his argument proves significant. He does not use Moshe Isserles's lenient ruling regarding the consumption of gentile wine as a precedent, like Silverman does. Instead, Dorff proclaims that virtually all non-Jews living in the Western World cannot be thought of as idolaters. But this fact, though it declares *stam yeinam* no longer relevant, does not alleviate the original spirit of the law against consumption of non-Jewish wine. In modern times, the Conservative author argues that the issue of intermarriage and the Movement's stance on kosher wine are independent matters. In fact, Dorff recognizes that Jews are intermarrying and that Jews are drinking non-kosher wine. On the first topic there is little that the CJLS can do, the author believes, because those who are intermarrying care little about the halakhic opinions of the Committee. However, on the question of non-kosher wine, Dorff offers a *teshuvah* that seriously takes into account the practices of the modern Jew, and moreover, directs his *responsum* directly toward Conservative Jewry. Dorff's *heter* is based upon an attitude toward social and communal trends that could only be enunciated by a liberal rabbi: namely, the willingness to consider the actions and demands of his core constituency and the desire to allow a broad degree of individual autonomy regarding the consumption of wine in the home. These factors render this opinion a truly Conservative *teshuvah*.

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<sup>31</sup> A Century of Commitment ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000) 129.

## **Chapter 4**

### **The Role of Women in the Synagogue**

## Aliyot for Women

In 1955, Rabbi Arthur Neulander, Chairman of the Committee on Jewish Law and Standards, divided the *responsa* team into six sub-committees: on synagogue services and religious functions; on problems of family status; on *isur v'heter*; on Sabbath and holiday observances; on the status of the Jewish woman in the synagogue; and on publications.<sup>1</sup> In presenting his RA colleagues with the Committee's annual report that same year, Neulander commented that the questions asked of the Committee represented the "concept of democracy prevalent in this country which stands or should stand four-square against uniformity and regimentation (that) is reflected in our Jewish community."<sup>2</sup> As such, the CJLS sub-committee on the Status of the Jewish Woman in the Synagogue published two *responsa*, one of which was signed by ten of the sixteen Committee members present, and the other signed by only five. A sixteenth person voted 'no' to both papers.<sup>3</sup> The *responsum* that garnered the majority vote allows women to be called up to the Torah for an *aliyah* only in "special" circumstances, while the minority paper allows women to be called up at any time. As is their custom, then, the Rabbinical Assembly permits the local congregation's rabbi as *mara d'atra* to choose to follow the *responsum* with which he agrees. Interestingly, several Conservative congregations had already begun the practice of women offering the Torah blessings—only for special circumstances in some communities, and all the time in other synagogues—even before the Committee gave its approval.<sup>4</sup>

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<sup>1</sup> Proceedings of the Rabbinical Assembly of America Volume XIX, ed. Max Weiner and Abraham Simon (New York: Rabbinical Assembly of America, 1956) 31.

<sup>2</sup> Proceedings of the Rabbinical Assembly of America Volume XIX, 32.

<sup>3</sup> Proceedings of the Rabbinical Assembly of America Volume XIX, 34.

<sup>4</sup> Proceedings of the Rabbinical Assembly of America Volume XIX, 36-37.

Rabbi Sanders Tofield published the majority paper, entitled, "Women's place in the rites of the Synagogue, with Special Reference to the Aliyah." The operative words separating the two *responsa* are "rites" in Tofield's paper and "rights" in the minority *responsum*, "An Aliyah for Women," by Rabbi Aaron Blumenthal. Regarding the question of whether or not a woman may be called to the Torah for an *aliyah*, both authors follow the logic stated explicitly by Tofield: "In face of a wide-spread practice of long standing the answer cannot be drawn from legal formulations alone. The spirit and motivation, historic development no less than rules adopted at a given time, go to make up the law."<sup>5</sup> Even more so, as Neil Gillman writes in his analysis of the Conservative movement's halakhic process as portrayed by Emet Ve-Emunah, "[A] modern community of Jews can introduce changes in *halakhah* to the extent that it wishes to do so. It does not have to change anything. But it must understand that if it remains bound to traditional practice, it does so because of where it decides to set its parameters, not because of where the parameters are intrinsically set."<sup>6</sup> Both sides of the debate over women receiving *aliyot* recognize the value of the traditional practice. Yet it is each author's desire to balance those customs with his own sense of the opinions of the modern Jewish community, lest he be accused of perpetuating uniformity and regimentation of which liberal Judaism has often attached to those who "progress" too conservatively.

To begin with, Tofield and Blumenthal agree that the beginning of the answer to the question of the permissibility of women receiving an *aliyah* lies in the quotation from

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<sup>5</sup> Sanders A. Tofield, "Women's place in the rites of the Synagogue, with Special Reference to the Aliyah" *Responsa—Orah Hayyim* 282:3, Proceedings of the Committee on Jewish Law and Standards 1927-1970 vol. III, ed. David Golinkin (Jerusalem: The Rabbinical Assembly and The Institute of Applied Halakhah, 1997) 1100.

B.T. Megillah 23a and echoed throughout the halakhic literature. In discussing the number and manner of aliyot for festivals and for Shabbat, "Our Rabbis taught: 'All are qualified to be among the seven [who read], even a minor and a woman, only the Sages said that a woman should not read in the Torah out of respect for the congregation.'" Tofield argues that should Jewish tradition have stopped there, with the practice of calling up women simply falling out of practice, then this would be a different matter altogether. Instead, the author of this CJLS majority paper turns to, as his title suggests, the historical relationship between women and the synagogue as the jumping off point for his discussion.

Tofield looks first to a similar synagogue ritual, namely the reading of the Scroll of Esther on Purim, to commence his discussion. According to the Mishnah (Megillah 2:4), "Everyone is eligible to read the Scroll, except the deaf, mentally deficient, and a minor." Though categorically minors and women are held to the same qualifications in B.T. Megillah 23a, here they are not. Even more so, as Tofield points out, B.T. Megillah 4a *obligates* women to participate in the reading of the Megillah.<sup>7</sup> Thus through the "established rule of inference,"<sup>8</sup> the rabbis declare that women are eligible even to read from the Scroll of Esther.<sup>9</sup> However, in the Tosefta (Megillah 2:7), "Women, slaves, and minors are not obligated (to participate in the Megillah reading) and cannot serve the

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<sup>6</sup> Neil Gillman, *Conservative Judaism: The New Century* (Behrman House, Inc., 1993) 158.

<sup>7</sup> "R. Joshua b. Levi also said: Women are under obligation to read the Megillah, since they also profited by the miracle then wrought."

<sup>8</sup> Tofield, 1101. Perhaps the "established rule of inference" here refers to the Shulkhan Arukh Orakh Khayim 589:1, in which "All those who are not obligated on a matter cannot free others from their obligation" (my translation). Thus the converse—all who are obligated on a matter *can* perform this *mitzvah* on behalf of others—is true too.

<sup>9</sup> According to B.T. Arachin 3a, "All are fit to read the scroll". What are these meant to include? They are meant to include women, in accord with the view of R. Joshua b. Levi; for R. Joshua b. Levi said: Women are obliged to read the scroll because they, too, had a part in that miracle."

public in fulfilling its obligation."<sup>10</sup> Yet, apparently, the Mishnah and the (slightly later chronologically) Tosefta disagree often about the role of women in ritual. As Tofield mentions, the Tosefta prohibits women from leading the Grace after the Meal,<sup>11</sup> while the Mishnah permits them.<sup>12</sup> Additionally, the Tosefta ruled that women are prohibited from blowing the Shofar in public,<sup>13</sup> while the Mishnah remains vague and could be understood either way.<sup>14</sup> Tofield, interpreting the allusiveness of the Mishnah against the Tosefta's clear negative attitude toward women as synagogue leaders, concludes the first section of his paper by deducing that "the rabbis were vitally concerned about women becoming public officiants."<sup>15</sup> Therefore, despite the fact that the primary halakhic literature permits—or even obligates--women to partake of certain *mitzvot*, Tofield asserts that Judaism always has been wary of allowing females to observe these commandments in public and especially to observe such laws on *behalf* of the public.

While Tofield begins with a general discussion of the role women have played (or not played) in the synagogue throughout history, Blumenthal begins with a pure textual

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<sup>10</sup> Tofield, 1101.

<sup>11</sup> Tosefta Brakhot 5:17 declares, "Women and slaves and children are exempt [from the obligation] and cannot exempt others from their obligation [to recite the benediction after meals]. Indeed they said, 'A woman may recite the benediction on behalf of her husband, a son may recite the benediction on behalf of his father, a slave may recite the benediction on behalf of his master.'" The Tosefta, Translated from the Hebrew, First Division: Zeraim, ed. Jacob Neusner and Richard Sarason (Hoboken: Ktav Publishing House, Inc., 1986) 29.

<sup>12</sup> According to Mishnah Brakhot 3:3, "Women, slaves, and minors, are free from the obligation to recite the Shema and [to wear] phylacteries. However, they are obligated with regards to the Prayer (the 18 Benedictions), to the mezuzah, and to the Grace after the Meal." (My translation.)

<sup>13</sup> Tosefta Rosh HaShanah 2:5, "Women, slaves, and minors are exempt (from the obligation regarding the sounding of the Shofar). So they also do not have the power to carry out the obligation of others." The Tosefta, Translated from the Hebrew, Moed: The Order of Appointed Times, ed. Jacob Neusner (Hoboken: Ktav Publishing House, Inc., 1981) 256.

<sup>14</sup> Mishnah Rosh HaShanah 3:8 says, "A deaf-mute, an imbecile, or a minor cannot fulfill an obligation on behalf of the many. This is the general rule: any on whom an obligation is not incumbent cannot fulfill that obligation on behalf of the many." The Mishnah transl. Herbert Danby (Oxford: Oxford University Press, 1972) 192. Thus, if women are not obligated, as the later Tosefta suggests, then they cannot blow the Shofar for the community. However, women are not included in the Mishnah's list of those explicitly forbidden from the *mitzvah*, so perhaps they were allowed in those days.

<sup>15</sup> Tofield, 1102.

bent, analyzing the specific phrase, "*mipnei kavod hatzibor*, out of respect for the congregation," used in B.T. Megillah 23a. The twentieth century rabbi proclaims that the "very phraseology" of B.T. Megillah 23a "has become hallowed, and any discussion concerning a woman's right to an *aliyah* must begin with it." The minority *responsum*'s author breaks the sentence down into two parts. First is the declarative statement: "Our rabbis taught: 'All are qualified to be among the seven [who read], even a minor and a woman.'" A subordinate statement then follows: "only the Sages said that a woman should not read in the Torah out of respect for the congregation." Blumenthal clarifies the meaning behind this construction by saying that if the subordinate clause did not exist, there could be no misunderstanding as to the right of women to be called up for an *aliyah*. Since the subordinate clause qualifies the permission, however, one must better understand what the original authors meant by the phrase, "*mipnei kavod hatzibor*, out of respect for the congregation."

This clause appears five other times in the Talmudic literature. Two occur shortly after the quotation at hand, in Megillah 24b. The Talmud teaches, "Ulla b. Rab inquired of Abaye: 'Is a child in rags allowed to read in the Torah?' He replied: 'You might as well ask about a naked one. Why is one without any clothes not allowed? *Out of respect for the congregation*. So here, [he is not allowed] out of respect for the congregation.'" Thus, in these two instances, "out of respect for the congregation" implies that to read the Torah while improperly dressed would offend those present, and thus it should not be done. The phrase "out of respect for the congregation" appears also in B.T. Yoma 70a. On Yom Kippur, the Mishnah required the High Priest to read a portion of the Torah from Leviticus, roll it up, and then recite the *maftir* by heart. "Why that?" the Gemarah



asks. "Let him roll up [the scroll] and read from it [again]? — R. Huna the son of R. Joshua said in the name of R. Shesheth: 'Because it is not proper to roll up a scroll of the Law before the community, *because of respect for the community*.'" So, like improper dress, to keep a congregation waiting amounts to an offense against and a demonstration of disrespect toward the community. Similarly, in Sotah 39b, "R. Tanhum also said in the name of R. Joshua b. Levi: 'The Precentor is not permitted to strip the ark bare in the presence of the Congregation *because of the dignity of the congregation*.'" In other words, the drapery affixed to the ark ought not to be removed until after the service, even though the Torah was moved to its place outside the synagogue. Once again, to keep a congregation waiting is an offense to the dignity of the community.<sup>16</sup>

Finally, based on the ruling in Gittin 60a,<sup>17</sup> Blumenthal presents the last talmudic usage of "*mipnei kavod hatzibor*": "*the dignity of the congregation* requires that every synagogue possess a Torah scroll that is *kosher* in every respect and that it is improper to read from any other kind of scroll."<sup>18</sup> The Conservative author then looks for what he considers the common link between these five occurrences of the sub-clause to that in B.T. Megillah 23a, and reasons that in every instance a prohibition is declared in order to prevent offending the congregation. Moving on to make his point, Blumenthal concedes that though the Talmud speaks highly of women, females were nevertheless rendered disabled by *halakhah* in matters such as witnessing, inheritance, marriage and divorce. Yet, in modern times, the Western World views women quite differently, and should thus

<sup>16</sup> Aaron Blumenthal, "An Aliyah for Women," *Responsa—Orah Hayyim 282:3 Proceedings of the Committee on Jewish Law and Standards 1927-1970 vol. III*, ed. David Golinkin (Jerusalem: The Rabbinical Assembly and The Institute of Applied Halakhah, 1997) 1087.

<sup>17</sup> B.T. Gittin 60a teaches, "Rabbah and R. Joseph both concurred in ruling that separate humashin should not be read from out of respect for the congregation."

<sup>18</sup> Blumenthal, 1087.

offer them the same rights as men for the sake of the *dignity of the congregation*.

Blumenthal declares:

The Jewish woman who works side by side with her husband for the welfare of the synagogue and the Jewish community, who is active in the UJA, in Zionist effort, in both Jewish and secular education, whose sense of social responsibility usually is keener than that of her husband, deserves this gesture of equality of status in the synagogue.

The author of this minority *responsum* extends "*mipnei kavod hatzibor*" to refer to the opinion of liberal Jewish communities of his own day that seek to advance the rights and privileges of women in synagogue life, disregarding as outdated those customs which would offend *kavod hatzibor* in earlier times. This willingness to take into account the evolving opinions of the Jewish communal majority (as he sees it) stands as a hallmark of Conservative halakhic theory dating back to the limited reforms entertained by Zacharias Frankel, the spiritual founding father of the Conservative movement.

Even more so, Blumenthal considers this virtual reinterpretation of Jewish law to be consistent with the traditional halakhic process, especially in light of the fact that "*mipnei kavod hatzibor*" is merely a rabbinic concept and not a biblically ordained precept. As such, the author feels obligated to demonstrate other instances in which the classical rabbis reinterpreted or even contravened biblical laws for the sake of social progress. Blumenthal lists Hillel's *prozbul*,<sup>19</sup> the abolition of the practice of the *sotah*,<sup>20</sup>

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<sup>19</sup> Mishnah Shvi-it 10:3-4 teaches, "[A loan secured by] a *prozbul* is not cancelled. This was one of the things instituted by Hillel the elder; for when he observed people refraining from lending to one another, and thus transgressing what is written in the law, 'Beware, lest there be a base thought in thy heart (Deut. 15:9),' he instituted the *prozbul*. This is the formula of the *prozbul*: 'I declare before you, so-and-so, judges of that place, that touching any debt that I may have outstanding, I shall collect it whenever I desire.' And the judges sign below, or the witnesses." Hillel saw that the *halakhah* inhibited a necessary economic tool and led to great strife between individuals so he created an opportunity to circumvent the biblical commandment that cancels loans in the sabbatical year.

<sup>20</sup> In Talmud Sotah 47a, one finds: "When adulterers multiplied the ceremony of the bitter water was discontinued and it was R. Johanan b. Zakkai who discontinued it, as it is said, 'I will not punish your daughters when they commit adultery, for they themselves, etc.' (Hosea 4:14)." For whatever reasons, Zakkai believed that the ritual of the *sotah* ought not be continued in light of his age, so he discontinued it.

and the whittling away at the law of *ben sorer umoreh*<sup>21</sup> as precedents to justify his own modern-day reversal of the opinions against women receiving *aliyot*. In doing so, Blumenthal links his *responsum* to the practices and authority of such monumental rabbinic figures as Hillel the Elder and Yochanan ben Zakkai. Additionally, the twentieth-century author cites opinions against levirate marriage<sup>22</sup> and Rabbenu Gerhsom's Ashkenazic ban on polygamy as further examples of reversals of established law. As Blumenthal writes, "If the *halakhah* could modify laws enunciated in the Torah, it certainly can redefine the rabbinic concept of *kavod hatzibor*. This is the most direct and obvious approach to our problem."<sup>23</sup> For the Conservative rabbi, modern scholars have every right to reinterpret even the most ancient of texts and laws, so long as the Jewish community (however he may define it) would accept that reinterpretation.

Though Tofield also analyzes the expression, "*mipnei kavod hatzibor*, out of respect for the congregation," he categorizes its usage in the rabbinic texts, in part two of his paper, quite differently from Blumenthal's understanding. Like Blumenthal, Tofield lists the other Talmudic citations of the phrase at hand and discusses each occurrence. However, the author of the majority opinion dismisses four instances of the usage of "*mipnei kavod hatzibor*" as irrelevant to the current discussion—two on account of a sense of indecency being conveyed and two because of the issue of waiting. Instead

<sup>21</sup> In B.T. Sanhedrin the rabbis argue over the definition of a stubborn and rebellious son (Duet. 21:18). Taking these qualifications into consideration, a baraita cancels out the biblical law by declaring, "But it never happened and never will happen. Why then was this law written? — That you may study it and receive reward."

<sup>22</sup> The law of levirate marriage is established in Deuteronomy 25:5. But, according to B.T. Yevamot 39b, "At first, when the object was the fulfilment of the commandment (i.e. intercourse for the sake of procreation), the precept of the levirate marriage was preferable to that of halizah; now, however, when the object is not the fulfilment of the commandment (i.e. a man marries his sister-in-law for sexual gratification alone), the precept of halizah, it was laid down, is preferable to that of the levirate marriage." Joseph Karo, however, in the Shulkhan Arukh (Even HaEzer 1:10) writes that since the time of Rabbenu Gershom (10-11<sup>th</sup> centuries), *chalitzah* took the place of levirate marriage entirely.

<sup>23</sup> Blumenthal, 1089.

Tofield comes to focus only on the dictum that the Torah should not be read in public from an incomplete scroll.<sup>24</sup> He presents the opinion of the Talmud Yerushalmi (Megillah 74a) on this matter, quoting: "Not that it is prohibited to do so, but anguished (that they are denied the Torah reading from a fragmentary text) they will purchase other (Scrolls)."<sup>25</sup> In other words, the rabbis of ancient Israel perceived no *halakhic* violation if an incomplete Torah scroll is read from in public, but to do so would be an insult to the honor of the congregation and cause the members unnecessary anguish because of their shortcoming. Tofield writes that this ruling is the most similar to the ruling against women and *aliyot*, given that, "the authorities wanted to safeguard values inherent in the public reading of the Torah as part of a policy."<sup>26</sup>

Having discovered this more specific definition of *mipnei kavod hatzibor* Tofield brings other instances in which the rabbis create laws in order to safeguard inherent values. Mishnah Sukkah 3:10 states, "If a slave, a woman, or a minor recited (the prayers that accompany the *lulav*) to him, he must repeat after them what they say. And may a curse come unto him." While it is halakhically permissible for one in such a "lesser" category to show a man how to say the necessary prayers, the man ought to feel embarrassed at such a deficiency in knowledge. Similar, Tofield argues, is the case from the Yerushalmi (Brakhot 6b) of a twenty-year old who depends on a ten-year old to say Birkat HaMazon on his behalf. "The Jewish male population must not neglect knowledge of Hebrew," Tofield reasons, "even as a congregation is honor bound to have

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<sup>24</sup> B.T. Gittin 60a.

<sup>25</sup> Tofield, 1103.

<sup>26</sup> Tofield, 1103-1104.

proper scrolls of the Torah for use at public worship."<sup>27</sup> Thus to allow women the *aliyah* would amount to permission for a male to forsake his responsibilities.

In order to further his case, Tofield brings five examples of rules relating to women that, he believes, prove relevant to this discussion. First, women are not counted in the quorum necessary to allow for public recitation of the weekly Torah portion, and are exempt from many of its statutes. However, in his second point the author qualifies this exemption, reminding that one may count educated women among the quorum if the congregation lacks seven men knowledgeable in the Hebrew text.<sup>28</sup> As a result, Tofield's third point claims that calling a woman up for an *aliyah* in a large congregation would advertise the fact that seven such men could not be found. In addition, he next argues, even when the practice of each person reading his own Torah portion evolved into the presence of a *baal kriyah* with individuals reciting only the blessings, medieval rabbis did permit the calling of women for *aliyot* but only on a limited basis. Furthermore, a congregation could not call women alone.<sup>29</sup> Finally, Tofield resolves, though women reciting prayers is not prohibited—as one might think—by laws against hearing a woman's voice,<sup>30</sup> Jewish tradition teaches that "Torah reading . . . was to remain a prerogative of men, primarily as a means of maintaining a high standard of Hebrew knowledge among them. Besides, the *halakhah* frowned upon the idea of a woman acting in the capacity of public officiant."<sup>31</sup> Thus, once again, Tofield argues that to allow women the *aliyah* at all times would amount to permission for a male to forsake his

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<sup>27</sup> Tofield, 1104.

<sup>28</sup> Talmud Yerushalmi, *Mas. Sof.* 10:8.

<sup>29</sup> Shulkhan Arukh Orach Chayim 282:3.

<sup>30</sup> B.T. Sotah 48a: "R. Joseph said: 'When men sing and women join in it is licentiousness; when women sing and men join in it is like fire in tow.' For what practical purpose is this mentioned? — To abolish the latter before the former."

<sup>31</sup> Tofield, 1105.

responsibilities of *Talmud Torah* and the acquisition of Hebrew-language capabilities. By limiting the occurrence of women being called to the Torah, Judaism ensures that men will continue to take the *mitzvot* seriously.

Blumenthal, however, after presenting in his minority paper what he considers a textual solution to the problem, presents more thoroughly the historical development of the relationship between women and *aliyot*, to which Tofield alludes as well. The Tosefta, like the Babylonian Talmud, makes reference to women receiving *aliyot*. It says, "Everyone may make an *aliyah*—even a minor or a women. One (however,) does not bring up a women to read *in public*."<sup>32</sup> In the Tosefta, there is no explanation—such as *mipnei kavod hatzibor*--for this exception. As Blumenthal writes, this is the law carried forth by Alfasi, the Tur, and Karo.<sup>33</sup> Though it seems that Jewish tradition supports a woman's right to the *aliyah*, it limits this permission to the point of actual prohibition. Blumenthal cites the Rambam as offering the most succinct statement on the ruling: "A woman may not read in public on account of the honor of the congregation. (However) a minor who knows how to read and recognizes the One who is being blessed may ascend (and thus be counted) from among the quorum of readers."<sup>34</sup> Blumenthal, as he did with the Talmudic "*mipnei kavod hatzibor*," looks to better understand the Tosefta's "*m'vi-in likrot b'rabim*." He finds a similar, though not identical, phrase elsewhere in the Tosefta, in reference to reading of the Book of Esther: "Women, slaves, and minors are exempt and cannot free the congregation of its obligation." Nevertheless, the Tosefta goes on to cite examples of minors reading in public!

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<sup>32</sup> My translation, Megillah 3:1.

<sup>33</sup> Blumenthal, 1090.

<sup>34</sup> Moses Maimonides, *The Mishneh Torah: Hilkhot T'filah* 12:17.

After much research, Blumenthal claims, he went to an unnamed professor at the seminary to gain a better understanding of the Tosefta's use of *kriyah b'rabim*. Accordingly, he writes, "it seems obvious to me now that the Tosefta means that whereas a woman is permitted to be called to the Torah when she is present in the synagogue, it is considered improper to invite a woman from the outside to read the scroll."<sup>35</sup> He continues, "It reflects on the honor of the congregation that they have no man who can read the Torah, and that they have to resort to inviting a woman for this purpose."<sup>36</sup> But in Babylonia, the position of *baal kriyah* had already come to fruition. A woman was allowed to say the blessing over the Torah, but they did not permit her to read from the scroll. Blumenthal concludes that the phrase "*mipnei kavod hatzibor*" did qualify the rights of women to a certain extent, but still permitted them the right to an *aliyah*.

These restrictions on the *aliyah* are discussed by many of the great halakhic code writers. Again, both the Ran (commenting on the Alfasi, Megillah 13a) and the Rama (Orach Chayim 282:3) suggest that a woman *may* be called to the Torah, but to call *only* women would amount to discrimination against men! The *Beer Heitiv* (Rabbi Judah ben Simon Ashkenazi Tiktin) similarly allows women to be called up, but only on the Sabbath when (at least) seven *aliyot* are read. Rabbi Akiba Eger explicitly limits the number of *aliyot* for women to one, and also only on Shabbat.<sup>37</sup> Additionally, as Blumenthal points out, the Ran raises other considerations when discussing the permissibility of a woman to be called for an *aliyah*, such as her ability to fulfill the *mitzvah* of *talmud torah* when she is not obligated and consequently would she be saying a *brachah l'vatlah*. The Ran answers the first of these difficulties by requiring at least

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<sup>35</sup> Blumenthal, 1091.

<sup>36</sup> *Ibid.*

one male presence at the Torah so that his blessing would fulfill the requirement for the congregation. Rashi's teacher, Rabbi Isaac Halevi, declared centuries before the Ran's commentary that such a blessing would not be a *brachah l'vatlah*.<sup>38</sup> Clarification of this issue may also be found in the writings of Rabbenu Tam, who separates the *mitzvah* of *Talmud Torah* from the act of blessing the Torah. Rather, it is a "*brachah m'shum kavod hatorah*—a blessing (merely) for the sake of honoring the Torah."<sup>39</sup> Since women are obligated to recite blessings over the Torah,<sup>40</sup> to call them up for an *aliyah* (aside from the *baal kriyah* issue) is well in line with Jewish tradition! Blumenthal concludes this history review by declaring, "It should be obvious by now that here is no *halakhic* objection to granting modern woman the privilege of an *aliyah*."

Having solved what he believes is the theoretical issue surrounding the role of women and *aliyot*, Blumenthal next moves on to the issue of actual precedent in Jewish history. The modern rabbi recounts the situation of Jews in Northern France, when individual Jews or Jewish families could be found in nearly every community, but each community often lacked a *minyan*. Rabbi Meir of Rothenberg addressed the possibility of such a situation for a town in which the only Jewish males were a father and his sons—all *kohanim*. The Maharam declared that women are to be called as the third (Israelite) *aliyah* in such a case.<sup>41</sup> However, there are examples of rabbis forbidding women to read at all, as is the case of Rabbi Gumbiner of Poland (1635-1683) and Rabbi Joshua Falk of Lublin (d. 1614).<sup>42</sup> Blumenthal thus reminds his readers that though

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<sup>37</sup> Blumenthal, 1093.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Tosefot*, B.T. Eruvin 96b.

<sup>40</sup> Shulkhan Arukh Orach Chayyim 47:14.

<sup>41</sup> Blumenthal, 1095.

<sup>42</sup> Blumenthal (1096) refers here to Gumbiner's *Magen Avraham* and Falk's commentaries "*Prishah*" and "*Drishah*" to the *Tor*.



theoretically women may have always had permission to recite the blessings over the Torah, the *minhag* of prohibition against them doing so has taken on the status of law.

Yet Blumenthal sees the desires of 20<sup>th</sup> century Conservative Jewry to loosen the restrictions on women in Judaism as part of an older trend reversed in recent centuries by over-reading and disrespect. He cites the restrictions on the rights of fathers to sell their daughters into slavery, the numerous changes in marriage law as begun by institution of the *ketubah*, a balancing of the divorce procedure and the elimination of polygamy as evidence of a process of equalization of women's rights. "This," Blumenthal proclaims, "is dynamic and creative *halakhah* at its loftiest and we can be proud of it."<sup>43</sup>

However, the right of women to *aliyot* has remained prohibited. Though one might attribute such prevention partially to the notion of *safek niddah*, Rabbi Judah ben Bateira's asserts that words of Torah cannot become unclean,<sup>44</sup> and Maimonides, Rashi, the Tosefot, and Joseph Karo affirm this.<sup>45</sup> Nevertheless, Ashkenazic custom has been to limit matters of *isur v'heter* much more severely. Blumenthal cites *teshuvot chavat yair* and that *responsa* collection's author's reasoning for not allowing women to say kaddish for a father as such an example.<sup>46</sup> Such statements in the Talmud regarding the enticement attributed to the voice and hair of a woman, among other negative statements about women, Blumenthal argues "are nothing more than inconsequential individual opinions, which, in the vast sea of the Talmud are submerged deep below the surface, where they are available only to the student-diver. To drag them up from the deep," he reasons, "to magnify them beyond all reasonable proportions, and to make of them

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<sup>43</sup> Blumenthal, 1097.

<sup>44</sup> B.T. Brakhot 22a: "It has been taught: R. Judah b. Bathyra used to say: 'Words of Torah are not susceptible of uncleanness.'"

<sup>45</sup> Blumenthal, 1098.

treacherous reefs and rocks to wreck piety and saintliness requires an earthquake of staggering proportions. And that," he says, "is exactly what has happened to our *halakhah*."<sup>47</sup>

Blumenthal writes that the "foundation stone of the activity" of the CJLS is based on the opinion of the Maharil in regard to women reclining at the Seder table.<sup>48</sup> Namely, "All our women are important."<sup>49</sup> In his conclusion, the author of the minority *responsum* combines the precedent in Tannaitic times and the theoretical halakhic permissibility of granting women the right to an *aliyah* with the "contemporary need to extend equality of status to the Jewish woman under Jewish law." As a result, he deduces that no barrier ought to stand in the way of a congregation wishing to grant such a right to its female congregants. Blumenthal considers the fact that a majority of modern, liberal Jews are supportive of equality for women in this manner, and the idea that no explicit, unqualified rejection of this opportunity is contained within the corpus of the basic legal literature of the Jewish people. Such claims take priority over centuries of objection on both theoretical and practical grounds. While the past has a vote, it does not have a veto. However, while Blumenthal grants permission for the *aliyah*, he does not discuss any notions of *obligations*—such as that of Torah study--on women.

Tofield, though, in the majority *responsum*, does not view the history of prohibition against women receiving *aliyot* as a sign of sexism that would lead him to reject, as Blumenthal does, tradition as anti-modern and exclusionary. Rather, the rabbis "fenced the Torah around with legal ammunition to withstand ignorance, neglect of

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<sup>46</sup> Blumenthal, 1099.

<sup>47</sup> *Ibid.*

<sup>48</sup> B.T. Pesachim 108a states, "A woman in her husbands [house] need not recline, but if she is a woman of importance she must recline."

tradition, and submission to the line of least resistance.”<sup>50</sup> For Tofield and his understanding of the logic behind the rulings of the last several centuries, a blanket right to *aliyot* for women would lead to men dismissing their own obligations to study and worship. He adds, “With all their wisdom, however, [the rabbis] failed to anticipate present-day methods of nullifying the effectiveness of the male guardians of the Torah,” with such devices as Torah Blessing Cards and transliteration.<sup>51</sup> Though theoretical *halakhah* might grant women the right to an *aliyah*, Tofield argues that the spirit of the law and the history of the interpretation of that law suggest extreme prudence.

Even more so, Tofield offers a modern-day, “practical” argument against women receiving blanket permission to receive *aliyot*. “In my limited experience,” he remarks, “I observed hesitancy among women to take the place of men in religious functions, although it would be difficult to determine how much is based on deference to tradition—a factor that deserves consideration, to say the least—and where psychological constitution comes to play its part.”<sup>52</sup> Tofield then turns to the Reform movement and claims that despite its policy of egalitarianism, Reform congregations have not made *aliyot* for women standard practice (as of 1955). The author concludes, “Letting down the barriers of women’s participation in the rituals of the pulpit would lead to what the rabbis feared—relegating religious observance to women and children. We are getting there fast enough. Should we be responsible for the final push into the chasm of unreality?”<sup>53</sup> Tofield feels comfortable with the dissonance between Jewish civil law’s

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<sup>49</sup> Blumenthal, 1099.

<sup>50</sup> Tofield, 1106.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Tofield, 1107.

praise of women on one hand, and its *halakhic* restrictions on another. Even more importantly, he senses that a majority of modern liberal Jews feels the same way as well.

As a concession, though, to the slowly changing tide of modernity, Tofield suggests a compromise. Women ought to be allowed *aliyot* on special occasions, so that the Conservative movement may still call itself a *halakhic* movement while extending itself slightly to account for popular opinion. After all, as Neil Gillman writes, the Conservative movement has always believed:

Seminary, rabbinate, and lay community together had effectively affirmed that whatever else Torah is, it is also a cultural document, that it has always been and will continue to be affected by historical considerations, and that it is the Jewish community in every generation that serves as the authority for the ongoing shape of Judaism in matters of belief and practice.<sup>54</sup>

Tofield includes the (new ceremony of) Bat Mitzvah, occasions when women are called to the Torah for personal prayer (for unmarried women only), and other occasions "delimited by earnest discussion of an Halakhic body." However, Tofield qualifies this by writing, "It should be evident to the congregation that the lady is invited to the pulpit for a specific reason, not because there are not enough men deserving the honor."<sup>55</sup> Furthermore, despite the aforementioned leniency in the *halakhah*, Tofield allows women to be called up only in addition to the seven *aliyot* reserved for men, and the women's attire must match the requirements placed on men (such as *tallitot* and head coverings). This, he reasons, will ensure the safeguards desired by our forefathers. In conclusion, Tofield chides, "Until we accumulate greater wisdom, let the ladies of the synagogue find blessing in the fact that the men take the *lead* (original emphasis) in its rituals."<sup>56</sup>

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<sup>54</sup> Conservative Judaism: The New Century, 148.

<sup>55</sup> Tofield, 1108.

<sup>56</sup> *Ibid.*

In the beginning of his *responsum*, Tofield declares: "In face of a wide-spread practice of long standing the answer cannot be drawn from legal formulations alone. The spirit and motivation, historic development no less than rules adopted at a given time, go to make up the law."<sup>57</sup> Indeed, Blumenthal's *responsum* echoes the same notion of an emphasis on historical trends—both as an ancient and modern phenomenon—above all else. Yet, when it comes down to it, after both authors' treks through historical precedent and halakhic literature, their respective *teshuvot* are separated by two factors: their interpretation of the Talmud's (Megillah 23a) phrase "*mipnei kavod hatzibor*," and their understanding of the desires of the modern Jewish community. Rabbi Aaron Blumenthal surmises that all the instances of "*mipnei kavod hatzibor*" lead one to realize that the phrase signifies a sign of offending the community. Namely, Jews of 1500 years ago disapproved of women playing public roles in religious life, which, significantly, is a complete antithesis to Jews' opinions in the twentieth century. Thus on account of a modern reading of *mipnei kavod hatzibor*, women must be allowed *aliyot*—out of respect for the contemporary Jewish community and the role that women play in it.

Rabbi Sanders Tofield disagrees with Blumenthal on both levels. First, he narrows Megillah 23a's qualification of women receiving *aliyot* to suggest that the phrase indicates a protection of the honor of the congregation that would be damaged should an educated man, or enough educated men, not be present to fulfill his commanded role. Granting permission for women to receive *aliyot* at all times would lessen the encouragement for men to accept the responsibilities that come from serving as the bearers of the yoke of the commandments. In other words, Blumenthal suggests that allowing women to receive Torah will increase demand for Jewish education by

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<sup>57</sup> Tofield, 1100.

spreading it to the equally deserving other sex, while Tofield fears that men—who have the real responsibility—will dismiss their obligation. In addition, and perhaps more importantly, Tofield believes that twentieth century women are not interested in such a public honor, so it should be reserved for “special” occasions. For Tofield and the signers of the 1955 *responsum*, the spirit and motivation of the *halakhah* of B.T. Megillah 23a and the desire of the twentieth century modern Jewish community are to continue to limit the role women play in public Jewish ceremonies.

## Women in the Minyan

"Conservative Judaism shares the fate of all center movements," Neil Gillman explains. "It exists in a state of perpetual tension, constantly pulled both to the right and to the left on any significant issue . . . More than Orthodoxy on the right and Reform on the left, it is a movement that is held together by a consensus often on the edge of fragmentation."<sup>1</sup> Perhaps no issue represents this tension greater than the evolving role of women in Conservative Judaism. Indeed, the Conservative movement's egalitarian nature serves as one of the clearest borders separating it from Orthodoxy.<sup>2</sup> Already during much of the first fifty years of the CJLS's existence, the complexities of the *agunah*-issue dominated Conservative thinking. By the 1950s, the place of women in the synagogue became a debate as well, leading to the contentious 1955 decision that a woman may receive an *aliyah* if her local rabbi approves. Almost thirty years later, the egalitarian leanings of the movement led to a major split in 1984, when Conservative Jews divided along the lines of who supports and who opposes the rabbinical ordination of women. *That* decision, however, was not left to the CJLS. Ten years prior to that ordination debate, the Conservative movement took another major step toward the equalization of the sexes when, in 1973, the Committee granted congregations the option to count women in the prayer quorum, thereby laying the foundation for the issue of rabbinical ordination to follow. The CJLS failed to gain a consensus, though, on how to defend their *minyan*-decision *halakhically*, so it simply passed a ruling by vote of nine in

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<sup>1</sup> Neil Gillman, Conservative Judaism: The New Century (Behrman House, Inc., 1993) 5.

<sup>2</sup> Michael Panitz, "Completing a Century: The Rabbinical Assembly Since 1970," A Century of Commitment: One Hundred Years of the Rabbinical Assembly ed. Robert Fierstien (New York: The Rabbinical Assembly, 2000) 111. Also, Steven M. Cohen writes, "Certainly by the 1980s, the largely egalitarian stance of the Conservative Movement served to mark a clear boundary with the Orthodox . . . the egalitarian stance constituted the first major distinction with Orthodoxy where Conservative leaders

favor and four opposed that read, "Men and women should be counted equally for a minyan."<sup>3</sup> Though Philip Sigal's 1973 *responsum* on the issue was ultimately rejected, his agitation—combined with that of Aaron Blumenthal—helped push through this landmark decision, albeit without a cogent halakhic defense.

Sigal begins his *teshuvah* with a reference to Abraham Millgram's book Jewish Worship, citing a story about Holocaust survivors in Dubrovnik, Yugoslavia who continued to hold Sabbath and Festival services despite the fact that they had only seven men (and ten women). Millgram debates between allowing communities such as these to revert to an ancient *Eretz Yisrael* custom in which only six to seven men were needed for a *minyan*,<sup>4</sup> or to continue holding regular services as if a quorum were present but acknowledging that one was not. Sigal wonders why the thought of counting the women never occurred to Millgram. The Conservative rabbi then uses this anecdote as a basis for his assertion, "We live in a radically changing world, and foremost among the transformations taking place is that of the status of women."<sup>5</sup> To justify the actuality of society's equalization of women, the Conservative rabbi cites the then-recent decision within the Reform movement to ordain women, as well as the Conservative movement's permission for women to sing in a choir, receive an *aliyah*, and to receive a marriage annulment. The time has come, Sigal argues, to grant women the right to be counted in the prayer quorum.

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could point to a clear difference of principle, rather than a surrender to the pressures of a religiously lax constituency" (Fine, 11).

<sup>3</sup> In 2002, the CJLS approved another *teshuvah* (OH 55:1.2002) to permit the counting of women in the *minyan*. This *teshuvah*, written by Rabbi David J. Fine, provides a thorough background and discussion of the CJLS's thirty-year debate about the issue. Fine even begins his *responsum* by stating that most Conservative congregations count women in the minyan, and so the movement is obligated to find halakhically-justifiable arguments for this practice.

<sup>4</sup> J.T. Mas. Sof. 10:6.



Sigal steps back a little, however, from making too dramatic a declaration about equal rights. He reminds his colleagues, "In the halakhah, a permissive conclusion does not invalidate the right to be *mahmir*, to accept a greater stringency upon oneself, to fulfill *lifnim meshurat ha'din*, to accept an observance that goes beyond the requirement of the precise limits of the halakhah."<sup>6</sup> In other words, the local congregational rabbi remains *mara d'atra*, and as such retains the final decision regarding this matter. Yet for the Committee to speak on behalf of the entire movement and prevent the outright counting of women in the *minyan* represents an unnecessary enforcement of traditionalism upon--what Sigal will come to argue--a society no longer interested in accepting such a *minhag*.

In order to establish a historical precedent for the inclusion of women, then, Sigal begins with the notion of obligatory prayer. According to the Babylonian Talmud (Brachot 6a), "It has been taught: Abba Benjamin says: A man's prayer is heard [by God] only in the Synagogue."<sup>7</sup> Sigal then presents a suggestion from Rabbi Akiva Eger of 18<sup>th</sup> century Posen, who noted a variant reading of the text that claims that a person's prayer is listened to *only* in public.<sup>8</sup> Maimonides, too, clarified the importance of public prayer and reinforced this notion by announcing "for even if there were sinners among them, God would not despise the prayer of the group."<sup>9</sup> Based on this and another reference to

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<sup>5</sup> Phillip Sigal, "Women in a Prayer Quorum," may be found only in Conservative Judaism and Jewish Law ed. Seymour Siegel (New York: Rabbinical Assembly 1977) 282.

<sup>6</sup> Siegel, 283.

<sup>7</sup> Abba Benjamin bases this on the verse, "To hearken unto the song and to the prayer" (I Kings 8:28). "The prayer is to be recited where there is song," in other words, the song of the person leading prayer services.

<sup>8</sup> Siegel, 284.

<sup>9</sup> Sigal's translation of Mishneh Torah, Hilkhot Tefila 8:1.

*halakhic* tradition,<sup>10</sup> Sigal concludes that public worship is not an option, but an absolute requirement.

After establishing the historical importance of public prayer in Judaism, Sigal next discusses the origin of the number ten for a *minyan*. He presents the various prayers and aspects of the service that require a quorum, then explains that the number originates from a talmudic *gezerah shavah*. In his footnote he points readers to Leviticus 22:32,<sup>11</sup> Numbers 16:21<sup>12</sup> and Numbers 14:27<sup>13</sup> and the subsequent discussion in B.T. Berakhot 21b.<sup>14</sup> He laments, however: "This *gezerah shavah* as expounded in the Babylonian Talmud is somewhat less than adequate."<sup>15</sup> To this Sigal adds other occurrences of the number ten relating to the idea of a community as further examples the rabbis used to justify the quorum requirement. Sigal writes: "Despite the ups and downs of the nature of support rendered, it is clear that the halakhic tradition, from the outset, defined 'public worship' as being constituted of ten persons." He adds, however, "That these ten people had to be males was not explicitly stated . . . Only in the Shulhan Arukh [Orach Chayim 55:1] was the term 'males' specified when the halakhah of ten was noted."<sup>16</sup> For Sigal, this last point is an important one.

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<sup>10</sup> B.T. Brakhot 8a: "Resh Lakish said: Whosoever has a Synagogue in his town and does not go there in order to pray, is called an evil neighbour."

<sup>11</sup> "Neither shall you profane my holy name; but I will be hallowed among the people of Israel; I am the Lord who hallows you."

<sup>12</sup> "Separate yourselves from among this congregation, that I may consume them in a moment."

<sup>13</sup> "How long shall I bear with this evil congregation, which murmur against me? I have heard the murmurings of the people of Israel, which they murmur against me."

<sup>14</sup> "R. Adda b. Abahah said: Whence do we know that a man praying by himself does not say the Sanctification? Because it says: I will be hallowed among the children of Israel; for any manifestation of sanctification not less than ten are required. How is this derived? Rabinai the brother of R. Hiyya b. Abba taught: We draw an analogy between two occurrences of the word 'among'. It is written here, I will be hallowed among the children of Israel, and it is written elsewhere. Separate yourselves from among this congregation. Just as in that case ten are implied, so here ten are implied."

<sup>15</sup> Siegel, 290.

<sup>16</sup> Siegel, 285.

Finally, Sigal turns to the topic of women in Jewish tradition. He explains that he has to demonstrate that women—like men—are obligated to pray. This is a necessary first step, because if they are not, then they may not fulfill the obligation of others and may not be counted as true worshippers.<sup>17</sup> In his footnote, Sigal offers a number of rabbinic sources and deduces, “The Talmud declares that prayer is not in this category of *mitzvah* from which women are exempt . . . Rashi further elucidates that prayer is a Rabbinic *mitzvah* and the Rabbis instituted it equally for women . . .”<sup>18</sup> Maimonides even went so far as to call the women’s obligation *d’oraita*.<sup>19</sup> In order to demonstrate that women have always had a place in public worship, Sigal presents the various perspectives on the roles women were traditionally allowed, such as Maimonides’ omission of a woman’s right to receive an *aliyah*, and Rabbi Isaac Alfasi and Rabbi Nissim’s admission that women were allowed to participate in the Torah service. Again, Sigal’s footnote proves worthwhile. He cites Josef Karo’s prohibition against including women in the quorum (55:4), and Elijah of Vilna’s commentary thereof, “A woman’s status is always like that of a slave.” To this Sigal responds with a very contemporary argument: “[S]ince a manumitted slave can be used in a minyan, a woman who is always free can be considered as a manumitted slave.”<sup>20</sup> But this comment, fraught with halakhic difficulties, is not part of the main body of his *teshuvah*. Also, Moshe Isserles permitted women to count in the quorum for the reading of the megillah (to which

<sup>17</sup> Shulkhan Arukh Orakh Khayim 589:1 states: “All those who are not obligated on a matter cannot free others from their obligation” (my translation).

<sup>18</sup> Sigal lists Mishnah Rosh HaShanah 3:8, B.T. Rosh HaShanah 8:4, and the Shulkhan Arukh Orakh Hayim 55:1.

<sup>19</sup> Siegel, 286. In his footnote, the author refers here to the Mishneh Torah *hilchot tefillah* 1:1, in which one is commanded to say the Shema as a result of Deuteronomy 6:7.

<sup>20</sup> Siegel, 292.

women are commanded),<sup>21</sup> and earlier, the Mordecai cited Rabbi Simchah to say that a woman may be counted among the ten persons necessary for the recitation of God's name in the Grace after Meals. Precedent, therefore, does exist for the counting of women in certain *minyanim*.

Moreover, Sigal remarks, women are traditionally on either an equal or lower level to the *mamzer*, the Karaite, and the slave. Sigal takes issue with this in light of the role of women in the twentieth century, declaring, "Certainly contemporary halakhah should avoid such an anomaly."<sup>22</sup> Nevertheless, both Rabbi Asher (in his compendium on Babylonian Brakhot) and Rabbi Yom Tov Lipman Heller equate women to slaves in order to argue that anyone who is obligated to follow the *mitzvot* may be included in a *minyan*.<sup>23</sup> "Above all," Sigal writes, "in respect to the specific question of public worship, a woman is obligated, and hence, is entitled to be part of the quorum."<sup>24</sup>

Sigal entitles the final section of his *responsum*, "A Necessary Change." Women are obligated to pray just as men are obligated. "To disqualify women from sharing in the right to constitute an assembly or a worship community is to offend them without reason." Sigal also saves the heart of his argument for the end of his *teshuvah*. He considers the disqualification of women from constituting a quorum to be a *minhag*—one which has now lost "its reason and its appeal. It is a *minhag* which runs counter to the best interests of Jewish communities, especially the small ones, not only on Friday nights but on Saturday mornings, at daily services and in houses of *shivah*."<sup>25</sup> For Sigal, when a custom such as this has lost its "spiritual benefit," the community has an obligation to

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<sup>21</sup> Sigal points his readers to Isserles's note to the Shulhan Arukh Orah Hayyim 690:18.

<sup>22</sup> Siegel, 287.

<sup>23</sup> Sigal concedes that Heller, however, believes that while a woman should be allowed to be counted, this custom should not be practiced (Siegel, 292).

modify or abolish it. He even cites Moshe Isserles to declare that when there is not support for an obsolete *minhag* in the Torah, then all the more so it should be abandoned. Thus, he declares, in light of a woman's obligation to pray and the rule that one who is obligated to something may fulfill the obligation for others, as well as the community's obligation to do away with customs that no longer appear suitable, the Conservative movement must allow for the counting of women in the *minyan*.

At the same time that Sigal made this liberal push, Rabbi David Feldman offered in opposition a *teshuvah* to maintain the prohibition against counting women in the *minyan*. Like Sigal's, this *teshuvah* was also formally opposed. Feldman rejects all of Sigal's arguments except for Sigal's reference to Rabbi Simchah in the Mordecai. Feldman comments, "even if this lone and questionable source were an adequate basis" for the change in *minhag*, then the Law Committee should limit the number permitted for counting—like Simchah does as well.<sup>26</sup> Many on the Law Committee agreed with Feldman's more conservative approach to reading the Mordecai, since the mainstream of *halakhah* forbids the counting of women at all. Sigal's supporters believed the changing status of women in the modern world demands that the CJLS rely on Simchah's minority opinion and reject the mainstream *halakhic* viewpoint. Thus, because neither side was able to come to any kind of consensus, many on the Committee considered the final ruling to be a *takanah*. After all, as Seymour Siegel wrote in a circular to his colleagues summarizing the position, "The right to institute *takanot* is vested in the authorities of each age when they see the need to correct an injustice or to improve the religious and

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<sup>24</sup> Siegal, 287.

<sup>25</sup> Siegel, 288.

<sup>26</sup> Fine, 3.

ethical life of the community."<sup>27</sup> For this Siegel, because the Conservative Movement gave a greater role to women in synagogue life and education, and it desired women to attend services as well, it ought to extend the egalitarian stance through the recognition of women in the *minyan*.

The differing *halakhic* viewpoints as represented by Philip Sigal and David Feldman demonstrate the tension that pervades Conservative Judaism. For Sigal, Joseph Karo's ruling that women not count in the *minyan* serves as "mere *minhag*," while for Feldman a tradition's appearance in the Shulkhan Arukh serves as the codification of a *mitzvah*. Feldman and his followers embrace the notions of *minhag m'vatel halakhah* (a custom can even supersede a law) and *hehalakhah k'batrei* (the Law is according to the later authorities). As Conservative rabbi David Fine writes, "A jealous loyalty to precedent and established custom is what puts the 'Conservative' into Conservative Judaism."<sup>28</sup> Fine, in his 2002 *teshuvah*, argues that there is no such thing as a pristine, original Judaism that needs uncovering. Rather, as Zacharias Frankel, Solomon Schechter and others have proclaimed, the *Volkgeist*—spirit of the people through history—determines the *halakhah* and it is to this that Conservative rabbis must be loyal.<sup>29</sup> "The essence of Judaism is fluid since it develops through time," Fine writes. "What is crucial and often misunderstood is that this is an emphatically 'Conservative' position crafted as a Romantic attachment to the experience of Jewish history in contradistinction to the liberal intellectualism of Reform Judaism."<sup>30</sup> Change is allowed, but with extreme patience and caution.

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<sup>27</sup> Fine, 4-5.

<sup>28</sup> Fine, 4.

<sup>29</sup> *Ibid.*

<sup>30</sup> Fine, 4-5.

For Sigal, however, even an early minority opinion can come back to serve as the basis for the modernization of *halakhah* and the changing of *minhag*. In 1988, twenty-five years after Sigal's *teshuvah*, JTS Professor Mayer Rabinowitz also agreed with Sigal's reasoning. He argues, "that not only can we base our halakhic position on one voice from the tradition even though precedent developed otherwise, but that in this case that one voice was the true authentic halakhah, presented in the Mishnah, and only later 'forgotten' by the time of the Shulhan Arukh."<sup>31</sup> While Sigal and later Rabinowitz's colleagues appeared to disagree with his reasoning, though, they did agree with the conclusion. Yet it was not because of *halakhic* precedent that the Conservative movement had the ability to change the *halakhah* and count women among the *minyan*. Rather, it was the significant changes wrought by modern society that warranted a drastic break from tradition—a break that could only come about through a *takanah*. As such the CJLS voted in 1973 to count women in the *minyan*, but left the proper reasoning and explanations for future generations to develop. Over time, perhaps, the increasing support for women's role in the synagogue would serve as a legitimate part of Catholic Israel, they hoped, and the *takanah* would then be well justified.

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<sup>31</sup> Fine, 6.

## Chapter 5

# Homosexuality



## Roth on Homosexuality

In 1990, as a response to the Rabbinical Assembly's refusal to grant help in looking for a rabbi to a New York congregation serving homosexuals, Rabbi Bradley Shavit Artson submitted a *responsum* to the Committee on Jewish Law and Standards demanding that the Conservative Movement take a renewed look at its stance regarding the issue of homosexuality.<sup>1</sup> Artson argued that the Torah's prohibition against homosexuality did not apply to, what he called, "constitutional" homosexuals—gays and lesbians in committed, monogamous relationships.<sup>2</sup> He went so far as to suggest that Conservative rabbis should offer a commitment ceremony for constitutional homosexuals on the pattern of heterosexual marriage ceremonies.<sup>3</sup> The Law Committee, however, rejected Artson's *responsum* and sat on the issue for two years.<sup>4</sup>

In 1992, then, CJLS chairman Rabbi Joel Roth submitted a lengthy *responsum* entitled "Homosexuality," which received the endorsement of only fourteen of his CJLS colleagues, with seven members in opposition and three abstentions. Roth divided his paper into six sections: the Jewish perspective on homosexuality throughout history; the definition of *to'evah*; modern theories of homosexuality and its etiology; *halachah l'ma'aseh*; the obligations of heterosexuals to homosexuals and the need for homosexuals to continue to respect the halakhic process; and a postscript regarding the secular rights of gays and lesbians. Roth concludes that, while no one is fully able to control his or her thoughts, love, or fantasies, homosexuals should either attempt to become heterosexuals

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<sup>1</sup> Michael Panitz, "Completing a Century: The Rabbinical Assembly Since 1970," A Century of Commitment: One Hundred Years of the Rabbinical Assembly ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000) 119.

<sup>2</sup> Rabbi Joel Roth, "Homosexuality (EH 24.1992b)," Responsa 1991-2000: The Committee on Jewish Law and Standards of the Conservative Movement ed. Kassel Abelson and David J. Fine (New York: The Rabbinical Assembly, 2002) 621.

or they should practice strict abstinence. Furthermore, an open, active homosexual should not be allowed into the clergy (i.e., as rabbi or cantor), and the local rabbi—as *mara d'atra*—must seriously consider whether s/he will permit an active homosexual to take a leadership or educational position within the synagogue. Nevertheless, Roth writes, gays and lesbians must be welcomed into the synagogue, and the U.S. government should offer them protection and full rights as individuals.

Roth begins his *responsum* by addressing the controversial nature of the topic. On one side of the debate, he claims, are individuals who believe that the Torah's prohibition against homosexual acts is clear and exact, and such people question why the CJLS would bother to address the issue in the first place. On the other end of the spectrum are "some homosexuals" who believe that a rejection of the homosexual lifestyle by the Committee on Jewish Law and Standards would alienate gays and lesbians and force them to leave the Conservative movement—and halakhic Judaism—en masse. In response to both parties, Roth writes, "It is dangerous for halakhah to refuse to discuss a question for fear that legitimate discussion will result in the 'wrong' answer."<sup>5</sup> As such, a precedent exists within Judaism to reject homosexual acts outright, and to consider homosexual behavior to be a *to'evah*, an abhorrence. However, "when a longstanding precedent is questioned by a significant number of people who cannot be dismissed as 'fringe lunatics,' it may no longer be sufficient merely to assert that the precedent stands because it is the precedent."<sup>6</sup> Roth continues this line of reasoning to assert that it is unfair for someone to label a halakhist who disagrees with a certain

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<sup>3</sup> Panitz, 120.

<sup>4</sup> *Ibid.*

<sup>5</sup> Roth, 614.

<sup>6</sup> Roth, 613.

constituency as insensitive or uncaring. Even more so, it is unreasonable for a particularly constituency to reject *halakhah* entirely if a certain halakhist disagrees with its stance. Additionally, though, the "halakhist" has an obligation not to cause the questioner to feel that s/he has been expelled from the community because of such a disagreement. Roth appears to view *halakhah* as an objective, unbiased process by placing the abstract concept of *halakhah* on one side of the argument and all those who disagree with it (i.e., the *one* answer) on the other.

After setting up the necessary social climate in which to conduct his analysis, Roth turns first to the prohibitions against homosexuality found in the Torah. The first mention of the negative law appears in Leviticus 18:22, amidst a list of forbidden sexual unions ("*arayot*"). Yet in that list, which includes laws against incest, adultery, and bestiality, only the commandment that a male shall not lie "with a male as one lies with a female" is followed specifically by the brief but importance sentence, "*to'evah hi*—it is an abhorrence." The term "*to'evah*" is used also in verses 26, 29, and 30, though, but as a cumulative reference to the forbidden relationships listed. Not only is the act of homosexuality considered an abhorrent thing, Leviticus 20:13 demands, similar to the other forbidden unions, that such a violation is punishable by death. In order to begin then to comprehend the traditional Jewish view of homosexuality, one must better understand the word "*to'evah*," and its usage in Scripture and by the rabbis.

While some rabbis might interpret the label "abhorrence" to represent an inherent quality within an action, Roth believes *to'evah* to be an attributed quality. He turns to the

usage of this term in Genesis and Exodus to further his point. In Genesis 43:32,<sup>7</sup> the Torah recalls that the Egyptians could not dine with the Hebrews because that would be “abhorrent *to the Egyptians*.” Roth explains, “Mixed eating is not inherently abhorrent. It is not objectively abhorrent. It is abhorrent to Egyptians for whatever reason they consider it abhorrent.” The same logic applies in Genesis 46:34<sup>8</sup> and Exodus 8:22.<sup>9</sup> In each instance, the word *to’evah* is applied to something because that is how the Egyptians felt about it, not because the act (whether eating or shepherding) was abhorrent in and of itself. The Book of Deuteronomy uses the expression *to’evah* eleven times, mostly in the context of discussing idolatry. In seven of those eleven verses, the expression *to’avat H’* is used to denote that the action is abhorrent, specifically, to God.<sup>10</sup> Two of the remaining four deal with the situation of Jews leading other Jews to practice idolatry; the third describes acts as abhorrent because the Torah has already defined idolatry as abhorrent; and Roth mentions that the fourth is irrelevant to the issue at hand.<sup>11</sup> Roth remarks, “In theory, though, one might wish to claim that the verses in Leviticus about homosexuality are different. They do not say *To’avat H’* and are not linked to acts which have been previously defined as abhorrence. Perhaps homosexuality is abhorrent not by attribution but inherently.” To this the rabbi responds, “I think not.”<sup>12</sup>

<sup>7</sup> Genesis 43:32, according to the new JPS translation, states, “They served him [Joseph] by himself, and them [Joseph’s brothers] by themselves, and Egyptians who ate with him by themselves; for the Egyptians could not dine with the Hebrews, since that would be abhorrent to the Egyptians.”

<sup>8</sup> Genesis 46:34 states, “[Joseph tells his brothers that when Pharaoh summons you and asks your occupation,] you shall answer, ‘Your servants have been breeders of livestock from the start until now, both we and our fathers’—so that you may stay in the region of Goshen. For all shepherds are abhorrent *to Egyptians*.”

<sup>9</sup> One finds in Exodus 8:22, “But Moses replied [to pharaoh], It would not be right to do this, for what we sacrifice to the LORD our God is untouchable to the Egyptians. If we sacrifice that which is untouchable to the Egyptians before their very eyes, will they not stone!” The English rendered here “untouchable” is a translation of the term *to’evah* in its noun-noun construct form, namely “*to’avat mitzrayim*.”

<sup>10</sup> Roth lists those seven as Deuteronomy 7:25-26, 12:31, 18:9, 18:12, 23:19, and 27:15. Roth, 615.

<sup>11</sup> Deuteronomy 13:15, 17:4, 20:18, and 32:16. Roth, 616.

<sup>12</sup> *Ibid.*

In order to affirm the "relative" quality of *to'evah*, Roth turns finally to Deuteronomy 14:3, and the recapitulation of the laws of *kashrut*.<sup>13</sup> Because Leviticus 11 fails to label non-kosher animals as *to'evah*, Deuteronomy's usage of the term cannot allude to some previously defined category of animal. Roth writes, "Since one would be very hard pressed to posit that nonkosher animals are inherently abhorrent rather than abhorrent by attribution, it follows that the *to'evah* of Deut. 14:3 should be understood as we have understood all the other occurrences of the word in the remainder of the Torah."<sup>14</sup> Namely, the label *to'evah* must be an attributed quality. Of course, the 20<sup>th</sup> century rabbi opts not to explain why he reasons that one would be "very hard pressed" to call non-kosher animals "inherently abhorrent" and one might speculate as to a variety of reasons. After all, perhaps our ancestors did find non-kosher animals inherently abhorrent; today, however, it is probably true that such animals are not considered inherently abhorrent. Nevertheless, this line of thinking regarding the attributed quality of *to'evah* is a necessary component of Roth's argument.

After completing his analysis of the term *to'evah*, Roth returns to the specific topic of homosexuality and the Bible's discussion of it. Much of tradition, he explains, understands the incident at Sodom and Gemorrah to be an example of punishment for homosexuals. In his footnote, Roth refers to Genesis Rabbah 50:5 and the medieval commentators Rashi, Rashbam, and Ibn Ezra who affirm this notion.<sup>15</sup> "It is interesting,

<sup>13</sup> Deuteronomy 14:3, "You shall not eat anything abhorrent."

<sup>14</sup> Roth, 616.

<sup>15</sup> Genesis Rabbah 50:5 teaches, "BUT BEFORE THEY LAY DOWN, they commenced questioning him, 'What is the nature of the people of this city?' 'In every town there are people good and bad,' he replied, 'but here the overwhelming majority are bad. THE MEN OF THE CITY, THE MEN OF SODOM, COMPASSED THE HOUSE ROUND, BOTH YOUNG AND OLD-not one of them objecting. AND THEY CALLED UNTO LOT, AND SAID UNTO HIM, etc. (XIX, 5). R. Joshua b. Levi said in the name of R. Padiah: Lot prayed for mercy on their behalf the whole of that night, and they would have heeded him; but immediately they [the Sodomites] demanded, BRING THEM OUT UNTO US, THAT WE MAY

however," Roth adds in his footnote, "that Ezekiel 16:49, 50 does not include homosexuality in its litany of Sodomite offenses."<sup>16</sup> (Ezekiel lists arrogance and haughtiness as the chief sins of Sodom.) Additionally, the Bible mentions the story parallel to Sodom and Gemorrah, Judges 19, where the men of Gibeah want the male traveler thrown out of his host Ephraim's house, so that they could "be intimate with him" (Judges 19:22). Also, either Rav or Samuel understands Ham's encounter with his father Noah to be a homosexual act.<sup>17</sup> Finally, in the last possible reference to homosexuality in the Bible, Rav teaches that Potiphar in the Joseph-story held homosexual intentions.<sup>18</sup> In all these biblical cases in which male homosexuality is presented negative consequences are ascribed. Thus combining these examples with the explicit statements found in Leviticus against sodomy, the prohibition against male homosexuality is a clear *isur d'oraita*.

Lesbianism, however, is forbidden *d'rabbanan*. Yet, according to the *Sifra* (*Acharei Mot* 9:8), the law of Leviticus 18:3, "You should not follow the acts of the land of Egypt . . . or the acts of the land of Canaan," refers to the practice of women marrying each other.<sup>19</sup> Maimonides explains in his *Mishneh Torah* that, despite this explanation from *Sifra*, the law against lesbianism is *d'rabbanan* because Leviticus 18:3 refers to a general prohibition through which the rabbis' determined the extension of the prohibition

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KNOW THEM-for sexual purposes-they said to him, 'Hast thou here (poh) any besides (ib. XIX, 12)? Until now you had the right to plead in their defence, but from now you have no right to plead for them.'"

<sup>16</sup> Roth, 616.

<sup>17</sup> Sanhedrin 70a: "Rab and Samuel [differ,] one maintaining that he [Ham] castrated him [Noah], whilst the other says that he sexually abused him."

<sup>18</sup> Sotah 13b: "And Joseph was brought down to Egypt. R. Eleazar said: Read not 'was brought down' but 'brought down', because he brought Pharaoh's astrologers down from their eminence. And Potiphar, an officer of Pharaoh's bought him, Rab said: He bought him for himself (for sexual purposes)."

<sup>19</sup> Roth, 617.

against homosexuality to women.<sup>20</sup> "Lesbianism is forbidden, being a 'practice of Egypt' about which the Torah has warned," the Rambam wrote. "And even though the act is forbidden, lashes [i.e., the normal legal punishment for a negative commandment] are not given because [the offense] has no unique prohibiting verse and there is no actual intercourse involved."<sup>21</sup> Roth clarifies the confusion between the *d'oraita* and *d'rabbanan* status of prohibition against lesbianism: "Nonetheless, lesbianism is itself *asur d'oraita* and we refer to it as *d'rabbanan* only in terms of the applicable punishment."<sup>22</sup>

For Rabbi Joel Roth, tradition teaches that a homosexual act—whether committed by a man or by a woman—may be considered a *to'evah*: an abomination. However, he does not want to take this restriction too far. Homoerotic fantasies and homosexual preferences, so long as such thoughts remain a product of the mind and heart alone, cannot be forbidden. He bases this differentiation on Sanhedrin 54a, which focuses on the negative commandment found in Leviticus 18:3, "*lo tishkav*."<sup>23</sup> Even though the rabbis believe that both the active and passive partners in a homosexual encounter should

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<sup>20</sup> *Issuri ve'ah* 21:8.

<sup>21</sup> Roth's translation, 617.

<sup>22</sup> Roth, 618.

<sup>23</sup> Sanhedrin 54a-b states: "Whence do I know that pederasty is punished by stoning? — Our Rabbis taught: [If a man lieth also with mankind, as the lyings of a woman, both of them have committed on abomination: they shall surely be put to death; their blood shall be upon them,] A man — excludes a minor; [that] lieth also with mankind — denotes whether an adult or a minor; as the lyings of a woman — this teaches that there are two modes of intimacy [i.e., the active and passive], both of which are punished when committed incestuously. R. Ishmael said: This verse comes to throw light [upon pederasty] but receives illumination itself. They shall surely be put to death: by stoning. You say, by stoning: but perhaps some other death decreed in the Torah is meant? — Their blood shall be upon them is stated here, and also in the case of one who has a familiar spirit or is a wizard: just as there the reference is to stoning, so it is here too. This teaches the punishment: whence do we derive the formal prohibition? — From the verse, Thou shalt not lie with mankind, as with womankind: it is an abomination. From this we learn the formal prohibition for him who lies [with a male]: whence do we know a formal prohibition for the person who permits himself thus to be abused? — Scripture saith: There shall be no sodomite of the sons of Israel: and it is further said, And there were also sodomites in the land: and they did according to the abominations of the nations which the Lord had cast out before the children of Israel: this is R. Ishmael's view. R. Akiba said: This is unnecessary, the Writ saith, thou shalt not lie with mankind as with womankind: read, 'thou shalt not be lain with.'"

be punished, the punishment is the result of the act itself. Roth presents this argument (arbitrarily?) as opposition to the writings of the Orthodox rabbi Moshe Halevi Spero, who marked out a far right-wing stance in claiming that even homosexual fantasies, thoughts, and preference represent a violation of the prohibition against *arayot*.<sup>24</sup> Roth selects what he considers Spero's two strongest points to refute, and suggests that this amounts to a refutation of the entire extremist argument.

Roth's refutation begins first with Maimonides' *Hilchot Issurei Ve'ah* 21:1, "One who has non-genital intercourse with any of the forbidden relationships, or hugs and kisses them lustfully, or engages in close bodily contact is liable for lashes by law of the Torah . . ." <sup>25</sup> Roth understands this *halakhah* to include not only homosexual intercourse, but other homosexual behavior as well. Certainly, however, Maimonides did not seek to regulate one's thoughts and feelings. Similarly later, in 21:9, Maimonides writes, "A man's wife is permitted to him. Therefore, he may behave with her [sexually] as he wishes. Nonetheless it is righteous for a man not be [*sic*] overly frivolous in this regard. Rather, he should sanctify himself at the time of intercourse . . . and not deviate from common behavior in this regard, since the sole purpose of the act of intercourse is procreation."<sup>26</sup> Once again, Roth reminds (in disagreement with Spero), Maimonides seeks only to influence attitude and intention during the act of intercourse. The Rambam does not forbid fantasizing—even fantasizing about forbidden acts. "Maimonides and the Talmud were far too wise to forbid thoughts," Roth writes.<sup>27</sup> The twentieth century Conservative rabbi is aware of the category of *hirhurei aveirah*, but believes that such

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<sup>24</sup> *Tradition*, vol. 17, no. 4 (spring 1979) 57.

<sup>25</sup> Roth's translation, 620.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*



legal statements are meant for the individual to try to control his/her thoughts if possible because such thoughts can lead to actions, but thoughts are not as illegal as the acts themselves.<sup>28</sup>

Lest Roth be considered too liberal as a result of his disagreement with the right-wing Spero, the Conservative rabbi next offers his thoughts on the rejection of Bradley Artson's *teshuvah* as well—for being too liberal. Artson argues that the Torah's prohibition is against homosexual violence, not homosexual love. Roth responds, "And even if Rabbi Artson is correct about the Torah itself, he himself tacitly recognizes that what is really critical is whether the Sages were able to conceive of such a loving homosexual relationship. If they were, and if they considered it forbidden under the law, that would be determinative."<sup>29</sup>

As such, Roth offers alternate explanations to Artson's three proof-texts to suggest that the Sages were aware of the existence of committed, loving homosexual relationships, and objected to them nevertheless. In B.T. Chullin 92a-b, "Ulla said (concerning the verse in Zachariah 11:12—'they weighted out my wages, thirty shekels of silver'), '[The thirty shekels] refer to the thirty commandments which the Noahides

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<sup>28</sup> In B.T. Brakhot, one finds the explanation, "But where do we find [warnings against] the opinions of the heretics, and the hankering after immorality and idolatry? — It has been taught: After your own heart (Num. 15:39): this refers to heresy; and so it says, The fool hath said in his heart, There is no God (Psalms 14:1). After your own eyes: this refers to the hankering after immorality; and so it says, And Samson said to his father, Get her for me, for she is pleasing in my eyes (Judges 14:3). After which ye use to go astray, this refers to the hankering after idolatry; and so it says, And they went astray after the Baalim (Judges 8:33)." Roth also cites several other rabbinic discussions of *hirhurei aveirah*, each one alluding to the fact that such thoughts exist unavoidably, no matter how undesirable they may be. Kiddushin 30b announces, "Our Rabbis taught: The Evil Desire is hard [to bear], since even his Creator called him evil, as it is written, for that the desire of man's heart is evil from his youth. R. Isaac said: Man's Evil Desire renews itself daily against him, as it is said, [every imagination of the thoughts of his heart] was only evil every day. And R. Simeon b. Levi said: Man's Evil Desire gathers strength against him daily and seeks to slay him, for it is said: The wicked watcheth the righteous, and seeketh to slay him; and were not the Holy One, blessed be He, to help him [man], he would not be able to prevail against him, for it is said: The Lord will not leave him in his hand."

<sup>29</sup> Roth, 621.

accepted upon themselves, though they comply with only three: One, that they do not write a *ketubbah* for a male . . .”<sup>30</sup> Artson reads Rashi’s commentary to this verse as suggesting that these people sequestered (*mityachdin*) males illicitly for partnership with other males.<sup>31</sup> Roth, however, reads Rashi as saying that these people “designated” (*miyyachdin*) a male as their partner, in order to engage in a monogamous relationship. Artson asserts that perhaps the Sages truly were unaware of the possibility of a loving, committed homosexual couple. They might have been more accepting had their perception of homosexuality not been as a sign of pagan cult behavior and wanton indiscretion. If Roth understands Rashi correctly, however, then the Sages recognized that monogamous homosexual relationships existed. Yet, they still upheld the laws against homosexuality. Moreover, “Not only, claims Ulla, do Jews recognize that such a [homosexual] relationship—even if loving and permanent—is religiously unacceptable, even non-Jews do not attempt to legitimate what cannot be legitimated.”<sup>32</sup>

Artson’s second point comes from a re-interpretation of *Genesis Rabbah* 26:5. “Rabbi Huna in the name of Rabbi Joseph [said]: The generation of the flood was not obliterated from the world until they wrote marriage contracts (*g’momsiyot*) from males and beasts.”<sup>33</sup> Rabbi Artson translates *g’momsiyot* as “coupling songs,” and believes that the Sages intentionally perverted the Greek term “*gamikon*” which means either

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<sup>30</sup> Roth’s translation, 621.

<sup>31</sup> According to Artson, “A second way of reading this paragraph [from *Chulin*] would be to recognize that polygamy was permitted by Jewish law in the period of both of these examples, so that what is being decried here is not a permanent loving relationship, but simply using the sanctity of the *ketubbah* to cover up the objectification involved in loveless, lustful intercourse, much like writing a *ketubbah* for a series of affairs.” Artson justifies this reading by interpreting Rashi’s commentary to claim that this paragraph demonstrates that “the motivation for the sexual act is simple lust . . . there is no notion of love, commitment, or any relationship extending beyond intercourse.” [Rabbi Bradley S. Artson, “Gay and Lesbian Jews: A *Teshuvah*,” unpublished responsum, 10.]

<sup>32</sup> Roth, 622.

<sup>33</sup> Roth’s translation, 622.

“marriage” or “wedding songs.” Because this comment from Rabbi Huna follows a discussion about the practice of many men marrying one woman,<sup>34</sup> Artson believes that “coupling songs” carries a negative connotation, once again implying that the rabbis were still unaware of the possibility of loving, monogamous relationships between individuals of the same sex. Roth, however, disagrees again with Artson. “The passage clearly recognizes the possibility of such a behavior (as a man loving a man), and denies its acceptability.”<sup>35</sup>

Artson’s third proof-text comes from the quotation in Sifra (*Acharei Mot* 9:8) discussed earlier by Roth, but Artson argues that the Egyptians and Canaanites practiced only lustful, loveless marriages. But Artson’s argument is expressed nowhere in the Bible or in the rabbinic writings! Roth comments, “[Such an interpretation] forces the meaning of the words of the Sifra beyond credulity to assert that this passage passes judgment on the nature of the marriages which it lists. No such judgment is passed.”<sup>36</sup> With that, Artson’s three proof-texts are dismissed, and Roth has managed to position himself in what he considers a middle-ground between the two extreme opinions regarding homosexuality: prohibition against even having homosexual thoughts on one side, and an *halakhic* attempt to justify homosexual behavior on the other. In addition to rejecting the extremes, Roth then recaps the other main points he has uncovered so far, namely the attributed status of *to’evah*, the applicability of the prohibition to men and

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<sup>34</sup> Genesis Rabbah 26:5, “THAT THEY WERE FAIR (TOBOTH). R. Judan said: Actually *tobath* is written: when a bride was made beautiful for her husband, the chief [of these nobles] entered and enjoyed her first. Hence it is written, For they were fair, which refers to virgins; And they took them wives, refers to married women, Whomsoever they chose: that means males and beasts. R. Huna said in R. Joseph’s name: The generation of the Flood were not blotted out from the world until they composed nuptial songs in honour of pederasty and bestiality. R. Simlai said: Wherever you find lust, an epidemic visits the world which slays both good and bad.”

<sup>35</sup> Roth, 622.

<sup>36</sup> Roth, 623.

women, as well as to both the active and passive partners in a homosexual act. Thus concludes part one of Roth's *responsum*.

In part two of his *teshuvah*, Roth returns to the ambiguous meaning of the term *to'evah*. He begins by looking at Nedarim 51a, in which Bar Kappara defines *to'evah* in an interchange with Rabbi, at Rabbi's son's wedding.<sup>37</sup> After consuming some alcohol, Bar Kappara comes to explain the word *to'evah* as a *notarikon*: *to'e (atah) vah*, or "You go astray on account of 'it'"—"it" being a feminine noun.<sup>38</sup> In order, then, to understand Bar Kappara's *notarikon*, one must seek the antecedent of "it." Roth discounts *mishkav zachar* as the antecedent, since this phrase seemingly would be associated with the masculine. "The only real possibility is that the *vah* refers to the noun *to'evah*, i.e., you go astray because of the abomination."<sup>39</sup> But this interpretation leaves the reader back at square one. However, since most of the *arayot* concern inappropriate interaction with women, perhaps Bar Kappara is referring to sexual misdeeds other than homosexuality. In this case, one would go astray on account of "her." The *Miyuchas L'Rashi* and *Ba-alei HaTosefot* affirm this reading. Of course, this explanation of the term *to'evah* brings one no closer to the relevant answer for the conversation at hand.<sup>40</sup>

Yet the Tosafot, the Rosh, and the Ran all believe Bar Kappara to be referring to homosexuality as the *to'evah par excellance*, despite the feminine *vah*.<sup>41</sup> All three sets of commentaries explain that the phrase "*to'eh atah vah*" refers to men who leave their wives to pursue a homosexual relationship. Roth explains that this understanding is

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<sup>37</sup> Nedarim 51a teaches, "[At the wedding] Bar Kappara asked Rabbi, What is meant by *to'ebah*? Now, every explanation offered by Rabbi was refuted by him, so he said to him, 'Explain it yourself.' He replied, 'Let your housewife come and fill me a cup.' She came and did so, upon which he said to Rabbi, 'Arise, and dance for me, that I may tell it to you.' Thus saith the Divine Law, '*to'ebah*': *to'eh attah bah*."

<sup>38</sup> Roth, 624.

<sup>39</sup> *Ibid.*

<sup>40</sup> Roth, 625.

reasonable. After all, Bar Kappara is known to be a lover of things Greek,<sup>42</sup> and the model of a married, older man pursuing a younger man for a homosexual relationship is the classical Greek model of homosexuality.<sup>43</sup> While Roth recognizes that this Greek model of homosexuality is exceptionally infrequent in modern times, he does mention the men who “come out of the closet” after their marriages to women, and either have pursued homosexual relationships while still married or who then leave their wives to fulfill their homosexual orientation. Either way, the explanation of Bar Kappara by the Tosafot, the Rosh, and the Ran might still apply today.

Roth easily could have stopped here, and concluded that since the Torah, the Talmud and the commentaries of the *Rishonim* decry homosexual behavior, so should we in the twentieth (and now twenty-first) century. But he chooses not to accept their statements alone. Rather, Roth desires to understand the motivation behind labeling homosexuality a *to'evah*, especially in light of the *Rishonim*'s reading of Bar Kappara's comments. As such, Roth speculates that perhaps the fear that homosexuality poses a threat to family life influenced the decision of the commentators. The Conservative rabbi offers Rabbi Akiba's teaching in B.T. Sanhedrin 58a about Genesis 2:24 as an example of this. “For it has been taught [in Genesis 2:24]: ‘Therefore shall a man leave his father and his mother . . . And he shall cleave,’ but not to a male.” Akiba's explanation rests on the premise that a sexual union of one man with another cannot equate to two persons becoming one flesh. Moreover, when God says in Genesis 2:18 that He will create a

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<sup>41</sup> *Ibid.*

<sup>42</sup> Roth uses as his proof-text for this assertion the discussion found in Genessis Rabbah 36:8. “Bar Kappara explained it: Let the words of the Torah be uttered in the language of Japheth [sc. Greek] in the tents of Shem,” thus referring to the Septuagint. (Roth, 625).

<sup>43</sup> Throughout this *responsum* Roth will make several statements regarding homosexuality, both in terms of historical research and speculation regarding its etiology. The author's footnotes reveal the depth to which

"help-mate" for the man (ironically, helpmate in this case is a masculine noun), God makes a woman. Nevertheless, Roth points out, the helpmate is created not for procreation, but for companionship and help. "Surely one could cogently argue that the Bible reflects an ideal, and that it could have posited a homosexual family structure at least in addition to a heterosexual one if it deemed it co-equal or even acceptable. As everyone must admit, a homosexual family can be a source of mutual help, companionship and intimacy."<sup>44</sup> Yet, once again, the Bible offers no such model.

The rabbis, too, Roth offers, could conceive of such a homosexual family (which remains an important counter-point to Bradley Artson's *teshuvah*) but they chose not to imbue it with any level of sanctity. Genesis Rabbah 8:9 teaches, "Neither man without woman nor woman without man, and neither of them without the Divine Spirit." Yevamot 62b echoes this sentiment: "Any man who has no wife lives without joy, without blessing, and without goodness." In both cases the rabbis refer specifically to man and woman, not man and partner. "It is not that a homosexual family is inconceivable," Roth argues, "but that it is unacceptable."<sup>45</sup> Jewish tradition has a long-standing precedent against the acceptance of homosexuality, but not because the thought never occurred to the rabbis. On the contrary, the rabbis saw homosexuality as a threat to heterosexual marriage: the only institution in which, they believed, God was present, and the only relationship sanctioned by the Torah. For Roth, this fact alone serves as enough grounds to uphold Judaism's intolerance of homosexual behavior.

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he researched the topic, and offer an invaluable resource to someone looking to research the history of homosexuality.

<sup>44</sup> Roth, 626.

<sup>45</sup> Roth, 627.

Aside from the issue of "holy relationships," however, other rabbis worry about the threat homosexuality poses to procreation. The *Pesikta Zutrata*, in its commentary to Leviticus 18:22, explains that the *to'eh vah* about which Bar Kappara mentioned deals with the inability of a homosexual relationship to produce children. "One goes astray," it declares, "and thus has no offspring."<sup>46</sup> In other words, the heart of the label *to'evah* in reference to homosexuality rests on the homosexual's inability to procreate. Nachmanides concurs. "The reason behind the prohibition of homosexuality and bestiality is well-known," he writes, "being an abhorrent thing because it does not allow for procreation."<sup>47</sup> *Sefer HaKhinukh* agrees as well, explaining that homosexuality leads to the wasting of one's seed and a violation of the commandment to be fruitful and multiply. Moreover, *Sefer Hakhinukh* declares that homosexuality does not fulfill the mitzvah of conjugal relations. The *Torah T'mimah* adds to this, saying that the homosexual's inability to procreate is akin to deviating from nature. In other words, homosexuality is totally unnatural.

If the status of *to'evah* is an applied and not an inherent quality, then understanding Jewish tradition's logic for maintaining the prohibition against homosexuality serves an important function. Roth has already accepted the notion that only heterosexual relationships have been called holy. Next he seeks to explore the idea put forth by individuals, such as the *Torah T'mimah*, that homosexual relationships are not only unholy, but they are "unnatural" as well. Homosexuality exists in the animal kingdom, even outside of the human species, he concedes.<sup>48</sup> But humankind uses the

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<sup>46</sup> Roth, 627 (my translation).

<sup>47</sup> Roth, 627.

<sup>48</sup> Roth elaborates, "The point that there is some behavior among animals that is homosexual need not be contested. Herders and husbandmen have known about it for years" (Roth, 628).

word “unnatural” regarding actions for which other animals would perform, Roth argues, such as walking around naked, eating one’s young, or various elements of animal copulation. So a literalist definition of “unnatural” does not apply. Others, Roth claims, define unnatural as an issue of comfort. The penis fits more comfortably in the vagina than elsewhere. Yet, the 20<sup>th</sup> century author admits, “Homosexuals have no trouble making their organs fit in orifices that are not vaginas, and there is a long history of the acceptability among heterosexuals of sexual intimacies in which the penis is not inserted into the vagina, but elsewhere.” This acceptance of various types of heterosexual intimacy can be found in the Sifra on Leviticus 20:13<sup>49</sup> and Rashi’s commentary to Yevamot 34b. On the other hand, with regard to natural lubricant and ease of movement, one might posit “that vaginal intercourse is more natural, the physiological structures themselves (that is, of the penis) being more appropriately designed for vaginal intercourse than for anal intercourse.”<sup>50</sup> Perhaps, then, there is some credence to the argument that vaginal intercourse is *more* natural than other kinds.

But to link the idea of something being “unnatural” with the inability to procreate, as the Torah T’nimah does, is hardly just. After all, in the twentieth and now twenty-first centuries, homosexuals can find alternate routes to procreation and build families of their own. Additionally, if the ability to procreate serves as the sole arbiter for the “naturalness” of a relationship, not only would all non-vaginal sexual acts be forbidden, so would relationships with an infertile partner. Roth declares: “Since halakhah clearly does not forbid sexual relations in these circumstances, it must imply that procreativity is

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<sup>49</sup> The Sifra explains, “Scripture tells of two types of intercourse with a woman” (my translation).

<sup>50</sup> Roth, 629.



not a *sine qua non* for licit sexual behavior.”<sup>51</sup> While the actual act of non-vaginal intercourse may appear less natural, the fact that such an act cannot lead to procreation is irrelevant to the matter at hand.

In his *Ba'alei HaNefesh*, Rabbi Abraham ben David (Ravad) of Posquieres included the mitzvah of *onah*, “which, he writes, ‘has nothing to do’ with procreation but is a fulfillment of [the woman’s] yearning when she is, say, nursing, or when he is about to leave on a journey.”<sup>52</sup> In other words, it is a *mitzvah* for a man to pleasure his partner, regardless of the potential for conception. Roth, though, in referring to Sefer HaKhinukh, limits the *mitzvah* of *onah* to apply only between a husband and wife—“any act of intercourse between a man and someone not his wife cannot be called *onah*.”<sup>53</sup> Thus, permission for non-vaginal intercourse and sexual relations for motives other than conception do not apply in different contexts, of which homosexuality is included.

Yet Roth does not stop with Judaism’s definition of a “natural” relationship. As a prelude to the third part of his *responsum*, the author looks to secular sources as well. Plato himself deals with the argument from nature. The Greek philosopher demands that people not fall below the nature of birds and beasts, who remain virgin until they find a mate with whom to procreate. Additionally he writes, “I think that the pleasure is to be deemed natural which arises out of the intercourse between men and women: but that the intercourse between men with men, or women with women, is contrary to nature.”<sup>54</sup> Linking the two, Plato—like many rabbis—associates “natural” sexual behavior with procreation. Roth also brings in Emmanuel Kant, who agrees with Plato. The practice of

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<sup>51</sup> Roth, 630.

<sup>52</sup> David Feldman, *Birth Control in Jewish Law* (New York: New York University Press, 1968) 69.

<sup>53</sup> Roth, 631.

homosexuality "is contrary to the ends of humanity: for the end of humanity in respect of sexuality is to preserve the species without debasing the person: but in this instance the species is not being preserved."<sup>55</sup> For Roth, the non-procreative nature of homosexuality and the impossibility of fulfilling the *mitzvah* of *onah* serve as reasonable grounds for the Torah's attribution of the label *to'evah* to gay and lesbian sexual relationships.

To present a counter-argument to the opinions of both Jewish tradition and secular philosophy, Roth looks to twentieth century statistical evidence and sociological studies to further his exploration of the notions of "natural" and "unnatural." In a 1948 study of 6000 males, thirty-seven percent had some homosexual contact after adolescence, thirteen percent had been "more homosexual than heterosexual" for at least three years between adolescence and age fifty-five, and four percent were exclusively homosexual after adolescence. A similar study of women five years later revealed that the homosexual responses reached twenty-eight percent, and thirteen percent of those surveyed had reached orgasm in a homosexual relationship. "Surely, the high incidence of homosexual behavior makes that behavior normal, and behavior which is normal is natural" Roth deduces.<sup>56</sup> Then again, Roth reasons, observance of the Sabbath and of Kashrut is considered normal for Conservative Jews, even if the percentage of those who fulfill these *mitzvot* is low. In this sense, "normal" means "normative behavior." "Thus it is surely possible from a halakhic perspective to call homosexuality unnatural and mean by it 'posited as non-normative behavior.'"<sup>57</sup> If a group feels strongly enough that

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<sup>54</sup> Roth, 631, from Plato's *The Laws*, 636b-c, translation B. Jowett in *The Dialogues of Plato* (New York: Random House, 1937), vol. 2, 418.

<sup>55</sup> Roth, 632, from *Lectures on Ethics*, translated by L. Infield (New York: Harper & Row, 1963), p. 170.

<sup>56</sup> Roth, 632-633.

<sup>57</sup> Roth, 633.

a certain behavior is non-normative, then it might go so far as to call that behavior *to'evah*. Because an action is natural, however, it can still remain abnormal.

Also, the fact that homosexuality is a cross-cultural phenomenon supports the argument that it is "natural." Nevertheless, *to'evah* is an attributed abhorrence, not an inherent one. The terms "natural," "unnatural," "normal" and "abnormal" cloud the issue. As Roth writes, "For a religious tradition to call a type of behavior unnatural may well reflect its biases and values. But, then, is that not part of what religious traditions are supposed to do?"<sup>58</sup> So, even if homosexuality is a trans-historical, cross-cultural phenomenon, Judaism—as a religion and a people—may continue to favor heterosexuality regardless of whether homosexuality is natural. Roth concludes this section with a quotation from David Zvi Hoffman in his commentary to Leviticus 20:13. "[The term] *to'evah* denotes an act which God denounces, even if it was widespread among enlightened peoples."<sup>59</sup> Thus, for Roth, Judaism's prohibition has nothing to do with whether homosexuality is inherently natural or unnatural, since these terms are sociological constructs. The fact remains that, *halakhically*, Judaism considers procreation and the fulfillment of the *mitzvah* of *onah* as the only justifiable reasons for engaging in sexual intercourse. Homosexuality qualifies as neither.

Yet, to begin the third section, Roth writes, "The author of this responsum does not merely concede or acknowledge that knowledge unavailable to earlier ages has potential halakhic relevance today, he affirms it enthusiastically."<sup>60</sup> In other words, for Roth, the potential exists that new information regarding the etiology of homosexuality might trump the traditional notion that homosexual sex is *to'evah*. This potential for

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<sup>58</sup> Roth, 634.

<sup>59</sup> Roth, 635.

nexus between Jewish Law and modern scholarship serves as the foundation of his concept of liberal *halakhah*. As such, the Conservative rabbi presents, first, a summary of Michael Ruse's Homosexuality: A Philosophical Inquiry.<sup>61</sup> Ruse presents two ideas to explain the origin of homosexuality: Freud's psychoanalytic theory and a variant thereof developed by the "adaptationists." Freud posits that homosexuality results from perversion, which he defines as arrested development in the stages that lead a man to direct his libidinal energies toward the opposite sex. "At a crucial juncture, the development arrests at the perception of male genitals being the norm, and they remain the norm for the rest of the child's life."<sup>62</sup> Or, similarly, a young boy who learns that women do not have penises might perceive women as castrated men. In this case, female genitals spark fear and anxiety about castration in that boy and inhibit his ability to develop past the phallic stage. Freud suggests also that if a boy cannot leave the Oedipal stage because his mother constantly smothers him with attention, then the boy becomes unable to transfer his sexual desires to other women. In order to avoid a rivalry with his father, then, the boy will turn his sexual attention to men. Because Freud considered homosexuality a perversion and not a neurosis, the Austrian doctor conceded that there was no real "cure."

This issue of the ability to "cure" homosexuality represents the main dividing point between Freud and the adaptationists. Adaptationists, like Freud, believe that homosexuality results from an environmental factor that forces a child to veer from his normal path toward heterosexuality. "If a human becomes homosexual it must be because something deflects him from the natural development into heterosexual maturity.

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<sup>60</sup> *Ibid.*

<sup>61</sup> Roth, 636.

Something must force the child to repress his natural evolution into heterosexual maturity.”<sup>63</sup> For Freud, homosexuality represented arrested development, and thus a perversion. But for the adaptationists, homosexuality represents a repression—called a “neurosis”—which can be “cured” through proper therapy and analysis.

After analyzing these two competing theories on the etiology of homosexuality, Roth puts them under a *halakhic* microscope to see if enough evidence exists to justify overturning a long-standing precedent of prohibition in Judaism. If the psychoanalytic theories are incorrect, that is if some indisputable evidence arose to prove conclusively that no homosexuals came from family constellations, then the finding would have no *halakhic* significance at all. In other words, the *halakhist* would be back at the beginning. But, if the psychoanalytic theories are correct, and homosexuality results from, say, an overprotective mother and a hostile or absent father—and in each and every case of this the child turned out homosexual, would this new information require a change in the precedent? For Roth, the answer is “no.” Tradition understands homosexuality to be a *to'evah* because of its non-procreative nature, its failure to qualify as *onah*, and because the Torah puts forth heterosexual relations as the ideal of holiness. None of these three reasons is affected by an awareness of the etiology of homosexuality. Moreover, if the *halakhist* rejects the rabbis' reasons for Tradition calling homosexuality a *to'evah*, one is still remiss to change the label. In a footnote, Roth provides an analogy. If the Torah called stealing a *to'evah*, and modern science deduced that stealing resulted from a lack of parental attention, stealing would remain a condemned behavior.<sup>64</sup> “Thus, if we knew that the psychoanalytic theory was absolutely correct, there would still be no reason to

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<sup>62</sup> Roth, 637.

<sup>63</sup> Roth, 639.

seek overturning the precedent, whether or not we accept the classical explanations of why the Torah calls homosexuality *to'evah*.”<sup>65</sup> How much more so, Roth argues, when these theories remain just that—theories.

I take issue, however, with Roth's analogy. Stealing is a behavior that would remain condemned because of its negative *consequences*—which are inherently negative. The negative *consequences* of homosexuality remain only that which the Jewish tradition labels as negatives. Roth himself suggests that the three foremost explanations for labeling homosexuality a *to'evah* all have rather weak bases. If one, then, dismisses these reasons for calling homosexuality abhorrent, as Roth suggests is possible, what negative *consequences* remain to continue to consider homosexuality *to'evah*?

However, Roth considers, if such a theory of biological or environmental etiology was proven correct today, and the Torah assumed homosexuality to be a result of an individual's free choice, then “we must seek to overturn the precedent because the moral God would not demand the avoidance of a behavior of one whose attraction to that behavior was not a matter of pure volition.”<sup>66</sup> In such a case, the systemic rules of *halakhah* demand that, with the exception of three actions,<sup>67</sup> a person not be held responsible for something which s/he was compelled to do. The Torah does not offer its own etiology of homosexuality, though, but instead makes a blanket prohibition.

Even in the face of contrary evidence, Roth argues, if the adaptationists are correct and a homosexual can “recover,” or even in the few cases that Freud concedes a homosexual was “changed” into a heterosexual, “if knowledge of the etiology holds out

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<sup>64</sup> Roth, 640.

<sup>65</sup> Roth, 641.

<sup>66</sup> *Ibid.*

<sup>67</sup> Sanhedrin 74a: Idolatry, murder, and incest.

the possibility that one who is homosexual can be changed from homosexuality to heterosexuality, the precedent can and ought to be retained, and therapy urged.”<sup>68</sup> Roth reasons that for a *halakhic* Jew who happens to be a homosexual, the very knowledge that homosexuality is considered a *to'evah* ought to be motivation enough for him/her to change sexual preferences. The CJLS must favor the precedent of prohibition, therefore, especially in light of the “fact” that therapy has been successful with some homosexuals. However, rabbis should be conscious of the difficulty of this therapy in order to provide a greater effectiveness for it, though the level of that difficulty is not enough to overturn thousands of years of Jewish law.

One might argue, then, that there are some homosexuals who can be “changed” and others who cannot. May a certain group be accepted according to *halakhah*, but not another? To this, Roth responds, “*Lo palug*—there is no distinction.” Differentiation between certain types of homosexuals, Roth believes, would alleviate the strong motivation a *halakhic* Jew who happens to be a homosexual would have for trying to lead a heterosexual lifestyle.

Furthermore, even if homosexuality is the result of something beyond the individual’s control, Judaism has a long history of requesting its adherents to follow laws of sexuality. This applies to both homosexuals and heterosexuals. Here, Roth makes the analogy to the limitations placed on *kohanim*—a status, he believes that represented an essential psychological make-up 2000 years ago.<sup>69</sup> Though this status of the priesthood is conferred without the individual’s choice, if the *kohen* has certain imperfections he is

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<sup>68</sup> Roth, 641.

<sup>69</sup> Though a more logical analogy might be made between sexual limitations placed on homosexuals and the prohibitions against *kohanim* marrying divorcees or proselytes, the CJLS has permitted such marriages

required to give up his role. "It is a hard act [God] demands of them, and its difficulty is made even greater by the fact that their need to suppress an element of their essential character arose through no act of will on their own part." Roth continues, "But, in the final analysis, one would have to admit that Jewish law recognizes that an act of personal suppression of an element of one's character is not an inherently immoral demand."<sup>70</sup> Thus the knowledge established from psychoanalytical theories poses no compelling reason to overturn the precedent of prohibition against homosexual behavior. Neither does the vote of the American Psychiatric Association to remove homosexuality from its list of mental disorders pose such a reason. First and foremost, the APA is not a body of *poskim*. Second, "Homosexuality may or may not be pathological." Roth writes, "I shall let mental health professions argue about that. But that homosexuality is *to'eavh* has nothing to do with whether or not it is pathological."<sup>71</sup>

Having rejected the theories of the etiology of homosexuality put forth by Sigmund Freud and the adaptationists as relevant to Judaism's *halakhic* prohibition, Roth turns next to the "bio-chemical or hormonal theory," likewise discussed by Michael Ruse. After a lengthy explanation of the role hormones play on the human body in general and on sexuality more specifically, Roth quotes Ruse in saying, "Adult sexual orientation can therefore be influenced by prenatal hormones, although there is certainly no absolute link of cause and effect."<sup>72</sup> The environment in which a child is raised can play just as important a role. If the hormonal theory is proven false, this negation would have no effect on the *halakhic* status of homosexuality as *to'eavh*. However, Roth

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under certain conditions (Theodore Friedman, chairman. "Committee on Jewish Law and Standards, Teshuvah." Proceedings of the Rabbinical Assembly 18 (1954), 55-61.)

<sup>70</sup> Roth, 644.

<sup>71</sup> Roth, 646.



wonders, if this theory is proven correct—those prenatal hormones do play a direct role in determining the sexuality of the child—would this affect the *halakhic* precedent? Once again, the Conservative rabbi declares that since the classical explanations for why homosexuality is considered *to'evah* are defensible and strong, this certain etiology would have no effect on the *halakhah*. “And, if we rejected the classical explanations for why the Torah calls homosexuality *to'evah*, we would still find ourselves in the position of affirming that homosexuality is *to'evah* because the Torah attributes that quality to it, and we would still not know why the Torah does so.”<sup>72</sup> Moreover, discovering the cause of homosexuality would give modern man a greater chance of “curing” the situation, providing even more reason for the precedent to stand.

However, even if the Torah assumed an alternate etiology of homosexuality, and the hormonal theory is proven correct, the argument that a moral God would not require someone to suppress innate desires is simply not part of the Jewish tradition. In other words, Jewish tradition has a long history of requesting its adherents to control their base desires, and this example would prove no exception.

Then, just as Roth dealt with Artson's *teshuvah* earlier, so does he take up an article written by Rabbi Hershel J. Matt who proposed using the category of *onas*—one who is compelled—with regard to homosexuals. Matt, however, does not use this category to propose that homosexuality ought to be perceived in the same religious sense as heterosexuality. Rather, because homosexuality is *not* the result of a choice one makes, heterosexuals ought to show compassion to the plight of gays and lesbians in society and oppose secular legal penalties for homosexual acts. Roth also presents Rabbi

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<sup>72</sup> Roth, 651.

<sup>73</sup> Roth, 652.

Norman Lamm's analysis of the applicability of *onas* to homosexuality. Like Matt, Lamm believes heterosexuals should show sympathy and understanding to homosexuals. Yet, "Lamm uses the category of *onas* only to exonerate from legal culpability, not to give any imprimatur of acceptability to homosexual behavior."<sup>74</sup> Roth explains that the application of the category of *onas* does not justify homosexual behavior, but it would release homosexuals from the punishment prescribed by Leviticus 20:13. This release is based on a Talmud quotation that appears three times: "The Merciful exempts with regard to one who acts under duress."<sup>75</sup>

However, Roth adds that the category of *onas* has limits as well. Namely, the category can only apply to a passive party. Deuteronomy 22:25-27 declares, "But if a man finds a betrothed girl in the field, and the man forces her, and lies with her; then the man only who lay with her shall die. But to the girl you shall do nothing; there is in the girl no sin deserving death. For as when a man rises against his neighbor, and slays him, so is this matter; for he found her in the field, and the betrothed girl cried, and there was no one to save her." Secondly, Rava proclaims in the Talmud,<sup>76</sup> "The category of *onas* is inapplicable to [the active parties in] forbidden sexual relationships because there are no unwilling erections except during sleep." For Roth, then, the argument that homosexual acts result from an inner compulsion beyond the individual's control does not prove strong enough to justify and forgive homosexuality. While Roth concedes that sexual arousal is out of one's control, acting upon that desire is well within someone's

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<sup>74</sup> Roth, 653.

<sup>75</sup> In his footnote, Roth refers to B.T. Bava Kama 28b, Nedarim 27a, and Avodah Zarah 54a as the sources for this policy. However, in none of these three places does the phrase appear.

<sup>76</sup> Yevamot 53b.

command. This point will prove important to Roth's conclusion regarding *halakhah l'ma-aseh*, as well.

After rejecting theories from psychoanalysis and endocrinology, Roth looks at a third attempt to explain the etiology of homosexuality: the genetic, or sociobiological, theory. According to the Conservative rabbi (and his research), "Sociobiological explanations of homosexuality will understand it as a social phenomenon—i.e., involving interaction between people—governed by the Darwinian evolutionary model which understands life as a process of natural selection (survival of the fittest)."<sup>77</sup> This theory posits three possible explanations for the source of homosexuality. The first argues that homozygotes are necessary in each generation in order to balance the number of heterozygotes. Before going into too much depth explaining this previous sentence, suffice it to say that Roth quickly dismisses the theory as so inconclusive that any "posek who relied upon it as the grounds for overturning an established precedent (one of which is *d'oraita*, at that) would be on extremely thin ice, at best."<sup>78</sup>

The second possibility arising from the sociobiological model is the kin selection theory. Since, from a Darwinian perspective, the reproduction of one's own genes is the ultimate biological desire, homosexuality may derive from nature's need for the sterility of some of its species' members in order to ensure the best results in the production of more copies of those sterile members' genes. In other words, a person might be born a homosexual in order to prevent him/her from having his/her own children, and instead would help out another family member raise those children. In this case, homosexuality is adaptive in order to ensure the best possibility for a family cluster's genes to reproduce.

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<sup>77</sup> Roth, 654.

<sup>78</sup> Roth, 656.

A third sociobiological theory, the parental manipulation theory, is similar. Here, if one's parents subconsciously "see that they can enhance the total number of reproductions by suppressing the reproduction of one child so that child becomes an enabler and helper to that child's siblings, the parents might do just that."<sup>79</sup> Of course, in the kin selection theory homosexuality serves one's own needs, while in the parental manipulation theory homosexuality serves the parents' needs. These last two theories, however, are not genetic in the same way as the first sociobiological theory.

After presenting these three genetic theories, Roth once again declares with a resounding "No" that these theories hold no halakhic weight. Primarily, a great deal of doubt remains as to the scientific validity of any of them. Yet if any one of them were to prove true, Roth believes that they would represent the most difficult challenges to maintaining the precedent of prohibition because sociobiological theories—unlike those of psychoanalysis and endocrinology—suggest that homosexuality is neither an aberration nor a mistake. Instead, it is a "necessary ingredient for the natural selection process . . . and an integral part of the evolutionary process. And, for a believing Jew, evolution is not free and independent from God's providence."<sup>80</sup> Roth argues, on the other hand, that the truth of either the kin selection theory or the parental manipulation theory would reinforce the notion that family and procreation stand at the core of mankind's obligation and support the argument that homosexuality represents only a necessary evil to further this basic goal. After all, the promotion of the heterosexual family as the ideal in Judaism serves as one of the traditional explanations for homosexuality being called a *to'evah*. Equalizing the status of homosexual relationships

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<sup>79</sup> Roth, 657.

<sup>80</sup> Roth, 659-660.

with heterosexual ones would undermine the genetic necessity for homosexuals in the first place, since this would discourage homosexuals from furthering their own genetic advancement through the support of their siblings. Roth concludes, "The responsible halakhist, therefore, would be ill advised to utilize such theories as grounds for seeking abrogation of the precedent."<sup>81</sup>

Likewise, the homozygote theory fails to hold up under halakhic analysis. While Roth again concedes that homosexuality might be genetically inevitable, such a genetic make-up is designed to sacrifice for the greater good of society. If this theory were to be proven true, however, "heterosexuals should recognize the sacrifice the natural selection process has imposed upon homosexuals for the heterosexual's benefit. Not only does Providence deal them a less fit set of genes, God calls upon them to refrain from the behavior which the genetically inevitable orientation seems to foist upon them."<sup>82</sup> Similarly, Roth argues, homosexuals should recognize their genetic obligation to sacrifice for the cause of the greater good and understand why halakhically no exceptions may be made. With that, Roth concludes the third section of his *responsum* and his understanding of the *halachah iyunit* regarding homosexuality.

Roth began his *teshuvah* with an analysis of Jewish tradition's prohibition against homosexual acts—not necessarily homosexuality in and of itself—and the application of that prohibition to both males and females, monogamous homosexual relationships and those not so, as well as both the active and passive partners in such relationships. In the second part of this *teshuvah*, Roth presents what he calls the "defensible" explanations of the rabbis for prohibiting homosexuality: namely, disruption of the heterosexual family

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<sup>81</sup> Roth, 661.

<sup>82</sup> Roth, 662.

ideal and the non-procreative nature of homosexual relationships. The third part of Roth's *reponsum* deals with modern explanations of the etiology of homosexuality, but somehow, this appears to be comparing apples and oranges. Roth's first section loudly proclaims the status of *to'evah* to be an applied and not an inherent label; more specifically, the Torah offers no explanation for the origin of homosexuality and indeed, does not appear to be concerned with it at all. So, even if one of the modern theories proves correct, it would hold no implications for the halakhic prohibition against homosexual acts. It seems to me that should Roth have wanted to put forth a legitimate antithesis to the rabbinic tradition, he would have had to offer the current position of modern "Catholic Israel." After all, for the Conservative movement the community has the final say as to matters of halakhah.<sup>83</sup>

Instead, though, Roth puts forth and rejects three theories toward understanding the etiology of homosexuality. In each case, he asserts that whether or not those theories had any validity, they prove insignificant to overturning the halakhic precedent. But if the precedent is based on the attributed status of *to'evah* and an ancient and medieval understanding of the implications of homosexuality, does it not make sense to seek to understand the modern Jewish community's perception of homosexuality? For some members of the CJLS and certified *poskim* of the Conservative movement (see my chapter on *Aliyot for Women*, for example), such would be the case. For Roth, though, only recent scientific discoveries appear to maintain significance toward the potential

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<sup>83</sup> So says Neil Gillman: "Seminary, rabbinate, and lay community together had effectively affirmed that whatever else Torah is, it is also a cultural document, that it has always been and will continue to be affected by historical considerations, and that it is the Jewish community in every generation that serves as the authority for the ongoing shape of Judaism in matters of belief and practice." [Neil Gillman, *Conservative Judaism: The New Century* (Behrman House, Inc., 1993) 148.]

change and modernization of *halakhah*, but even then, he appears to stack the deck so as to deny these theories any effect in influencing his decision.

After discussing what he considers to be the *halachah iyunit* regarding homosexuality, Roth desires to offer *halachah l'ma-aseh* as well. He opens this discussion with a disclaimer: "In the opinion of this author, the clarity of the halakhic position on homosexual behavior is not open to any real doubt. The biblical and rabbinic sources do not really lend themselves to permissive interpretations."<sup>84</sup> Thus an halakhic committed community ought not take any steps or initiate any actions that would seem to validate a homosexual lifestyle or render it equal to that of a heterosexual lifestyle. As such, there can be no such thing as a gay or lesbian marriage, and a commitment ceremony only serves to blur the lines as well. However, just as Conservative rabbis recognize that intermarriages happen and that intermarried couples need to feel comfortable in Conservative communities, so too should rabbis help gay and lesbian couples to feel welcome—though they must be clear that such relationships are not considered valid according to *halakhah*. Moreover, should a congregant come to his/her rabbi requesting guidance on making a sexual-preference decision, the Rabbinical Assembly's resolution of 1990 declaring the movement's "prescription" for heterosexuality demands that the local rabbi steer his/her congregant away from homosexuality.<sup>85</sup> If the congregant certifies himself/herself as homosexual, then the rabbi must answer, "'Jewish law would have you be celibate.' Prescribing heterosexuality means proscribing all other types of sexual expression. Inability to abide

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<sup>84</sup> Roth, 663.

<sup>85</sup> Roth, 664-665.

by the heterosexual prescription does not validate violating the homosexual proscription."<sup>86</sup>

Regarding homosexuals in positions of Jewish clergy, however, Roth takes an even more stringent stance. Because leaders serve as role models, and Conservative Jewish leaders must model that which is halakhically acceptable, "persons who live an openly homosexual lifestyle could not reasonably be accepted as rabbis or cantors."<sup>87</sup> The author intentionally does not define the phrase "openly homosexual." Yet Roth recognizes that in individual congregations, there is some relaxation of such policies for lay leaders. As such, a local rabbi—as *mara d'atra*—ought to treat leadership opportunities for "open" homosexuals in the same way s/he would deal with laypeople, seeking to be leaders, who do not keep kosher or who violate the Sabbath laws. Similarly, rabbis and congregations can take one's sexual preference into account when offering synagogue honors; though, once again, homosexuality as a non-ideal halakhic behavior should be judged akin to the intermarried or those violating the *Shabbat* or *kashrut* laws. To summarize: the Conservative movement welcomes homosexuals—as individuals—into congregations, and would even extend to them leadership positions and synagogue honors if those individuals recognize and demonstrate that a homosexual lifestyle is unacceptable. Gay and lesbian partners are welcome in the Conservative movement as well, though by living a homosexual lifestyle they limit the extent to which their involvement may increase or be recognized.

Roth argues against the notion that his recommendations for *halakhah l'ma-aseh* would encourage homosexuals to "remain in the closet." "I have invited persons

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<sup>86</sup> Roth, 665.

<sup>87</sup> Roth, 666.



committed to halakhah to refrain from prohibited behavior," he writes, "not to circumvent the prohibition by violating it in silence and with discretion."<sup>88</sup> He then adds that this *teshuvah* in no way should discourage academic freedom or the willingness of someone to disagree with his opinion. Roth concludes this fourth section of his *responsum* by reminding his readers that, because other papers on this topic were adopted, his opinion represents only one option that Conservative rabbis may follow. Additionally, the fact that this *teshuvah* did not receive enough votes to call it a "Standard of Rabbinic Practice" means that Roth's guidelines are unenforceable.<sup>89</sup>

After rejecting the halakhic viability of a homosexual lifestyle, encouraging celibacy for homosexuals and clarifying his position vis-à-vis homosexuals in leadership positions, Roth directs comments to heterosexuals, specifically, then to homosexuals. "Much of the heterosexual community reacts to homosexuality as if it were inherently ugly, inherently immoral and inherently repulsive. None of these claims is true. Homosexuality, from a halakhic perspective is *to'evah*, but it is the Jewish legal tradition that attributes that characteristic to it."<sup>90</sup> Therefore homosexuals and homosexual love do not represent "evil," and should not be treated as if they do. The Conservative community, Roth argues, should only be as intolerant to gays and lesbians as it is to intermarried couples. Tolerance must be practiced, even if the behavior disagrees with our most fundamental beliefs; tolerance does not equal acceptance.

On the other hand, homosexuals must remember that *halakhah* is a religious legal system, seeking to determine God's wishes. Such wishes frequently impinge on

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<sup>88</sup> Roth, 667.

<sup>89</sup> Only three Rabbinic Standards currently exist for the RA: no rabbi shall perform a marriage for a divorced man or woman unless such a person has obtained a *get*; no rabbi shall officiate or be present at an

individual behavior in all aspects of life, including the bedroom. Homosexuals should not view the acceptance of the traditional prohibition as a rejection of the homosexual community, just as the homosexual community should not reject the halakhic community. "There is no glee in the mind of the decisor when he reaches a decision that imposes any hardship of any kind on any individual. Nonetheless, the values and ideals of the law—the community's best understanding of God's will—sometimes make the imposition of such a hardship unavoidable. *Hameivin yavin* (Those who understand will understand)."<sup>91</sup>

While this appears to conclude his section directed specifically toward the homosexual community, Roth adds a lengthy footnote that actually summarizes his approach to *halakhah*. "The ideological commitment of the Conservative movement to halakhah and its authority is, in large measure, independent of whether or not the constituency recognizes that ideological commitment or acts on it."<sup>92</sup> This halakhic theory seems to contrast those of other *poskim* within the movement. Both Aaron Blumenthal and Sanders Tofield, for example, cite their understanding of the contemporary mood regarding the role of women in the synagogue as one of the bases for justifying their respective opinions on women receiving *aliyot*. Israel Nissan Silverman declared blatantly in his *teshuvah* regarding the consumption of non-hekshered wine that he was actually looking for a *heter*. Elliot Dorff writes, "In the operation of any legal system, Jewish law included, when [a halakhic prohibition has fallen into disuse] those in charge of the law must decide whether to lament and combat the widespread

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intermarriage; and members must affirm and demonstrate affirmation of matrilineal descent, and must include *brit milah* or *t'vilah* in all conversion ceremonies.

<sup>90</sup> Roth, 668.

<sup>91</sup> Roth, 671-672.

transgression or to accept it, recognizing that a specific law has fallen into disuse and there is no strong reason to fight for it.”<sup>93</sup> In other words, the *posek* maintains the power to choose whether to overlook community standards to adhere to them. Additionally, in 1948, the RA rejected a resolution that would require the CJLS to hold itself bound by the authority of Jewish law and instead gave it permission to go beyond *halakhah*.<sup>94</sup>

In the case of homosexuality, though, Roth has chosen to fight modern society’s growing acceptance of homosexuality, and to remain close to the *halakhic* precedent of prohibition. “[I]f halakhic validation is found to be unwarranted or impossible, the homosexual community cannot demand validation within Conservative Judaism extra-halakhically,” Roth’s footnote says. “Such validation could come only at the cost of a gross violation of one of the very characteristics of the Movement that impel the homosexual community to seek its validation in the first place.”<sup>95</sup> Robert Gordis concurs with Roth’s approach to Conservative *halakhah*. “To modify traditional Jewish law in order to bring it into conformity with the way of life of American Jews today is tantamount to amending the Constitution of the United States so as to harmonize it with the viewpoint of an anarchist, however high-minded he may be.”<sup>96</sup> For Gordis as well as Roth, the CJLS is responsible for deciding when the opinions and behaviors of Catholic Israel have veered far enough from tradition that a change in Law needs to be made (namely, when such opinions are ethically and socially desirable), and when, despite the opinions of Catholic Israel, a certain law must be upheld. Roth writes elsewhere,

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<sup>92</sup> Roth, 672.

<sup>93</sup> Rabbi Elliot Dorff, “The Use of All Wines,” Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1986-1990 (New York: Rabbinical Assembly, 2001) 218.

<sup>94</sup> Pamela S. Nadell, “New and Expanding Horizons,” A Century of Commitment: One Hundred Years of the Rabbinical Assembly ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000) 86-87.

<sup>95</sup> Roth, 672.

<sup>96</sup> Robert Gordis, Understanding Conservative Judaism (New York: The Rabbinical Assembly, 1978) 58.

It is the duty of halakhists to Judaize modernity halakhically in a cogent and defensible way . . . And it is the responsibility of apologists (in the very best sense of that word) to provide the ideological and philosophical underpinnings that will allow a modern Jew to meet the challenges of modernity by Judaizing modernity, without falling to the pitfalls that result from confusing Judaizing modernity with modernizing Judaism.<sup>97</sup>

For Roth, the acceptability of homosexual behavior would represent the modernizing of Judaism, as opposed to the Judaizing of modernity.

In the sixth section of Roth's *teshuvah* on homosexuality, he offers a postscript. He reminds his readers that the attributed status of *to'evah* remains in place because of the disruption that homosexuality causes on the family structure and because of its nonprocreative nature. Such concerns, he declares, are legitimate to a religious legal system. However, these concerns are not necessarily as legitimate to a secular legal system. In a secular legal system, a "right" (as opposed to the notion of "obligations" within Judaism) may only be restricted if the exercise thereof threatens the citizens of a particular polity or the state itself. "Therefore," Roth writes, "I can see no justification for civil legislation proscribing such acts [of homosexuality]."<sup>98</sup> *Halakhah* and secular civil law need not be congruous. Roth's understanding, then, of the differences in legal systems leads to him to offer a resolution that calls for the RA to support full civil equality for gays and lesbians in national life and to deplore violence against them as well. Moreover, Roth includes a statement that says that all Jews—including homosexuals—are welcome in Conservative congregations, and that all arms of the movement ought to move to increase levels of awareness and understanding for homosexuals and homosexual issues.

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<sup>97</sup> Joel Roth, "Halakhah and History," The Seminary at 100: Reflections on the Jewish Theological Seminary and the Conservative Movement, ed. Nina Beth Cardin and David Wolf Silverman (New York: The Rabbinical Assembly and the Jewish Theological Seminary of America, 1987) 289.

<sup>98</sup> *Ibid.*

Then, in addition to his postscript, Roth provides an epilogue regarding the AIDS pandemic. "I reject categorically that AIDS can be viewed as God's punishment of homosexuals," he writes.<sup>99</sup> On the other hand, AIDS does not serve to provide grounds to validate homosexuality either. "All suffering is a tragedy." Roth reasons, "Great suffering is a great tragedy. But neither suffering nor tragedy, in and by themselves, constitute grounds for the grant of a *heter* to what is *asur*."<sup>100</sup> Thus concludes the lengthy *reponsum* from Joel Roth on the topic of homosexuality and the Conservative movement. While the movement had drifted to the left on issues of kashrut (permitting non-kosher wine, gelatin, etc.) and ritual (equalizing the role of women, for example), its stance on homosexuality has brought it back toward the right, ensuring the movement's place somewhere in the middle. "Conservative Judaism shares the fate of all center movements," Neil Gillman writes. "It exists in a state of perpetual tension, constantly pulled both to the right and to the left on any significant issue . . . More than Orthodoxy on the right and Reform on the left, it is a movement that is held together by a consensus often on the edge of fragmentation."<sup>101</sup> As the question of the halakhic status of homosexuality is revisited in the coming years, this consensus will be put to the test again.

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<sup>99</sup> Roth, 674.

<sup>100</sup> Roth, 675.

<sup>101</sup> Gillman, 5.

### Kimelman on Homosexuality

On March 25, 1992—the same day that the CJLS approved Joel Roth's *responsum* on homosexuality—the Conservative Movement's Law Committee passed three other papers as well. None, however, received as many signatures as Roth's proposal. Rabbi Reuven Kimelman's *responsum* entitled "Homosexuality and the Policy Decisions of the CJLS" received eleven votes in favor, seven opposed, and five abstentions. Rabbi Mayer Rabinowitz's *responsum*, "On Homosexuality," received only eight votes in favor and five opposed, but ten committee members chose to abstain. Likewise, Elliot Dorff's "Jewish Norms for Sexual Behavior: A Responsum Embodying a Proposal," received eight votes in favor, but five in opposition and seven abstentions. While Roth's *teshuvah* contains the most thorough example of traditional *halakhic* argumentation, Kimelman attempts a very different approach. Kimelman's *teshuvah* focuses less on the process of legal reasoning and more on his understanding of what is "good" for the Jewish people as a whole. He takes the stand that homosexuality—aside from legalistic argumentation—holds the potential to destroy the Jewish community. Such a community, governed by the notion of "Catholic Israel," maintains the right and the obligation to set parameters that will ensure its own continuity, regardless of the opinion of any individuals or a changing modern perspective.

His *teshuvah*, therefore, begins by openly attempting to separate itself from the other papers, declaring that it is focusing more on issues of "public policy" rather than *halakhah*.<sup>1</sup> Kimelman disagrees with Roth by declaring as irrelevant Roth's investigation of whether *to'evah* is an attributed or an intrinsic status. Like Roth, though, Kimelman

provides an answer to questions he believes are brought out by Rabbi Bradley Shavit Artson's *responsum*. Accordingly, Kimelman asserts that Artson is aware of the slippery slope that the UJ professor creates, in that the halakhic tool of compassion for the individual holds the potential to undermine any overall standards of behavior. "Extra-legal compassion often consists of responding to particular cases as opposed to a class of cases," Kimelman writes.<sup>2</sup> One assumes that Kimelman would agree, in theory, with the assertions of Aaron Kirschenbaum, author of Equity in Jewish Law. Kirschenbaum writes, "Individual judicial decisions and general guidelines for decision-making that apparently contradict the formal Torah law, *de'oraita*, are understood to be doing so as the fulfillment of the justice and fairness that Scripture itself requires and as meting out the punishment for improper behavior, again, that Scripture itself requires."<sup>3</sup> Yet for Kimelman, the extension of the claim for justice and fairness could be made (albeit hypothetically) regarding all prohibited relationships within Jewish Tradition, then on to other laws as well, thus leading to the collapse of Jewish Law altogether. While compassion is important in individual cases, to negate a whole Torah-itic law because of compassion seems imprudent to Kimelman.<sup>4</sup>

Additionally, Kimelman believes that Artson is aware of research that disconnects the Hebrew terms *k'deshah/kadesh* (Deuteronomy 23:18) from the cult and that this

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<sup>1</sup> Rabbi Reuven Kimelman, "Homosexuality and the Policy Decisions of the CJLS," Responsa 1991-2000: The Committee on Jewish Law and Standards of the Conservative Movement (New York: The Rabbinical Assembly, 2002) 676.

<sup>2</sup> *Ibid.*

<sup>3</sup> Aaron Kirschenbaum, Equity in Jewish Law: Halakhic Perspectives in Law (Hoboken: Ktav Publishing House, Inc., 1991) 26.

<sup>4</sup> The use of compassion as a tool for ridding Judaism of prohibitions against homosexual acts seems Aristotelian in nature. Kirschenbaum explains, "Aristotle defines equity as the rectification of law where law is defective because of its generality. With Aristotle's definition as a point of departure, we may say that equity is that part of the law—legislative provisions, rule of adjudication, the prerogative of some high functionary, or other mechanisms—that interferes with a strict application of the law that otherwise would

research weakens the link between homosexuality and idolatry.<sup>5</sup> Kimelman explains, "The fact that Deuteronomy's diatribe against all forms of idolatry does not include homosexuality and that the prohibition against *kadesh* and *k'deshah* appears in a list of moral wrongs indicates that homosexuality is understood in the context of immoral sexuality, not idolatry."<sup>6</sup> One must assume that Kimelman refers here to modern research, such as archaeological discoveries, that sheds light on the cultic practices of the ancient Near East. Presenting such research in their *teshuvot*, both Roth and Kimelman seek to demonstrate that they understand the changing views of homosexuality during this modern period and make an attempt to address these changes while still uphold the traditional *isur*. While Roth addressed etiological theories of homosexuality, Kimelman uses modern scholarship to better understand the world-view of the biblical authors and how that would influence the text itself. As such, Kimelman believes that the Bible offers a blanket prohibition against homosexuality, regardless of the monogamy or the love between the partners. Modern scholarship also has something to offer the Committee on Jewish Law and Standards, and that is how approval of homosexuality would affect the twentieth century Jewish community and beyond.

Thus Kimelman comes to focus on the beliefs that inform Artson's *responsum*, and thereby offers a different approach from Joel Roth. Social scientists argue that sexual norms are the result of a particular perspective, and no one perspective can be right. Yet, as Kimelman points out, this line of reasoning is often utilized to effect change. "The difficulty [though] is that once the argument has been made for

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have resulted in undue hardship, an unreasonable judgment, or a miscarriage of true justice" (Kirschenbaum, 4). Kimelman's concerns lie with drawing a boundary between equity and stability of law.

<sup>5</sup> Kimelman provides no reference to such literature.

<sup>6</sup> Kimelman, 677.



undermining the ultimate validity of any one perspective, the basis for arguing for a change dissipates." If, then, one's perspective can have no "real" substantiation, then even such an argument from social science would concede that one has a right to promote his own interests. As such, Kimelman believes, the ethical relativism put forth by some social scientists fails to diminish a community's right to promote its own interests. Indeed, to promote policies that will sustain and enhance a community's chance for continuity remains a valid reason for retaining a certain perspective.

Remaining on this route of public policy, Kimelman analyzes an economic theory as well, and its application to the Jewish community's view of homosexuality. In the sixteenth century, Britain's Thomas Gresham suggested that if two kinds of money in circulation have the same denominational value but different intrinsic values, then the money with higher intrinsic value would be hoarded and eventually driven out of circulation by the money with lesser intrinsic value.<sup>7</sup> The 20<sup>th</sup> century Conservative rabbi applies Gresham's theory to sexuality, wondering: does "bad" sex drive out "good" sex? In other words, "Ascertaining whether valorizing homosexuality is at all detrimental to family-producing sexuality is at the heart of public policy analysis. If it is, then the approval of *a priori* non-procreative marriages as a class could tend to devalue the type of sexuality that leads to procreation."<sup>8</sup> By granting approval to homosexual lifestyles—

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<sup>7</sup> The American Heritage Dictionary: Second College Edition (Boston: Houghton Mifflin Company, 1985) 576. The Columbia Encyclopedia states that Gresham's theory is "the economic principle that in the circulation of money 'bad money drives out good,' i.e., when depreciated, mutilated, or debased coinage (or currency) is in concurrent circulation with money of high value in terms of precious metals, the good money is withdrawn from circulation by hoarders. It was thought that Gresham was the first to state the principle, but it has been shown that it was stated long before his time and that he did not even formulate it." The Columbia Encyclopedia: 6<sup>th</sup> Edition (New York: Columbia University Press, 2002).

<sup>8</sup> Kimelman, 679.

even monogamous, loving relationships—the Conservative movement would undermine the Jewish community's need to perpetuate itself through procreation.

Moreover, homosexuality, according to Kimelman, offers an easier life because there is no commitment of time, money, and emotions into a relationship, nor the “toil, anguish, and expense” of raising children.<sup>9</sup> Therefore, societies offer incentives for individuals to pursue monogamous relationships that result in families, such as various types of tax breaks and publicly funded education. As a religious community, Judaism cannot simultaneously encourage childbearing families and grant approval to relationships that are inherently non-procreative. The latter would undermine the former. Since, as Kimelman believes, too many couples are declining to fulfill their duty to “invest in the future by replenishing themselves,” placing emphasis on the importance of the relationship above the obligation to have children would prove detrimental to Jewish continuity.<sup>10</sup>

Judaism has always placed the couple with children on a higher plane than those without offspring, he argues. The author cites B.T. Yevamot 64a, which claims that childless marriages bring about a withdrawal of the divine presence from Israel.<sup>11</sup> Like Roth, however, Kimelman cannot make such a comparative statement without addressing the issue of heterosexual couples who are unable to have children. “There is of course a

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> In Yevamot 63b-64a, the Talmud declares, “Another [Baraita] taught : R. Eliezer said, Anyone who does not engage in the propagation of the race is as though he sheds blood; For it is said, Who so sheddeth man's blood, and close upon it follows, And you, be ye fruitful etc. R. Eleazar b. Azariah said: As though he diminished the Divine Image. Ben 'Azzai said etc. They said to Ben 'Azzai: Some preach well etc. Our Rabbis taught: And when it rested, he said: 'Return O Lord unto the ten thousands and thousands of Israel', teaches that the Divine Presence does not rest on less than two thousand and two myriads of Israelites. Should the number of Israelites happen to be two thousand and two myriads less one, and any particular person has not engaged in the propagation of the race, does he not thereby cause the Divine Presence to depart From Israel!”

considerable difference in having compassion for a couple who cannot have children as opposed to one for which it was never biologically intended," he writes.<sup>12</sup> Perhaps this is akin to the difference between *l'hatchilah* and *b'diavad*: one cannot grant permission beforehand for an inherently infertile couple to marry; but should a couple marry *k'dat Moshe v'yisrael*, then turn out to be infertile, the couple's relationship remains acceptable (with the exception of the ten-year rule<sup>13</sup> not addressed by the Conservative movement). Kimelman goes on to say, "In cases where medical intervention is needed to induce pregnancy (i.e., in heterosexual couples), this may accrue to the benefit of all involved. Sundering these links for a whole class of people, however, undermines the centrality of the family for the locus of love, sex, childbearing, and parenting."<sup>14</sup>

Yet not only does a couple need children to be whole, the couple itself ought to consist of a male and a female partner. Kimelman, like Roth, cites Genesis Rabbah 17:2: "He who has no wife dwells without good, without help, without joy, without blessing, and without atonement." Moreover, Kimelman argues that "female love" is more consumed with creating a future than is male love—thus man needs woman to ensure that his sexual energies are channeled toward a productive outcome. This argument comes not from Jewish sources, but from George Guilden and his book Sexual Suicide. "Traditionally, women have leveraged the male sexual drive into domestication," Kimelman learned. "Without channeling the sexual drive into family making, we could become totally enmeshed in 'nowness' with little thought of the future."<sup>15</sup> It is this focus

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<sup>12</sup> Kimelman, 680.

<sup>13</sup> Yevamot 64a also says, "If a man took a wife and lived with her for ten years and she bore no child, he may not abstain [any long from the duty of propagation.] The Talmud requires an infertile couple to divorce after ten years of marriage, though there are several qualifying factors that determine when one begins counting the ten years.

<sup>14</sup> Kimelman, 680.

<sup>15</sup> *Ibid.*

on "nowness" that our tradition seeks to avert by regulating sexual behavior and emphasizing the importance of procreation. The balance created by a relationship between a man and a woman furthers this notion of controlling mankind's base instincts and channeling it toward the greater good. As Kimelman argues, "Marriage involves more than the ratification of love between two people. It is the transformation of love into a biological and social continuity that transcends the participants to become the basis of human community."<sup>16</sup>

Furthermore, Kimelman asserts, Judaism links the family with the idea of redemption. In B.T. Shabbat 31a, Raba explains "When man is led in for [the Day of] Judgment he is asked, 'Did you deal faithfully [i.e., with integrity]? Did you fix times for learning? Did you engage in procreation?'" The relationship between a man and a woman, and the partners' mutual goal to have children, demonstrates a focus on the long-term—both in the context of this world and the World-to-Come. Kimelman sees this link between family, religion, and redemption in B.T. Pesachim 88b<sup>17</sup> and Psalms 78:4-7<sup>18</sup> as well. For the Conservative rabbi, homosexuality signifies an emphasis on immediate gratification, while heterosexuality serves to take the entire world order into account.

Aside from the link between family life and redemption, Kimelman sees the approval of homosexual relationships as the first step toward dissolving all prohibitions against sexual taboos. "The legitimization (*sic*) of loving homosexual relations easily

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<sup>16</sup> Kimelman, 681.

<sup>17</sup> Pesachim 88b teaches, "but surely the world was not created for aught but procreation as it is said, He created it not a waste, He formed it to be inhabited (Isaiah 45:18)."

<sup>18</sup> Psalms 78:4-7 declares, "We will not hide them from their children, but tell to the latter generation the praises of the Lord, and his strength, and his wonderful works that he has done. For he established a testimony in Jacob, and appointed a Torah in Israel, which he commanded our fathers, that they should make them known to their children; That the generation to come might know them, the children who should be born; who should arise and tell them to their children. That they might set their hope in God, and not forget the works of God, but keep his commandments."

slides into the legitimization of "loving" incestuous, pedophilic, and adulterous relationships."<sup>19</sup> The Conservative rabbi claims that the recognition of the interrelationship between homosexuality, infidelity, pedophilia, and incest can be traced back to ancient times, as is demonstrated in B.T. Sanhedrin 58a. For Kimelman, "Once feelings are accepted as the criterion for overturning a prohibition, every leak in the dam threatens to become a flood."<sup>20</sup> Kimelman believes that "dysfunctionalities" can become respectable when one recognizes that others practice them as well, and so to grant permission to one of the traditionally abhorrent sexual practices could lead eventually to permitting them all.

Aside from arguing that the purpose of marriage is to direct sexual desire toward a productive outcome as opposed to serving as the culmination of a loving relationship, Kimelman also believes that modern society's view of love (the basis upon which Artson justifies permitting homosexuality) is wrong altogether. Again drawing on secular sources, the Conservative rabbi states that mature love is not simply a feeling or sense, but an "exercise of wisdom, since love is, 'the will to extend oneself for the purpose of nurturing one's own or another's spiritual growth.'"<sup>21</sup> In other words, love is not a passive emotion that happens upon someone. Love is a choice. This leads Kimelman to make an analogy between homosexuality and kleptomania: "Notwithstanding our compassion for the low esteem that generates the characterological problem of kleptomania," he argues, "we still cannot condone the stealing."<sup>22</sup> Even though homosexuals might feel love toward a member of their own sex (such as a kleptomaniac

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<sup>19</sup> Kimelman, 682.

<sup>20</sup> *Ibid.*

<sup>21</sup> Kimelman, 683.

<sup>22</sup> Kimelman, 684.

possesses the desire to steal), this does not necessarily justify one to act on those feelings. One chooses to cultivate love (and thus sexuality) with another person—love does not choose to cultivate itself. As such, one can make no argument involving compulsion when dealing with the permissibility of homosexuality.

Concluding his “public policy” opinion, Kimelman then writes, “From the point of view of market strategy, it is unwise to risk the loyalty of an already committed population for the possibility of securing that of a questionable one, especially one unable to perform the basic function of continuity.”<sup>23</sup> In other words, Jewish communities ought to focus primarily on the construction of Jewish families. Since Jewish public policy must take into consideration the health of the Jewish community, and homosexuality offers only unhealthy results for the future of Jews and Judaism—so Kimelman believes--the Conservative movement should not enfranchise the Jewish homosexual community. Like Roth, Kimelman also urges the movement not to permit homosexual behavior from clergy at all. Additionally, like intermarriage in the eyes of the Conservative movement, rabbinic presence at a commitment ceremony only serves to validate that lifestyle, and so he discourages rabbis from attending such functions. Aside from the *shalshet d'kabbalah* of *halakhah* that the Conservative movement considers itself a part, Kimelman’s public policy *teshuvah* argues that homosexuality has always been seen as a threat to Jewish continuity and the mental health of the Jewish community, and should continue to be seen as such a threat today.

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<sup>23</sup> Kimelman, 685.

## Chapter 6

### Other Sensititve *Responsa*

## Driving on Shabbat

In 1932, the Committee on Jewish Law rejected a proposal to lift the ban on automotive travel on Shabbat.<sup>1</sup> Nearly twenty years later, though, they revisited the issue in a collection of *teshuvot* that triggered a debate surrounding the persistent tension between tradition and modernity festering within the heart of Conservative Judaism. Indeed, the issues underpinning the overturning of the Sabbath ban on driving served as the most controversial decision by the movement until JTS's 1984 acceptance of women into the rabbinical school. How flexible is *halakhah*, and under what pretenses may it be altered? The *responsa* from 1950 regarding driving on Shabbat were part of Conservative rabbis' movement-wide "Sabbath Revitalization Campaign," designed to encourage congregants to recapture the spirit of Shabbat as a day of rest highlighted by the beauty of home rituals, the reading of sacred literature, and participation in communal services.<sup>2</sup> Moreover, the question about the permissibility of driving on the Sabbath allowed the then-newly formed CJLS (as of 1948) to try out its recent decision to use extra-halakhic powers and to increase the scope of its ability to interpret Jewish tradition as tools to confront a rapidly changing modernity.<sup>3</sup> The *teshuvah* from rabbis Morris Adler, Jacob Agus, and Theodore Friedman and the *responsum* from Dr. Robert Gordis, rabbis Ben Zion Bokser and Arthur Neulander came to be identified as containing both the best and worst aspects of Conservative Judaism—with the appropriate moniker dependent upon the eye of the beholder.

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<sup>1</sup> Pamela S. Nadell, "New and Expanding Horizons," A Century of Commitment ed. Robert Fierstien (New York: Rabbinical Assembly, 2000) 88.

<sup>2</sup> *Ibid.*

<sup>3</sup> Nadell, 87.



A discussion of these *responsa* immediately followed their passage at that 1950 RA convention, with Conservative rabbis coming down on every side of the controversy. Rabbi David Aronson, chairman of the CJLS, praised the debate by comparing the authors of the two *responsa* to the Houses of Hillel and Shammai and concluded that in this discussion as well, *eilu v'eilu d'verei Elokim Chayim*.<sup>4</sup> "Theoretically the two reports present two varying philosophies of Halachah," Aronson declares, "the one stressing the Takkanah, the legislative or rabbinic ordinance method; the other, stressing the method of progress through a liberal interpretation of the Law."<sup>5</sup> Aronson's colleagues, however, heartily disagreed with his praise. Most of those who spoke up considered these varying perspectives much more than a difference in opinion—a number went so far as to call the conclusion come to by both *teshuvot* "revolutionary." Rabbi William Greenfeld applauded the *teshuvot*, calling them a marker of the CJLS's willingness to consider itself an authoritative governing body for the Conservative movement alone, and responsive to only that movement's needs.<sup>6</sup> Professor Isaac Klein announced his concern that the permissive *responsa* "will have the single effect of spreading irreligion."<sup>7</sup> Yet Rabbi Jack Cohen challenged Klein's view. "Irreligion is running rampant [already] . . . right

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<sup>4</sup> Rabbi Aronson is referring to B.T. Eiruvin 13b, which states, "R. Abba stated in the name of Samuel: For three years there was a dispute between Beth Shammai and Beth Hillel, the former asserting, 'The halachah is in agreement with our views' and the latter contending, 'The halachah is in agreement with our views'. Then a bath kol issued announcing, '[The utterances of] both are the words of the living God . . .'" But Rabbi Aronson left unsaid the second half of this quotation, which surely all of his colleagues understood: "but the halachah is in agreement with the rulings of Beth Hillel'." Aronson probably counted on their knowledge of this passage, and used this as a behavioral reminder inherent within his message: "Since, however, both are the words of the living God' what was it that entitled Beth Hillel to have the halachah fixed in agreement with their rulings? Because they were kindly and modest, they studied their own rulings and those of Beth Shammai, and were even so [humble] as to mention the actions of Beth Shammai before theirs."

<sup>5</sup> A Discussion from the 1950 Proceedings of the Rabbinical Assembly as recounted in Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1927-1970, Volume III: Responsa ed. David Golinkin (Jerusalem: The Rabbinical Assembly and The Institute of Applied Halakhah, 1997) 1170-1171.

<sup>6</sup> Golinkin, 1174.

through the ranks of Judaism today," Cohen writes. "If we can at least show our lay people that we are ready to recognize the legitimacy of their demands for satisfaction of their points of view, we have at least an opening to come to them and say, 'All right, you want some kind of observance which will be meaningful for you. Now what are you going to do about it?'"<sup>8</sup> Again, on the other side of the debate, Rabbi Ismar Schorsch asked that the *responsa* be tabled indefinitely because he found them so troubling. Nevertheless, these *teshuvot* became official Conservative *responsa*, and along with the movement's stance on egalitarianism, have come to serve as a clear separation from Orthodoxy.

The question posed to rabbis Adler, Agus, and Friedman (whose response will be called *Teshuvah A*) demonstrates the frustrations of a congregational rabbi who (one assumes) upholds a traditional lifestyle while serving individuals who do not maintain the same level of ritual observance. "One cannot serve a congregation for any time," this rabbi laments, "without being depressed and disheartened by the widespread disintegration of Sabbath observance among our people."<sup>9</sup> The *shoel* begs the CJLS for guidance on how to enable his congregants to better understand the spirit of Shabbat and to and participate in its laws. In response, *Teshuvah A* begins with a lengthy discussion on the beauty and importance of the Sabbath day. Shabbat is a "sanctuary in time," they remind the reader; it serves as a manifestation of the Covenant, and helps to link Jews to the Shekhinah.

*Teshuvah B*, written in three parts by Gordis, Bokser, and Neulander, agrees. "It was the [Sabbath] prohibitions which freed man from immersion in the world, and thus

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<sup>7</sup> *Ibid.*

<sup>8</sup> Golinkin, 1177.

helped create the distinctive Sabbath atmosphere which pervaded the Jewish home, and became part and parcel of the Jewish personality," writes Bokser.<sup>10</sup> While this *responsum* praises the notion of restrictions over and over again, it too eventually comes to permit driving on the Sabbath. Nevertheless, *Teshuvah B* reminds its readers that the rabbis were well aware of how difficult such prohibitions are, but that these limitations help relieve stress and prevent undue exertion during an otherwise hectic week.

One must wonder, though, about the place of this discussion within the *responsa*. Obviously the *shoel* is familiar with the sanctity of Shabbat, or else he would not have asked for assistance. These *responsa* were not distributed in any major public forum for laity to read, so my assumption is that lay-people were not the target of this discussion either.<sup>11</sup> Perhaps the authors of these *responsa* felt a need to prove to their colleagues that, despite the lenient *heter* to come, they indeed respected the Sabbath as well. After all, in the discussion following the presentation of the *responsa*, Rabbi Samuel Rosenblatt demanded, "[I]n order that such lawlessness be not sanctioned, men [should] be appointed on the Law Committee who are conversant with the Law, and who are pledged to uphold it."<sup>12</sup> Writers of the *teshuvot* on both sides of the debate take careful time to praise the Sabbath, its corresponding prohibitions, and its role both in Jewish history and modernity.

The authors of *Teshuvah A* state clearly that the twentieth century marks a significant turning point in Jewish history. Either the CJLS, as representatives of the

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<sup>9</sup> Golinkin, 1109.

<sup>10</sup> Golinkin, 1153.

<sup>11</sup> Actually, not until Golinkin published several volumes of *responsa* in 1997 were any *teshuvot* easily available to the public; still, many remain unpublished by the Committee. These particular *teshuvot*, however, did appear for public consumption eight years after their approval, in Tradition and Change: The Development of the Conservative Movement ed. Mordecai Waxman (New York: The Burning Bush Press, 1958) 351ff.

Conservative movement, could allow Shabbat observance to continue to fall into disuse, or it could take drastic measures to attempt to revive the practice thereof in light of the new age of humankind. "One of the great responsibilities of this age in our history, is to release the lifegiving and life-enriching powers that inhere in our tradition, by relating that tradition to modern life," the *teshuvah* explains.<sup>13</sup> Like many other Conservative *responsa*, the authors remind that no one benefits from an unchanging legal system, and that the very framers of the original system intended for change to occur. "The very designation of Jewish law as *Halachah* suggests its capacity for movement, and reveals the intent of its architects and builders to charge it with a genius for vital adaptability to the moving and changing scene."<sup>14</sup> In *Teshuvah B*, Robert Gordis puts it another way: "Sinai marked the commencement, not the conclusion of Revelation." Additionally, Gordis writes, "to decide what the law requires on any given issue means not the discovery of a point, but the plotting of a line on a graph, where tradition is one coordinate, and contemporary life the other." It is in this spirit that the authors of the two *teshuvot* and the CJLS took up the question of driving on Shabbat in the first place—to attempt to balance tradition with modernity and to serve as ambassadors of Judaism to a de-ghettoized American Jewry.

This American Jewry, so the authors reason, must be ignorant of the power and meaning of Shabbat and so need a bridge to help cross over into the land of observance. Jews need Shabbat more now than ever, the authors argue: "Our modern environment, built as it has been by the drives for possession and dominion which it stimulated, needs

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<sup>12</sup> Golinkin, 1173.

<sup>13</sup> Golinkin, 1111.

<sup>14</sup> *Ibid.*

the spiritual overtones of a day overflowing with moral and religious content.”<sup>15</sup> Because of the high degree of tension brought on by overpopulation and increased mechanization, Jews would be well served—the rabbis argue—by partaking in the customs of Shabbat.

This leads the authors of *Teshuvah A* to discuss why Jews in America have let the Sabbath fall into desuetude. When the Jewish community lived a relatively insular life, they explain, social and cultural pressures encouraged observance of Shabbat, especially with regard to economic practices. In America, however, where Jews are a small minority living among a Christian population, Sunday became the day of rest. If a Jewish person worked for a gentile employer, then the Jew had little choice but to work on Saturday—or to give up the job entirely. Those who did work for other Jews, such as in retail work or the needle trade, needed to open their stores anyway in order to survive since Saturday was America’s shopping day. “The whole spirit of early 20<sup>th</sup> century America was one of economic expansionism,” reasoned the Conservative authors. “Indeed, it was the hope for just such advancement, as it was the driving force behind other immigrant groups, that impelled many Jews to pull up stakes and come to America.”<sup>16</sup> Moreover, as the Eastern European Jews arrived during their mass migration at the turn of the century, they saw Jews already in America (predominantly Reform, the authors add) who still held prominent positions within the Jewish community even though they worked on the Sabbath. The internal pressures of the “Old Country” to conform to *shmirat Shabbat* no longer held sway.

The Conservative authors point the finger at the Enlightenment as well. “In total effect, the Haskalah and its spiritual derivatives such as Jewish socialism, led to a

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<sup>15</sup> Golinkin, 1112.

<sup>16</sup> Golinkin, 1115.

weakening and slow dissolution of the ties that bound the Jew to his spiritual tradition.”<sup>17</sup> This Enlightenment professed the virtues of economic advancement over and above religious commitment—the authors claim. *Teshuvah A* even goes so far as to suggest that Jews of the middle twentieth century are like ignorant children who had not been taught otherwise. “For many, indeed for a growing proportion of the members of our congregations, their violation of the Sabbath represents merely a practice they have inherited from the previous generations without ever having themselves seriously considered the alternative of Sabbath observance.”<sup>18</sup> The authors go so far as to suggest that it was as if those who did not observe Shabbat were like individuals who had been captured by heathens and had thus forgotten the importance of the Sabbath! Through a simple process of re-education, these rabbis believed, those who fail to observe Shabbat will be brought around to becoming observant Jews. Ignorance must be the explanation, they believe, because if Jews knew the power and significance of Shabbat, they surely would take advantage of it.

This assumption that if modern Jews were exposed to the beauty of Shabbat then they would begin to observe its laws and customs led the CJLS to its call for a campaign to revitalize the Sabbath. The authors conclude, “It is the merest truism to state that the overwhelming majority of our people are not presently spiritually prepared to forego the opportunity for economic advancement in favor of Sabbath observance.”<sup>19</sup> Nevertheless, it is celebrating Shabbat through cessation from all gainful employment for twenty-four hours that the Committee desires. “Our program,” the authors declare, “seeks to reintroduce into the lives of our people as much Sabbath observance and spirit as we may

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<sup>17</sup> Golinkin, 1116.

<sup>18</sup> *Ibid.*

reasonably hope our people will, with proper education, accept."<sup>20</sup> As part of their desire, then, to meet people at a middle point in order to usher them back toward tradition, the authors of this *teshuvah* look to the role of the automobile as something considered a normal feature of daily life but with complicated consequences. The pervasive use of cars has led to the decentralization of the community and a distancing of membership from synagogues. "To continue unmodified the traditional interdiction of riding on the Sabbath is tantamount to rendering attendance at the synagogue on the Sabbath physically impossible for an increasing number of our people."<sup>21</sup> By limiting this ban on driving, the authors of *Teshuvah A* believe, the Sabbath revitalization program will have a better chance of success.

Something appears to be missing, however, in their logic. The goal is clear: to encourage Conservative Jews to participate in the traditional Shabbat observances. The problem, as well, is easily defined: an ignorant laity (so they assume—though it might be the case that the laity is well educated but chooses not to follow Shabbat laws anyway) who fail to appreciate and understand the blessings that Shabbat observance provides. What remains confusing is the process whereby the authors of these *responsa* seek to alleviate the problem. If Conservative Jews are violating the laws of the Sabbath already, such as by driving, for example, then giving them permission to continue this behavior will not educate them about the rewards of a traditional Shabbat. On the other hand, if the formerly ignorant laity have learned about *shmirat Shabbat* and have fallen in love with it as the rabbis hoped, then they would indeed be inhibited from participating in communal functions because of their distance from the synagogue. Herein lies a logical

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<sup>19</sup> Golinkin, 1117.

<sup>20</sup> Golinkin, 1118.

reason for limiting the ban on automobiles: committed, observant people who want to participate but refuse to break Sabbath laws, so the CJLS eases one of the burdens. But if this is the case, how did the Committee manage to educate these formerly ignorant Jews and allow them to experience the beauty of Shabbat? Apparently, this is not the case. Rather, as was stated previously, the rabbis appear to see allowing Conservative Jews to drive (to synagogue only, as they are about to say) as a means to encouraging Shabbat observance.

The authors of *Teshuvah A* call on their colleagues in the Rabbinical Assembly as well as the United Synagogue of America to declare certain elements of Sabbath observance indispensable. These elements include participation in the rituals surrounding the Friday night dinner; completion of all necessary preparations for Shabbat before its start; attendance at public worship at least once during the weekend; cessation "from all such activities that are not made absolutely necessary by the unavoidable pressures of life and that are not in keeping with the Sabbath spirit;" and engagement only in activities that reflect the spirit of Shabbat and finally, discontinuing to drive.<sup>22</sup> "However," the rabbis add, "where a family resides beyond reasonable walking distance from the synagogue, the use of a motor vehicle for the purpose of synagogue attendance shall in no wise be construed as a violation of the Sabbath but, on the contrary, such attendance shall be deemed an expression of loyalty to our faith."<sup>23</sup> No longer is driving on the Sabbath a violation of *halakhah*, it can now lead to a *mitzvah*! The authors of *Teshuvah A* concede that the majority of Conservative congregants would not engage in private prayer and are incapable of studying Torah on their own. Participation in the synagogue community is

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<sup>21</sup> *Ibid.*

<sup>22</sup> Golinkin, 1119.



the only way for these Jews to have a full Shabbat experience and therefore, they should be allowed to drive on Shabbat in order to preserve Sabbath observance. These Conservative rabbis are, in essence, calling some *hilkhot Shabbat* more important than others.

Ben Zion Bokser, in *Teshuva B*, puts it somewhat more reluctantly. "Given a choice between travel on the Sabbath or the total denial of the opportunities of worship on Sabbaths and festivals, we would regard travelling (sic) as the less objectionable alternative."<sup>24</sup> Yet *Teshuvah B*, like *A*, leaves the ultimate decision up to the individual. Bokser even asserts that the congregant's rabbi ought to be sympathetic toward one's decision to drive and the rabbi should recognize that such a conclusion must not have been easy for the congregant to make. Bokser derives this point from an analogy to the Mishnah (Yoma 8:5) in which an ill person may choose for himself or herself whether to eat on Yom Kippur. "It is one of the characteristic marks of Judaism that it trusts the conscience of the Jew who is really zealous for the observance of Torah."<sup>25</sup> The authors of *Teshuvah B* hold their congregants in quite high esteem, and this helps to ease their reluctance toward granting this *heter*.

Bokser teaches that there are two reasons for the prohibition against traveling on the Sabbath, both with the goals of relieving anxiety and preventing the distraction that comes with the many responsibilities of the workweek. Seeking to utilize interpretation rather than a *takanah*, Bokser turns to the rabbinic notion of a *tehum* established in

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<sup>23</sup> Golinkin, 1120.

<sup>24</sup> Golinkin, 1160.

<sup>25</sup> Golinkin, 1161.

Exodus 16:29,<sup>26</sup> where the Israelites are instructed that no man should leave his “place” on Shabbat. This *tehum* served as a broad area (2000 cubits) outside of one’s house that was included as part of the permissible areas of travel. Over time one’s city became considered one’s home, and the assistance of an *eruv* could extend that even farther. Bokser states that a traveler who happened to be away on the Sabbath could establish a home for himself though *kinyan shevitah*, thus granting himself an additional 2000 cubit radius in which to travel. Similar to the idea of limiting travel, the Tosefta even sought to control how a person walked on the Sabbath, in order to differentiate it from the hustle and bustle of everyday life.<sup>27</sup> Again, these rules and others were designed to prevent the headaches associated with travel during the workweek. To this Bokser asserts, despite his leniency toward driving on the Sabbath, “If we want to preserve the Sabbath, then we must create fixed home experience and limit movement away from home, in order that the family be kept together.”<sup>28</sup> This desire dictates why the driving *heter* is limited to transportation to and from synagogue alone.

Perhaps more relevant to the issue of driving is the prohibition against riding an animal on the Sabbath. The Talmud<sup>29</sup> debates the exact reason behind this prohibition and comes up with two. First, by traveling, one might be tempted to go outside the *tehum*. Secondly, one might be tempted to cut down a twig in order to encourage the animal on its way. For critics of the driving *heter*, this parallels a situation in which the

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<sup>26</sup> Exodus 16:29 says, “See, because the Lord has given you the Sabbath, therefore he gives you on the sixth day the bread of two days; abide you every man in his place, let no man go out of his place on the seventh day.”

<sup>27</sup> “One may not run on the Sabbath to the point of exhaustion, but one may stroll leisurely throughout the day without hesitation” (Golinkin, 1155).

<sup>28</sup> Golinkin, 1157.

<sup>29</sup> In B.T. Beitzah 36b one learns, “ONE MAY NOT CLIMB A TREE . . . NOR RIDE A BEAST; it is a Preventive measure lest he might go without the *tehum*. Then this proves that the law of *tehum* is Biblical? — Rather say, it is a preventive measure lest he cut off a switch.”

car being driven on Shabbat breaks down. One might then be tempted to fix it— incidentally violating other Shabbat prohibitions. This is the second reason, then, why travel is not allowed. Bokser present the contemporary parallel as well. Not only would one be traveling on the Sabbath, s/he would need to carry a wallet, writing materials, and other items considered *muktzeh* simply as part of the traveling experience. “No one can attain the *neshamah yeterah*, the ‘over-soul’ of the Sabbath, unless one withdraws physically as well as mentally from the mundane affairs, their associations, and the very objects which represent them for us,” Bokser reminds.<sup>30</sup>

Yet, in order to continue to highlight the flexible nature of *halakhah*, Bokser points out exceptions to these rules as well. For example, in the case of ocean travel, it often proved nearly impossible to avoid sailing on a ship during the Sabbath. Of course, B.T. Shabbat 19a, Bokser points out, prohibits such travel *l’hatkhila*: “One must not undertake a boat voyage less than three days prior to the Sabbath . . . On the other hand, the short distance from Tyre to Sidon one may undertake even the day preceding the Sabbath.”<sup>31</sup> Over time, this difficulty was worked out as the ship came to be considered a person’s home for the duration of his/her trip through an act of *kinyan shvitah*. In an additional leniency, the Mishnah allows travel on the Sabbath for one coming to testify to a sighting of the New Moon.<sup>32</sup> Thus while tradition teaches two reasons for prohibiting travel on the Sabbath, there is a history of exceptions as well.

In order to justify their radical departure from tradition, the authors of *Teshuvah A* claim to be following the spirit of the sages who ordained that the concept of *shevut* (literally, “resting”) does not apply in the Holy Temple. Yet, according to the Talmud, “a

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<sup>30</sup> Golinkin, 1158.

<sup>31</sup> Bokser’s translation, Golinkin, 1156.

shebuth relating to the Temple within the Temple has been permitted whereas a shebuth relating to the Temple in the country has not been permitted.”<sup>33</sup> Nevertheless, these Conservative rabbis argue that driving to the synagogue on Shabbat should be considered an action taken toward fulfilling the sanctification of the day, such as those actions performed in the Holy Temple in ancient times that otherwise would have been prohibited.

After briefly mentioning the issue of *shevut* in their nod toward the process of halakhic interpretation, the rabbis of *Teshuvah A* quickly turn back toward the overall goal behind this new *heter*. In ancient times, they remind their readers, God and Israel formed covenant after covenant in order to renew their relationship. The same such notion of voluntary acceptance supported the Mishnah, Talmud, and various codes of laws written over the centuries. The authors argue that two hundred years after the Talmud was accepted, for example, the practice of wearing *tefillin* fell out of style.<sup>34</sup> Through education and a re-commitment to communal standards of piety, *tefillin* once again became common. The authors of *Teshuvah A* proclaim that it is to this pattern the Conservative movement ought to adhere. “We must learn to adjust our strategy to the realities of our time and place, in keeping with the realistic genius of the great builders of our faith.”<sup>35</sup> The authors then bring forth a number of quotations from rabbinic literature to remind their colleagues that it is better to take baby steps than to try to accomplish major change in one fall swoop. Also, it is better that the *siyag* around the Torah be small but sustainable as opposed to large and flimsy. For the Conservative authors of *Teshuvah*

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<sup>32</sup> Mishnah Rosh HaShanah 1:9.

<sup>33</sup> Rabbi Joseph in B.T. Eiruvim 103a.

<sup>34</sup> As demonstrated by the *responsa* of Gaon Y'hudai (Golinkin, 1121).

<sup>35</sup> Golinkin, 1122.

A, permission to drive on Shabbat reflects sensitivity to the practices of modern Jews while maintaining a desire to uphold the sanctity of Shabbat. Furthermore, the congregants' awareness of the rabbis' sensitivity can act as a catalyst to bringing back Sabbath observance, the authors believe.

Then, the Conservative authors of *Teshuvah A* go on to suggest that driving on Shabbat—and all those activities associated with it (such as electricity) should fall under the realm of *oneg Shabbat*. They justify this claim by stating their understanding of the *halakhic* process, namely: "The power of a community to enact ordinances in the field of religious life is virtually unlimited, provided its ordinances are made with the consent of the resident scholars and provided further that they be inspired by the purpose of 'strengthening the faith', and intended only for their own time and place."<sup>36</sup> For the Orthodox (but not for Conservative Jews?), these authors explain, there are such issues as *Halakhah d'oraita* and *Halakhah d'rabbanan*. The former can be suspended temporarily for "good and valid reasons," while only a re-constituted Sanhedrin may revoke the latter. "In crucial periods," state Adler, Agus, and Friedman, "Our Sages did not hesitate to make special enactments for their own time or for a limited period of time, in order to meet the challenge of new circumstances."<sup>37</sup> For the Conservative movement, the CJLS maintains this function of legislation.

These rabbis argue that *halakhah* is not the rigidly inflexible system as some among the Orthodox put forth as the case. Rather, the Conservative rabbis praise the research of Zunz, Frankel, Schechter, Chernowitz, Ginzberg, and Finkelstein who demonstrated that Jewish Law has always been a fluid body that reacts to changing

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<sup>36</sup> *Ibid.*

<sup>37</sup> Golinkin, 1123.

situations. Like *Teshuvah B*, *Teshuvah A* points to older sources of flexibility and ingenuity as well. According to one *Tannaitic midrash*,<sup>38</sup> the whole Torah was *not* given to Moses on Sinai, but rather a set of rules for developing laws so that future courts could share in the process of legislation. These rabbis also put forward the story of the *bat-kol* that reminded the Sages that the Law was not in Heaven, but rather up to man to decide.<sup>39</sup> *Teshuvah B*'s Robert Gordis calls for this return to the spirit and techniques that dominated the creative periods of Jewish law as well; for Gordis, though, the emphasis is on interpretation—not legislation. Gordis believes in the necessity to use modern insights and conclusions as an aid in the reinterpretation of traditional attitudes toward the *halakhah*.<sup>40</sup> Not long after granting itself the power to formally legislate, the issue of driving on Shabbat is here being used as a test case for the CJLS's newfound authority.

That which grants the CJLS this power to decide between legislation and interpretation is the Conservative laity. The Conservative rabbis remind their readers that the Torah was not binding until the Israelites accepted the covenant. As such, *minhag* has the power to make and break laws, argue the authors of *Teshuvah A*. "It was the duty of the highest rabbinic court to declare an ordinance invalid, if the majority of the people did not accept it in their daily practice."<sup>41</sup> These authors cite ordinances against the

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<sup>38</sup> Midrash Rabbah 41:6 relates, "Another explanation of AND HE GAVE UNTO MOSES. R. Abbahu said: All the forty days that Moses was on high, he kept on forgetting the Torah he learnt. He then said: 'Lord of the Universe, I have spent forty days, yet I know nothing.' What did God do? At the end of the forty days, He gave him the Torah as a gift, for it says, AND HE GAVE UNTO MOSES. Could then Moses have learnt the whole Torah? Of the Torah it says: The measure thereof is longer than the earth, and broader than the sea (Job XI, 9); could then Moses have learnt it all in forty days? No; but it was only the principles thereof which God taught Moses."

<sup>39</sup> B.T. Bava Metzia 59b.

<sup>40</sup> Golinkin 1136.

<sup>41</sup> Golinkin, 1124. In Avodah Zarah 36a-b, it says, "Rabban Simeon b. Gamaliel and R. Eliezer b. Zadok declared: We make no decree upon the community unless the majority is able to abide by it. R. Adda b. Ahaba said: What Scriptural verse supports this rule? Ye are cursed with the curse; for ye rob Me, even this whole nation (Mal. 3:9) — i.e., when the whole nation has [accepted an ordinance, then the curse which is the penalty of its infraction] does apply, otherwise it does not."

consumption of milk and bread made by gentiles and a requirement to dip newly purchased dishes into a *mikveh* as examples of those removed by the rabbinical courts because of the choice by the majority not to follow the laws. Apparently, Maimonides believed that even small rabbinical courts had the power to write and remove legislation in order to react to a given set of circumstances—whether those laws be *d'oraita* or *d'rabbanan*. The Conservative authors reference here Maimonides' citation of B.T. Shabbat 151b, in which it is written, "Desecrate one Sabbath on his account so that he may keep many Sabbaths." Rabbinical courts have the power to choose when to suspend legislation in order for the greater good to be accomplished.

Yet *Teshuvah B's* Robert Gordis cautions against the CJLS assuming too much power. "The *Takkanot* and *Gezerot* of earlier ages presupposed a far greater degree of homogeneity of outlook and practice in the Jewish community than exists today," he writes, "and a correspondingly greater recognition of the authority of the rabbinate than any rabbinic group, particularly the R.A., now enjoys."<sup>42</sup> Gordis, like his predecessors at JTS, encourages the Committee to maintain caution in their willingness to disregard the opinions of the traditional Jewish community, and remains concerned about recognition of its new authority. "Common sense would dictate that we walk before we run, and that interpretation be utilized to the utmost before recourse be had to legislation."<sup>43</sup>

No one disagrees with the problem as presented by the authors of the *teshuvot*: namely, Conservative Jews are not observing Shabbat according to the traditional laws. It appears that Adler, Agus, and Friedman believe that the only way to solve this problem is for congregants to attend services on Shabbat and to study in the communal setting.

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<sup>42</sup> Golinkin, 1144.

<sup>43</sup> *Ibid.*

*Teshuvah B* does not see this as the only way, though it does recognize the great significance of public prayer on the Sabbath. As such, its authors grant the same *heter* but with a greater sense of reluctance.

The second problem identified by the authors of both *teshuvot* is the distance from synagogue many Conservative Jews live, and that without use of a car, those Jews impede their ability to come to synagogue to participate in public prayer and to study the laws and customs of the Sabbath. Logically, then, if such individuals were given permission to drive, this would overcome that barrier of access to learning and would encourage Jews to resume their commitment to Shabbat. Yet Adler, Agus, and Friedman must now justify the permission to drive within a *halakhic* framework. First they make a reference to the concept of *shevut*, saying that because driving a car to synagogue is akin to work performed inside the Holy Temple, there is no *halakhic* difficulty. But then the authors switch gears to say that the philosophy of "desperate times for desperate measures" is an age-old *halakhic* justification to augment rules and procedures. Nevermind the *shevut* argument, they say. If Jews are not allowed to drive on Shabbat, then eventually the whole institution of the Sabbath itself will be forgotten. This justifies the temporary suspension of the law against driving so that the current generation will resume its observance of the Sabbath, and so future generations will have the opportunity to enjoy it as well. Yet, Adler, Agus, and Friedman have yet to discuss which laws—specifically—are violated by the act of driving, and thus which laws need suspending.

For these Conservative rabbis, "Even as the physician cuts off a hand or a foot in order that the patient might survive, a rabbinic court may teach the violation of some



*mitzvah* for a time, in order that the totality of Judaism might be preserved.”<sup>44</sup> The first conflict eventually discussed by *Teshuvah A* is that of the problem of electricity. It mentions that a debate has occurred regarding this issue for sixty years prior to the current question, with some rabbis calling the prohibition against electricity on Shabbat *d’oraita*, and some calling it *d’rabbanan*. According to Exodus 35:3, the Israelites are instructed, “You shall kindle no fire throughout your habitations upon the Sabbath day.” For some, since electricity is used today for the same functions that fire was used in ancient times, the *isur* is toraitic in nature. For others, however, since no electricity was used toward the construction of the mishkan, then the prohibition against electricity can only be *d’rabbanan*. Adler, Agus, and Friedman suggest that because “the power that causes the filament to radiate light comes from the city’s central dynamo” then “the action of turning the switch is therefore merely *grama* which according to the severest view is *shvus*.”<sup>45</sup> Still others, the authors say, consider electricity’s consumption of filament to be a form of cooking and therefore should be considered *isur d’oraita*. To this they respond that an activity is considered cooking only when it is performed in the customary manner. Based on a long precedent of setting aside a prohibition of *shevut* for the sake of a *mitzvah*, the use of electricity toward the observance of the Sabbath may be permitted.<sup>46</sup>

Arthur Neulander, in *Teshuvah B*, weeds through the *halakhah* more deeply, yet in the end he too concludes, “We find this identification between electricity and fire to be

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<sup>44</sup> Golinkin, 1125.

<sup>45</sup> Golinkin, 1125-1126.

<sup>46</sup> The authors provide a number of examples. These include performance of circumcision, permission for a gentile to perform certain functions such as stoking the furnace, concluding the purchase of a home in Israel through a signature in non-Hebraic script, etc. (Golinkin, 1126).

wrong both on Halachic and on scientific grounds.”<sup>47</sup> Neulander looks to B.T. Shabbat 42a, in which Samuel declares, “One may extinguish a lump of fiery metal in the street, that it should not harm the public, but not a burning piece of wood.” Then, based on Rashi to Shabbat 134a and the Magen Avraham, Neulander explains that the prohibition against fire has to do only with things that are consumed through the process of burning. Additionally, in Pesachim 75a, “Our Rabbis taught: If he cut it and placed it on the coals, Rabbi said: I maintain that this is ‘roast with fire.’” After a lengthy discussion the *Amoraim* conclude that another characteristic of fire is that it must produce a flame. Neulander concludes, based on these two points, that electricity is not fire (and thus prohibited on the Sabbath) because the filament of an electric light undergoes no combustion and gives off no flame. From a literal standpoint, then, electricity is permissible on the Sabbath.

Granted, many scholars disagree over the above-mentioned leniency. Yet, to this the Conservative authors of *Teshuvah A* proclaim, “We think of Halachah as an instrument of the people, for the enrichment of the spiritual life of our people and not as an end of itself.”<sup>48</sup> This bold statement suggests that no matter how much the Conservative movement relies on *halakhah*, its adherents belong to the camp of liberal Judaism and not Orthodoxy. After all, Orthodoxy does not consider *halakhah* a means to anything, but rather the end in and of itself. Moreover, they write, “our decision depends on the utilization of the liberty to choose between authorities and to apply general principles—liberty which is properly within the province and authority of *Takkanoth*

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<sup>47</sup> Golinkin, 1164.

<sup>48</sup> Golinkin, 1127.

*HaTzibur*.<sup>49</sup> As such, Adler, Agus, and Friedman argue that electricity is "essential to the normal comforts of living" and that Jewish tradition stresses the importance of having one's home brightly lit on the Sabbath. "Therefore in the spirit of a living and developing Halachah responsive to the changing needs of our people," the authors explain, it is permitted to use electric lights on the Sabbath for any of three reasons: for the purpose of enhancing *oneg Shabbat*; for reducing personal discomfort; or for helping in the performance of a *mitzvah*. These three categories used for dismissing Shabbat restrictions, however, lend themselves to a very easy "slippery-slope" argument. Yet for three Conservative rabbis looking to enrich the spiritual lives of their congregants, this fact seems to matter little.

In *Teshuvah B*, Robert Gordis understands the role of *halakhah* slightly differently. Instead of Jewish Law serving to enrich the spiritual lives of its adherents, Gordis believes that *halakhah* functions to emphasize the ethical ends of religion. He cites Genesis Rabbah 44:1, in which Rav states, "The Commandments were given in order to purify human nature." He points also to B.T. Yoma 85a's admission that saving a human life takes precedent over the Sabbath. Again, in Mishnah Yoma 8:9 human interrelationships are given high priority: "For transgressions between man and man, Yom Kippur cannot atone until he appease his fellow man." Gordis concludes, "In sum, while both the ritual and ethical elements of the Halachah are binding, the latter are more important than the former."<sup>50</sup> Moreover, this fact, in combination with the historical fluidity of Jewish Law, renders this temporary ease of the Sabbath prohibitions appropriate—so as to encourage Jews to resume observance thereof.

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<sup>49</sup> *Ibid.*

<sup>50</sup> Golinkin, 1143.

After allowing for the use of electricity and dismissing quickly the idea that combustion of gasoline could be considered a type of prohibited labor,<sup>51</sup> the next conflict that the authors of *Teshuvah A* must confront is that of the notion of riding on the Sabbath. They conclude that the rule against traveling from one domain to another is a rabbinic prohibition, "since today there is no *r'shut harabim*, there can be no Torah-itic interdiction involved."<sup>52</sup> The authors explain that the main reason for the prohibition against riding was to prevent an indirect violation of Shabbat laws, because the rider might be tempted to break off a branch along the way to use as a whip on his/her horse or donkey.<sup>53</sup> There was also the fear that riding causes an animal owned by Jews to labor on Shabbat.<sup>54</sup> Adler, Agus, and Friedman dismiss the latter on obvious grounds. Regarding the former, they refer to the Tosafot on Beitzah 30a in order to argue that one would not be tempted to fix a car in the event that it broke down since such a complicated mechanism requires the service of an expert. Also, according to tradition, there are numerous precedents for setting aside a rabbinic prohibition when a mitzvah is involved. The authors cite the *mitzvah* of returning to the land of Israel,<sup>55</sup> and testifying to the sighting of the new moon.<sup>56</sup> Since riding is a rabbinic prohibition, they believe that they are able to conclude, "When this act [of driving] prevents the fulfillment of the mitzvah of attending public worship it shall not be considered a prohibited act."<sup>57</sup>

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<sup>51</sup> "All acts of burning are prohibited only when performed for specifically described purposes such as: cooking, heating, lighting or the need of its ashes. Burning for the sake of power was not included in this list" (Golinkin, 1127).

<sup>52</sup> Golinkin, 1128.

<sup>53</sup> B.T. Beitzah 36b teaches, "ONE MAY NOT CLIMB A TREE; it is a preventive measure lest he pluck [fruit]. NOR RIDE A BEAST; it is a Preventive measure lest he might go without the *tehum*. Then this proves that the law of *tehum* is Biblical? — Rather say, it is a preventive measure lest he cut off a switch."

<sup>54</sup> Jerusalem Talmud Beitzah 85.

<sup>55</sup> B.T. Bava Kamma allows, "when one buys a house in Eretz Yisrael, the deed may be written even on the Sabbath day."

<sup>56</sup> Mishnah Rosh HaShanah 4:5.

<sup>57</sup> Golinkin, 1128.

With that statement, so begun a new era in American Jewry. Adler, Agus, and Friedman were cognizant, however, of the significance of this ruling. To achieve their goal of revitalizing Sabbath observance, they saw no way to preserve the illusion of unity among the streams of Judaism in America. Yet they hoped that perhaps the other movements would follow their lead. "In setting forth this program of Sabbath-observance for our congregations," they write, "we hope to contribute toward a reversal of the trend of deterioration in all three groups. We earnestly trust that both the Orthodox and Reform movements will be moved to set up and implement similar programs of reconsecration for their respective memberships, with a consequent gain for American Judaism as a whole."<sup>58</sup> Far from causing a permanent divide between Orthodoxy and Conservative Judaism, the authors of this *teshuvah* prayed that the recommitment to participation in Shabbat would spark a "common core of reference for Judaism and respect for its institutions." While hindsight is 20/20, it is hard not to respect their dream—no matter how impractical it was.

Desperate times call for desperate measures, these rabbis believed. The authors of *Teshuvah A* conclude their *responsum* by calling on their colleagues to dedicate all their talents toward the rejuvenation of Shabbat observance among Conservative laity, and consider this contribution but a small beginning. On one hand, Adler, Agus, and Friedman attempted to reach back in history to utilize a precedent of leniency among the rabbis as a temporary remedy for *halakhic* desuetude. On the other hand, however, they put forth a new page of Jewish legal reasoning by suggesting that *halakhah* and *takanot* therein are merely instruments of the people to use for their own spiritual enrichment: a vehicle (pardon the pun) toward but not the end-goal itself of Jewish life. *Teshuvah B*

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<sup>58</sup> Golinkin, 1130.

grants the same permission, but does so through the more traditional—and somewhat less controversial—methods of interpretation instead of legislation. Additionally, both *responsa* raise the level of individual autonomy in the Conservative movement to a new level, since each person must decide for himself or herself whether s/he lives in such a situation that demands subscribing to this leniency. As Isaac Klein responds, “The case [of driving on the Sabbath] presents a conflict between two values—not riding on the Sabbath and participating in public worship—and we must each opt for one or the other of them. Our fathers, and many of us today, would not opt to ride. We can understand the feelings of those who opt for public worship because of the changed conditions under which we live.”<sup>59</sup> Indeed, this individual choice is the mark of modernity. The willingness of a CJLS to speak boldly and proudly on behalf of one stream of Judaism serves as another mark.

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<sup>59</sup> Isaac Klein, A Guide to Jewish Religious Practice (New York: The Jewish Theological Seminary of America, 1992) 86.

## Birth Control

In 1961, member and future chairman of the Committee on Jewish Law and Standards Ben Zion Bokser published a *responsum* in Conservative Judaism magazine on the topic of birth control.<sup>1</sup> Citing the national conversation regarding the dissemination of contraceptive devices, Bokser takes issue with the rationale that fears pertaining to world over-population justify their usage. Instead, the rabbi argues that while birth control ought to be permitted and at times even encouraged, other mitigating factors should dictate the conversation around the dissemination of contraception. More specifically, Bokser believes that the moral aspect of birth control rests in the realm of the individual family. "Is it right," he asks as his guiding question, "for a couple to maintain normal relations as husband and wife while interfering with the conception and birth of children that are otherwise destined to derive from their union?"

Bokser begins by clarifying the basic *mitzvot* pertaining to reproduction, asserting that birth control should be the exception and not the rule. In Genesis 1:22, God blesses both Adam and Eve with the commandment to "be fruitful and multiply." However, according to B.T. Yevamot 65b, "A man is commanded concerning the duty of propagation but not a woman." Thus Bokser declares, "As the head of the family and as the one who holds the initiative in the establishment of marriage and in the act of procreation, the husband carried primary responsibility for the fulfillment of this commandment."<sup>2</sup> The author of the *responsum* appears to assume that his readers are

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<sup>1</sup> Ben Zion Bokser, "Responsum—Even Haezer 5:12, the Committee on Jewish Law's Statement on Birth Control," Proceedings of the Committee on Jewish Law and Standards 1927-1970 vol. III, ed. David Golinkin (Jerusalem: The Rabbinical Assembly and The Institute of Applied Halakhah, 1997) 1451-1454.

<sup>2</sup> Bokser, 1451.

aware of the rabbinic sources for this and for all other rabbinic citations, since in the body of his text he only offers limited, biblical quotations.

To his statement regarding the responsibility of the head of the family, Bokser adds that women too hold a certain responsibility. As it says in Isaiah 45:18, "[God] did not create [the world] to be a waste; He formed it to be inhabited." The author's insertion here from the prophet Isaiah stems from the Mishnaic discussion, and subsequent Tosafot commentary to the Talmud (B.T. Gittin 41b), about the rights and restrictions of a Jew who is half-free and half-enslaved. The Tannaim suggest that such a half-slave ought to marry—a right reserved for free men (Deuteronomy 23:18)—and justify their decision on this quotation from Isaiah 45:18. The Tosefot seek to explain why the authors of the Mishnah would use this statement in Isaiah rather than the commandment in Genesis to be fruitful and multiply. They explain that this initial commandment, *p'ru urvu*, applies only to free men. The quotation from Isaiah, however, applies to slaves as well as to free men, and would thus require the half of the man that was enslaved, as well as his free half. Additionally, the concept from Isaiah of *leshevet yetzarah*, that God formed the world to be inhabited, and the requirement to fulfill this statement then becomes applicable to women as well.

However, since a *mitzvah* that derives from a prophetic source is weaker than the *mitvah d'oraita* of Genesis 1:22, the larger obligation to procreate still falls on the man more so than on the woman. As such, the Rambam permits women to choose to live as a single adult or even to marry a eunuch;<sup>3</sup> yet, the commentary of Beit Shmuel follows the reasoning of the Tosefot to affirm women's responsibility to marry for the sake of

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<sup>3</sup> Moshe ben Maimon, Mishneh Torah, *Hilchot Isurei Bi'ah* 21:26.



reproduction.<sup>4</sup> For Bokser and Judaism as a whole, therefore, reproduction serves to continue the divine work of creation and, as the commandments from Genesis and Isaiah mandate, the choice not to have children or to limit one's number of children ought not to be taken lightly.<sup>5</sup>

Having presented the basic obligation to be fruitful and multiply, Bokser moves on to establish the grounds for fulfillment of that commandment. Remaining in B.T. Yevamot (62a), though again not citing it, the Conservative rabbi offers Hillel's resolution to the question of how many children satisfies the requirement to be fruitful and multiply, namely: one boy and one girl. Yet Bokser recognizes this as only a minimum and to this he reminds the reader of the opinion of Rabbi Joshua who claims, "If a man married in his youth, he should marry again in his old age; *if he had children in his youth, he should also have children in his old age.*"<sup>6</sup> Thus, as the author of Ecclesiastes writes, "*both alike shall be good.*" While Jewish tradition allows a man to stop procreating after he has a son and a daughter, it nevertheless encourages him to continue participating in the work of creation.

Bokser, though, reminds that "in some circumstances it was considered morally right to curtail childbirth."<sup>7</sup> Rabbinic authorities throughout history have been apt to permit and even to require birth control in order to protect a woman's life. Perhaps here Bokser is alluding to Nedarim 35b, in which it states: "Three women use a resorbent [to prevent conception]: a minor, a pregnant woman, and a woman giving suck." The authors

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<sup>4</sup> Rabbi Joseph Karo, *Shulkhan Arukh, Even Ha'ezer* 1:2.

<sup>5</sup> For a more thorough discussion than Bokser presents of the responsibility to procreate, please see CCAR Responsa 5758.3, "In Vitro Fertilization and the *Mitzvah* of Childbearing."

<sup>6</sup> Rabbi Joshua's comment is based on Ecclesiastes 11:6, in which it is written, "Sow your seed in the morning, and don't hold back your hand in the evening, since you don't know which is going to succeed, the one or the other, or if both are equally good."

<sup>7</sup> Bokser, 1451.

of the Talmud are concerned that the health of the women in these three categories would be put at risk should they become pregnant. Relating to the phrase "*meshameshot bemoch* (one who uses a resorbent)," Asheri and R. Nissim go so far as to say that not only are women in these three categories permitted to use birth control, they are obligated to do so. Despite such provisions for the divorce of a husband from his wife if they do not have children together after ten years,<sup>8</sup> Bokser seeks to demonstrate that this permission to use birth control teaches that *halakhah* remains committed to encouraging intercourse in the marital relationship even if procreation cannot result.<sup>9</sup> As Bokser writes, "[I]n normal circumstances marital relations remain an indispensable aspect of husband-wife relationship."<sup>10</sup> Thus the 20<sup>th</sup> century rabbi is working toward grounds to demonstrate according to *halakhah* that a husband and wife may, provided they already have children, continue intimacy but prevent conception in order to protect the "health" of the woman.

Thereupon Bokser needs to define when the health of a woman is jeopardized enough for her to fall into a new, parallel category to those set out in Nedarim 35b. He turns to the laws of Yom Kippur, in which the rabbis permit leniency toward the fast—in that a person need not a physician's approval—in order to preserve life and health. Mishnah Yoma 8:5 declares, "He that is sick may be given food at the word of skilled persons; and if no skilled persons are there, he may be given food at his own wish, until

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<sup>8</sup> *Shulkhan Arukh, Even HaEzer 1:3.*

<sup>9</sup> In Yevamot 61b, one reads: "MISHNAH: A man shall not abstain from the performance of the duty of the propagation of the race unless he already has children. Beth Shammai ruled: two males, and Beth Hillel ruled: Male and a Female, for it is stated in scripture, 'Male and female created He them.' GEMARA. [This implies] if he has children, he may abstain from performing the duty of propagation but not from that of living with a wife. This provides support for a statement R. Nahman made in the name of Samuel who ruled that although a man may have many children he must not remain without a wife, for it is said in the Scriptures, It is not good that the man should be alone."

<sup>10</sup> Bokser, 1452.

he says, 'Enough!'" Even more so, Bokser argues, "There are subjective factors affecting life and health which the physician may not be able to discern."<sup>11</sup> For Bokser, this halakhically-established ability to make an autonomous decision regarding one's health and the related consequences of certain required actions serves as a precedent. Consequently, if a person is allowed to decide that his/her health is weak to the point of warranting the consumption of food on the holiest day of the year, so too may a woman evaluate her own physical health to deduce prudence towards procreation.<sup>12</sup> On behalf of the CJLS, Bokser proclaims,

We are, therefore justified in sanctioning birth control as a precaution against a danger to the life or health, physical or mental of the mother or her children, on the advice of a physician, or on the personal convictions expressing the private conscience of the individuals involved.<sup>13</sup>

The CJLS's lenient approach toward birth control is heightened as well by the Committee's definition of unsuitable mental health. Bokser includes a woman's decision to work in order to increase the family's livelihood, and couples' "profound difficulty in their marital adjustments," as justifications—in the name of protecting mental health—for the use of birth control. "On the principle that 'the heart knows its own bitterness,'" the CJLS therefore established, "the individual conscience would in every instance be deemed competent to determine the gravity of the pressure exerted and the peril for health which it represents."<sup>14</sup> Unlike more traditional streams within Judaism, the Conservative movement has created a scriptural basis on which to rest the power of an individual to make his or her own halakhic decision. Bokser relies on this autonomy of

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<sup>11</sup> Bokser, 1452.

<sup>12</sup> Bokser look to Proverbs 14:10 ("The heart knows its own bitterness; and no stranger shares its joy.") as another scriptural source to further his embrace of a woman's autonomy to make this decision.

<sup>13</sup> Bokser, 1452.

<sup>14</sup> *Ibid.*

the individual--one of the main determining factors separating liberal Jews from more traditional branches of Judaism--to decide the appropriate usage of birth control.

Yet, while permitting the use of birth control and allowing individuals to make such a decision on their own, Bosker returns to his original message that humanity--and Jews in particular--maintain a special obligation to be fruitful and multiply. Additionally, he looks to qualify claims, which he calls "alleged," of over-population. Bokser dismisses halakhic decisions rendered during the Holocaust as too unique to serve as precedents for the use of birth control, and declares as doubtful parallels between European rabbis' decisions to allow contraception in World War II ghettos to the issue of over-population in general. Even more so, though he earlier dismissed the use of the Holocaust-era *responsa* as a precedent, Bokser uses the destruction of European Jewry in a syllogism to encourage Jews, from a sociological perspective, to reproduce. First, "The Jewish people is under a divine imperative to serve as a witness of the Torah ideals before all mankind." Second, "A decimated Jewish people (as a result of the Shoah) is an impaired tool in the divine service." Thus, "Jewish parents who bring children into the world and train them to be faithful to their heritage as Jews help in the fulfillment of their people's vocation in history."<sup>15</sup>

Then, returning to his argument against claims of over-population serving as a justification for birth control, he reasons that countries in the Middle and Far East suffering from famine have failed to adequately use their resources. Bokser does, however, concede that in the case of a country that confronts famine as a result of proven over-population, birth control "is a decision that can be made only by the people who

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<sup>15</sup> Bokser, 1453.

themselves are confronted with this grievous dilemma."<sup>16</sup> In other words, one country's legitimate claims of over-population fail to justify the use of birth control for the entire world. While Bokser concedes that a precedent exists in Jewish law for permitting birth control when perilous conditions confront the general community (as during the Holocaust), such claims of world-wide over-population fail to qualify as such a condition.

In his conclusion, Bokser reminds that while building a family represents one of the highest commandments in Judaism, preserving and protecting life trumps almost all other obligations. He cites Leviticus 18:5 as the scriptural proof for this line of reasoning, though again he offers no rabbinic citations to further his claims.<sup>17</sup> Additionally, he deems it preferable for the woman to use contraception primarily because she suffers the brunt of the difficulties involved in childbirth, though he also mentions his original statements about the primary responsibility to procreate falling on the man. This secondary statement reminds the reader that for a woman to use the contraception results in "a less direct circumvention of the biblical commandment"<sup>18</sup> to be fruitful and multiply. Finally, though the ability to reproduce represents a divine gift to participate in the work of creation, Bokser argues that the ultimate purpose of the commandment is the preservation and continuation of life. If having children threatens an individual's life or health, then birth control—not continence—ought to serve as the appropriate alternative.

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<sup>16</sup> *Ibid.*

<sup>17</sup> Bokser's citation of Leviticus 18:5 assumes knowledge of the discussion in B.T. Yoma 85b, because the *pshat* of the verse would not necessarily prove his point. The rabbis, in Yoma, look to understand why the laws of the Sabbath may be broken in order to save a life. Rabbi Judah said in the name of Samuel that he would use Leviticus 18:5 as a proof-text for such a decision, which is affirmed by Raba. The statutes of Scripture were given to protect life, not to threaten it. When a commandment comes into conflict with Leviticus 18:5, the latter commandment almost always wins out.

<sup>18</sup> Bokser, 1454.

The decision from Ben Zion Bokser and the Committee on Jewish Law and Standards remains well within the realm of traditional halakhah. As Nedarim 35b and rabbinic authorities throughout the ages have asserted, when health is on the line, birth control is preferable to abstinence in a marriage. Where the Committee's decision differs from more traditional rulings, establishing it as an opinion from a liberal movement, is in the permission for the individual family—a wife and/or her husband—to decide whether having children (or additional children) represents a threat to one's physical or mental health. This reliance on individual autonomy was in 1961, and remains today, a hallmark of liberal Judaism. However, Bokser does qualify this permission by making a sociological argument that members of the Jewish community must consider its future, and ought to take seriously the *mitzvah* of *p'riyah urviah*.

## **Chapter 7**

### **Conclusion**

**“[Jewish Tradition] is neither scripture nor primitive Judaism, but general custom, which forms the real rule of practice. The norm as well as the sanction of Judaism is the practice annually in vogue. Its consecration is the consecration of general use—or, in other words, Catholic Israel.”**

**-Solomon Schechter**

“It is Conservative Judaism that most directly confronts the challenge to integrate tradition with modernity,” writes Rabbi Robert Gordis in the Conservative movement’s Statement of Principles, *Emet Ve-Emunah*. “By retaining most of the tradition while yet being hospitable to the valuable aspects of modernity, it articulates a vital, meaningful vision of Judaism for our day.”<sup>1</sup> Rabbi David Golinkin believes that in order to achieve this goal, the Committee on Jewish Law and Standards of the Conservative movement follows six principles that guide its members, and thus the Conservative rabbinate, in their halakhic decisions.<sup>2</sup> The process, in order, is based on the following steps:

- 1) *Changes are not made for their own sake;*
- 2) *A lenient ruling is preferable to a strict one;*
- 3) *Subjects are studied in a historic-scientific fashion;*
- 4) *The Shulkhan Arukh is not viewed as the ultimate authority;*
- 5) *A commitment to halakhic pluralism is maintained;*
- 6) *Significant emphasis is placed on the moral component of Judaism and of Jewish Law.*

Though there is a certain truth to Golinkin’s set of principles in terms of guiding a *posek* in his/her argument, a deeper, overarching commitment to the founding philosophy of the Conservative movement—namely, Catholic Israel—appears to trump these six steps, dictating how the Conservative movement balances tradition and modernity. When the Rabbinical Assembly wrestled the Law Committee away from JTS professors in 1948,

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<sup>1</sup> Robert Gordis, et al., *Emet Ve-Emunah: Statement of Principles of Conservative Judaism* (New York: The Jewish Theological Seminary of America, The Rabbinical Assembly, and The United Synagogue of America, 1988) 10.

<sup>2</sup> David Golinkin, *Halakhah For Our Time: A Conservative Approach to Jewish Law* (New York: United Synagogue of America, 1991) 29-32. This description also appears with additional explanations in David Golinkin, *Responsa in a Moment: Halakhic Responses to Contemporary Issues* (Jerusalem: The Institute of Applied Halakhah at the Schechter Institute of Jewish Studies, 2000) 17-21.



the CJLS embraced with a new vigor the concept of Catholic Israel and the implications thereof in setting a course for the movement. The above analyses of *responsa* from the last fifty years reveal a commitment on behalf of Conservative *poskim*—above and beyond all other priorities—to affirm modernity and to permit the customs and practices of Catholic Israel in America. Then, the authors of Conservative *teshuvot* attempt to strike a compromise between, on one hand, the demands of modernity as expressed by Catholic Israel, and on the other, a rabbinical sense of loyalty to the underlying spirit that they believe serves as the foundation of traditional Jewish observances. In doing so, the CJLS strives to conserve Jewish Law and perpetuate some semblance of an halakhic process even when the demands of modern Conservative Jewry urge otherwise. As a result, these *poskim* have helped to define a new stream of American Judaism: one that cannot be described as left-wing or right-wing, but only as Conservative.

Solomon Schechter, one of the three men (along with Zacharias Frankel and Alexander Kohut) often attributed the title of “founding father” of Conservative Judaism, wrote with regard to the spirit of individualism flourishing at the beginning of the twentieth century:

It must, however, be remarked that this satisfying the needs of anybody and everybody is not the highest aim which Judaism set before itself. Altogether, one might venture to express the opinion that the now fashionable test of determining the worth of a religion by its capability to supply the various demands of the great market of the believers has something low and mercenary about it. Nothing less than a good old heathen pantheon would satisfy the crazes and cravings of our present pampered humanity, with its pagan reminiscences, its metaphysical confusion of languages and theological idiosyncrasies. True religion is above these demands.<sup>3</sup>

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<sup>3</sup> Selected Writings: Solomon Schechter ed. Norman Bentwich (Oxford: Phaidon Press Ltd, 1946) 60.

Such words could easily have come from an Orthodox rabbi as well. Despite the above warning, Schechter in reality championed the cause of *Klal Yisrael*, or as he more famously put it, "Catholic Israel." Specifically, Schechter taught his many students at JTS that the will of the Jewish people is the most powerful force in the maintenance and perpetuation of Judaism. "[Jewish Tradition] is neither scripture nor primitive Judaism, but general custom, which forms the real rule of practice," he argued. "The norm as well as the sanction of Judaism is the practice annually in vogue. Its consecration is the consecration of general use—or, in other words, Catholic Israel."<sup>4</sup> This realization that the desires and practices of the Jewish people represent an integral aspect of the *halakhah*—in conjunction with the *mitzvot* of the Bible, Talmud, and centuries of rabbinic thought—became the basis for a half a century of Conservative *halakhah*. The notion of Catholic Israel represents a belief in the democratic nature of Jewish authority.

As such, the power held by Catholic Israel serves as the instrument that reconciles Conservative Judaism's commitment to both the notion of "commandedness" and the school of modernism that makes the incorporation of scientific knowledge and contemporary morality a legal imperative. "One can maintain these contradictory positions," Neil Gillman explains, "provided he or she acknowledges that since Torah is viewed as emerging from the community, then the authority for establishing parameters of authentic belief and practice has in fact been vested in that community. Therefore, the community has the right to change those parameters if it wishes to do so, but it does not have to do so if it chooses not to."<sup>5</sup> In other words, *halakhah* results from the modern

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<sup>4</sup> Bentwich, 36.

<sup>5</sup> Neil Gillman, Conservative Judaism: The New Century (West Orange: Behrman House, Inc., 1993) 62.

Jewish community's understanding of God's will. Ironically, the CJLS must heed the demands of modernity in order to maintain a viable halakhic system.

But if the community has the power to shape *halakhah*, what defines "community"? After a thirty-year struggle with the traditionalist professors of JTS, the RA decided finally in the late 1940s that "community" consists of members of congregations affiliated with United Synagogue and their rabbis—individuals trained in the positive-historical model begun in America by Solomon Schechter. Yet more than just the entire general membership of United Synagogue, Catholic Israel is the "core of serious Jews who want to live their Judaism fully. In a totally natural and intuitive way, these Jews retain certain patterns of belief and behavior, drop others, create new ones—all in the name of keeping Jewish religion alive."<sup>6</sup> Robert Gordis helps to explain further what Neil Gillman means by "serious Jews." "Catholic Israel is the body of men and women within the Jewish people who accept the authority of Jewish law and are concerned with Jewish observance as a genuine issue," Gordis writes. He continues, "It therefore includes all who observe Jewish law in general, although they may violate one or another segment of it, and who are sensitive to the problem of their non-observance because they wish to respect the authority of Jewish law."<sup>7</sup> If the community maintains traditional customs, it is only because it desires to do so; a community does not remain within a certain set of patterns because those patterns are intrinsic to Judaism.<sup>8</sup> Golinkin lists "Changes are not made for their own sake, but rather to deal with an urgent, acute

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<sup>6</sup> Gillman, 55.

<sup>7</sup> Robert Gordis, *Judaism for the Modern Age* (New York: Farrar, Straus, and Cudahy, 1955) 177.

<sup>8</sup> Gillman, 158.

problem" as the first of his six guiding principles of Conservative halakhah.<sup>9</sup> In truth, the "urgent, acute" problems are those dictated by the will and practice of Catholic Israel.

Thus, the *responsa* of the CJLS reflect the power of Catholic Israel to initiate change, even in opposition to its rabbis' objections. One example of this is found in the *teshuvot* regarding driving on the Sabbath. "Our program" of Sabbath revitalization, the authors of one *responsum* write, "seeks to reintroduce into the lives of our people as much Sabbath observance and spirit as we may reasonably hope our people will, with proper education, accept."<sup>10</sup> Obviously, avoiding use of the car on Shabbat is not one of those prohibitions the people are willing to accept. Therefore, "To continue unmodified the traditional interdiction of riding on the Sabbath is tantamount to rendering attendance at the synagogue on the Sabbath physically impossible for an increasing number of our people."<sup>11</sup> By choosing to live far enough away from the synagogue to walk on Shabbat, Conservative Jews have dictated to their rabbis that the prohibition on driving is no longer acceptable; the rabbis, in response to this modern phenomenon, removed the prohibition! These rabbis did so within the *halakhic* system, though, as part of a textual argument. Adler, Agus, and Friedman remind that *halakhah* is an instrument of the people to achieve a certain sense of spirituality in their lives. If a traditional law no longer serves that purpose, it may be discarded or augmented.

Similarly, when Catholic Israel perceives a new moral obligation, the CJLS responds. Several Conservative congregations had already begun giving women *aliyyot* prior to the mid-1950s *responsa* that granted formal permission. Rabbi Aaron Blumenthal, author of the minority *responsum*, declared that Jewish Law might relegate

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<sup>9</sup> Golinkin, 29.

<sup>10</sup> See my chapter on the *responsa* regarding driving on Shabbat, page 128.

women to a second-class status, "Yet, in modern times, the Western World views women quite differently, and should thus offer them the same rights as men for the sake of the dignity of the congregation."<sup>12</sup> He elaborates:

The Jewish woman who works side by side with her husband for the welfare of the synagogue and the Jewish community, who is active in the UJA, in Zionist efforts, in both Jewish and secular education, whose sense of social responsibility usually is keener than that of her husband, deserves this gesture of equality of status in the synagogue.<sup>13</sup>

Blumenthal goes on to explain that the willingness to consider the evolving opinions of a majority of the active Jewish community "stands as a hallmark of Conservative halakhic theory" as far back as Zacharias Frankel and the founders of Conservative Judaism.<sup>14</sup>

Yet a Conservative *posek's* impression of the will of Catholic Israel can, like Gillman suggests, work to slow the tide of change when s/he senses a different moral standard among members of the movement. The granting of permission for women to receive an *aliyah* represents just one example. "In my limited experience," remarks Rabbi Sanders Tofield in the *responsum* regarding *aliyot* for women that garnered the majority of CJLS votes, "I observed hesitancy among women to take the place of men in religious functions, although it would be difficult to determine how much is based on deference to tradition—a factor that deserves consideration, to say the least—and where psychological constitution comes to play its part."<sup>15</sup> For Tofield and his supporters, regardless of where traditional *halakhah* may stand on the issue of women receiving the right to an *aliyah*, there was a perception that the women of Catholic Israel were not interested in *aliyot*. However, Tofield did not then continue the traditional prohibition

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<sup>11</sup> *Ibid.*

<sup>12</sup> See my chapter on the *responso* regarding *aliyot* for women on page 50.

<sup>13</sup> *Ibid.*

<sup>14</sup> See my chapter on the *responso* regarding *aliyot* for women on page 51.

outright, as the Orthodox maintain. Rather, he permitted women to receive *aliyot* in special, limited circumstances as a reflection of his understanding of the desire of Conservative women to participate more than what was "traditional" for women but less than the men do. The evolving morality of Catholic Israel, at least as discerned by members of the CJLS, holds the power to initiate a great deal of change.

In fact, the CJLS is so committed to responding to the moral dictates of Catholic Israel that it was willing to include women in the *minyan* even though no *halakhic* justification for the *heter* could be found.<sup>16</sup> Rabbi David Fine explains, "[I]t was the significant changes wrought by modern society that warranted a drastic break from tradition."<sup>17</sup> Earlier, Rabbi Philip Sigal, author of the defeated *responsum* calling for women to be counted, argued that to maintain the practice of recognizing only men amounts to an unnecessary enforcement of traditionalism upon a society he considers no longer interested in accepting such a tradition. For Sigal, when a custom such as this has lost its "spiritual benefit," representatives of the community have an obligation to modify or abolish it.<sup>18</sup>

Moreover, sixty years ago, Rabbi Louis Epstein lamented the failure of Jewish Law to reach modern Jews' sense of decency. He cites the fact that traditional *halakhot* that permit the "marriage of infants, concubinage, polygamy, physical punishment of a wife for disciplinary purposes, the husband's free power of divorce, and many other

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<sup>15</sup> See my chapter on the *responsa* regarding *aliyot* for women on page 60.

<sup>16</sup> See my chapter on the *responsa* regarding women in the minyan on page 64.. It is important to note, however, that later *poskim* did claim to find a *halakhic* justification for permitting women to count in the *minyan*. The CJLS approved a *responsum* from Rabbi David J. Fine, "Women and the Minyan," OH 55:1. 2002. This *responsum* remains unpublished but was obtained by contacting the Committee. Rabbi Joel Roth also gave permission for the counting of women in his *teshuvah* on the topic. Joel Roth, "On the Ordination of Women," On the Ordination of Women as Rabbis: Position Papers of the Faculty of the Jewish Theological Seminary of America, unpublished, 26.

<sup>17</sup> See my chapter on the *responsa* regarding women in the minyan on page 72.

things at which the Jewish conscience would be scandalized are still permitted by Jewish law. We are higher morally [today] than our code [is]."<sup>19</sup> It is such sentiments that drove him and his colleagues to address the cause of the *agunah* and to attempt to rectify the situation in light of modern Jews' respect for women and women's rights. For the last fifty years, the CJLS has been committed to adjusting law in an effort to reflect the evolving morality of Conservative Jews.

Additionally, Catholic Israel's desire to participate with non-Jews in a secular culture has led to Conservative changes in *halakhah*, as marked by the leniency toward laws of *kashrut*. Rabbi Israel Silverman considers the behavior of Conservative Jews a significant impetus to relax the prohibitions on non-Jewish wines. He explains, "In our own day, as we know, the custom of being lenient has spread to almost all Jewish homes in regard to the prohibition against 'foods cooked by non-Jews,' to a greater extent than the Rabbis permitted."<sup>20</sup> In order then to continue loyalty to *halakhah*, the Conservative rabbi has a choice to ease the restrictions or to call all those who drink non-kosher wine with their gentile friends violators. Silverman chooses the first option. Then, In 1985, when Elliot Dorff revisited the issue, he declared:

One must also recognize that many Jews who otherwise observe the laws of *kashrut* drink rabbinically uncertified wine. In other words, whatever one may think of the halakhic status of the prohibition based on the sources, the fact is that for many the prohibition has fallen into disuse. In the operation of any legal system, Jewish law included, when that happens those in charge of the law must decide whether to lament and combat the widespread transgression or to accept it, recognizing that a specific law has fallen into disuse and that there is no strong reason to fight for it. Even if we decided that we wanted to maintain *stam yeinam* as part of the

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<sup>18</sup> See my chapter on the *responsa* regarding women in the minyan on page 69.

<sup>19</sup> Louis Epstein, "A Solution to the Agunah Problem, Proceedings of the Committee on Jewish Law and Standards 1927-1970, Volume 2, ed. David Golinkin (Jerusalem: the Rabbinical Assembly and The Institute of Applied Halakhah, 1997) 619.

<sup>20</sup> See my chapter on the *responsa* regarding the permissibility of non-Jewish wine on page 26.

law, I doubt that it would be very high on our list of educational and halakhic priorities. We are better off acknowledging the fact that this prohibition has fallen into disuse and letting it be.<sup>21</sup>

Rabbi Dorff even expresses his view that positive results can come from the intermingling of Jews and non-Jews (with the exception of intermarriage), and by easing the laws on *kashrut*, members of the Conservative movement are better able to participate in this modern society. The views of Dorff and Silverman are in line with the sense of the traditional halakhic process as understood by their predecessor Solomon Schechter as well. Schechter taught: "In the interests of . . . the welfare of the secular world—[the Sanhedrin] enacted such laws as either tended to elevate the position of women, or to promote the peace and welfare of members of their own community, or to improve the relations between Jews and their Gentile neighbours."<sup>22</sup> Schechter also mentioned that the Sanhedrin perpetuated "the great principle that nothing is so injurious to the cause of religion as increasing the number of sinners by needless severity." The achievement of a positive relationship with non-Jews is a goal embraced by Catholic Israel and approved of by the CJLS.

An additional aspect of modernity found throughout Conservative *responsa* is a commitment to individual conscience. Despite Neil Gillman's assertions that "The concept of Catholic Israel breaks with that individualistic impulse,"<sup>23</sup> Henrietta Szold remarked in 1913, "Catholic Israel is individualism at its thoughtful best, and its exhortation is directed to the best in man—to his heart."<sup>24</sup> Rabbi Harold Kushner agrees with Szold, claiming that the only reason *halakhah* continues to work for Conservative

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<sup>21</sup> See my chapter on the *responsa* regarding the permissibility of non-Jewish wine on page 30.

<sup>22</sup> Solomon Schechter, *Studies in Judaism: A Selection* (New York: Meridian Books, Inc., 1958) 33-34.

<sup>23</sup> Gillman, 56.



Jewry is because individual Jews accept upon themselves a particular law as a result of their own sense of personal autonomy.<sup>25</sup> Both Silverman and Dorff in their respective *responsa* on the consumption of non-kosher wine give permission to the individual to choose for himself or herself which bottle to drink. In 1961, Ben Zion Bokser expressed this emphasis on individual conscience in his *teshuvah* on birth control. "We are, therefore, justified in sanctioning birth control as a precaution against a danger to the life or health, physical or mental of the mother or her children . . . on the personal convictions expressing the private conscience of the individuals involved."<sup>26</sup> Again, in his *responsum* regarding driving on Shabbat, Bokser asserts the importance of individual conscience in granting a person the right to decide whether his/her geographical location requires vehicular transportation to the synagogue. He remarks, "It is one of the characteristic marks of Judaism that it trusts the conscience of the Jew who is really zealous for the observance of Torah."<sup>27</sup> Catholic Israel—those Jews who wish to uphold a Jewish life while engaged thoroughly in the modern world—demands individual conscience be respected, and the CJLS has responded.

While many Conservative authors, such as Rabbi David Golinkin, claim that Conservative Judaism represents an equal commitment to modernity and tradition, this dedication to the will of Catholic Israel represents something else. In fact, contrary to the notion of an equal commitment, the *responsa* of the CJLS demonstrate, fire and foremost, an affirmation of the demands of modernity as expressed by the will of contemporary Conservative Jews. Yet, since Conservative Judaism considers itself engaged in the on-

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<sup>24</sup> Henrietta Szold, "Catholic Israel," *Tradition and Change* ed. Mord. Waxman (New York: The Burning Bush Press, 1958) 125.

<sup>25</sup> *A Century of Commitment* ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000) 129.

<sup>26</sup> See my chapter on the *responsum* regarding the permissibility of birth control on page 148.

going, historical dialogue of the Jewish people, it must demonstrate how the opinions of its modern-day Catholic Israel fit into the *halakhic* narrative of that people—even if a liberal *halakhic* process is utilized to achieve a pre-determined outcome. To accomplish this task, the CJLS demonstrates the Conservative commitment to *Wissenschaft* through an approach that focuses on these trends of leniency, the utilization of a text's "true" *pshat*, a rejection of the principle "*hilchata k'batra'ay*,"<sup>28</sup> and the conscious introduction of scientific knowledge into its *teshuvot*. Controversies regarding the status of a Conservative opinion as *takkanah* or as interpretation that result from this process often reflect the extent to which these techniques are used. In the end, however, this debate about the role of legislation versus interpretation serves merely as esoteric banter for secondary parties, and does little to influence the actual decisions made.

Regarding this emphasis on engaging in historical dialogue, David Golinkin explains, "A lenient ruling is preferable to a strict one."<sup>29</sup> He continues, "This approach is firmly anchored in the halakhic tradition. It is reflected in the well-known talmudic saying: 'The strength of a lenient ruling is greater.'"<sup>30</sup> This first technique anchored in Conservative Judaism's positive-historical school is demonstrated in a number of *responsa*. The Bokser *teshuvah* about driving on Shabbat argues that, historically,

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<sup>27</sup> See my chapter on the *responsa* regarding the permissibility of driving on Shabbat on page 130.

<sup>28</sup> The principle "*hilchata k'batra'ay*, the law is in accordance with the views of the later authorities," comes from *Piskei HaRosh*, Bava Metzia, chapter 3, #10, among other places. Menachem Elon explains that the *geonim* established the rule that among authorities who live(d) after the redaction of the Talmud the view of later authorities is to be adopted. Menachem Elon, *Jewish Law: History, Sources, Principles, Vol. 1*, trans. Bernard Auerbach and Melvin J. Sykes, (Philadelphia: The Jewish Publication Society, 1994) 268. The Conservative movement, however, believes that the last several centuries of Orthodox *psak halakhah* represents a break from Jewish tradition and therefore does not have to be upheld.

<sup>29</sup> This principle, "*koach d'heteira adif lay*," may be found in B.T. Berakhot 60a and Beitzah 2b. Rashi explains in his commentary to Beitzah 2b that in order to rule leniently, a *posek* must be very certain of his position. Thus, if one is certain enough of his position to offer a leniency, then this opinion is preferable to that of a *posek* who may be less certain and therefore argues for a stricter ruling. Golinkin expands this concept this into a general principle, suggesting that if any rationalization for a lenient opinion may be found, then the *halakhah* ought to follow the leniency.

Judaism has a trend toward leniency regarding the prohibition on travel. The traditional Shabbat *tehum* was expanded from one's home to one's city. Also, a traveler who happened to be away on the Sabbath could establish a home for himself through the act of *kinyan shevitah*, and thus grant himself an additional 2000 cubits of distance to travel. The same process could be used for one sailing on a boat as well, even though the Talmud explicitly prohibits this travel *l'hatchilah*. This trend of leniency, argues Bokser, could be taken one step further in permitting Jews to drive to synagogue on Shabbat. The issue here is not whether this logical leap makes sense—for that, please see my discussion above. Rather, the important matter is Bokser's reliance on what he sees as a trend of leniency involving travel on the Sabbath.

Rabbi Israel Nissan Silverman, in his *responsum* on non-kosher wine, also utilizes what he considers to be a trend of leniency. With regard to the question of American wine representing *s'tam yenam* or *ye'en nesekeh*, Silverman writes, "If the lessening of idolatrous practices was evident already by the time of the Talmud, then all the more so is it not present in twentieth-century America's major wine-producing companies."<sup>31</sup> Later the rabbi points out that the older restriction against economic benefit from non-Jewish wine was relaxed. "This was especially true in France," he explains, "where Jews were very prominent in the production of wine for sale, and where it was customary for Jews to accept non-Jewish wine as payment for debts."<sup>32</sup> Again, later, Silverman points to the leniency permitted toward non-Jewish bread and oil—despite the traditional prohibitions—in order to demonstrate that the *isur* against the consumption of non-Jewish wine is no longer relevant as well.

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<sup>30</sup> Golinkin, *Halakhah for Our Time*, 29.

<sup>31</sup> See my chapter on the *responso* regarding the permissibility of non-Jewish wine on page 24.

Another trend of leniency to which Conservative rabbis point often is the reinterpretation or contravention of biblical laws by the *tannaim* and *amoraim*. For example, Rabbi Aaron Blumenthal lists Hillel's *prozbol* (though it is actually a *takanah*), the abolition of the practice of the *sotah*, and the whittling away at the law of *ben sorer umoreh* as precedents to justify his own modern-day reversal of the opinions against women receiving *aliyot*. As Rabbi Mordecai Waxman exclaims, "[Conservative Judaism] holds that the religious legal tradition must be held in reverence, but that the need for changes and adjustments must be recognized when they come pressing, and it believes that the legal tradition of Judaism itself provides the remedy if we allow it to be implemented."<sup>33</sup> For the CJLS, Jewish law demonstrates a history of leniency and Conservative *poskim* are merely following that trend in order to enact the will of Catholic Israel. These *poskim* are even willing to put outcome before process to achieve their goal.

Another technique used in the *halakhic* process of the historical school is the attempt to find a text's true meaning and then to utilize this perceived spirit of the law to modernize it. Rabbi David Fine, in his 2002 *teshuvah* "Women and the Minyan," argues that there is no such thing as a pristine, original Judaism that needs uncovering.<sup>34</sup> *Responsa* of the CJLS, however, demonstrate the many Conservative *poskim* disagree. Rabbi Joel Roth attempts to uncover why homosexuality is considered a *to'evah* in the Torah, and claims to believe that the initial purpose behind the attribution of this status could hold significance regarding the continuation of the prohibition on homosexual acts

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<sup>32</sup> See my chapter on the *responsa* regarding the permissibility of non-Jewish wine on page 26.

<sup>33</sup> Mordecai Waxman, "Conservative Judaism--A Survey," *Tradition and Change* ed. Mordecai Waxman (Philadelphia: Rabbinical Assembly of America, 1958) 17.

<sup>34</sup> Fine, 5.

today. Similarly, Rabbis Tofield and Blumenthal spend much of their *responsa* disagreeing over the original meaning and use of the Mishnah's "*mipnei kavod hatzibor*." Also, both Rabbis Silverman and Dorff reference Rashi's interpretation of the reasons behind the prohibition against the consumption of non-Jewish wine, and Dorff—while stating emphatically his distaste for intermarriage—argues that this justification for the ban no longer holds sway. In another example, Bokser takes the Talmud's specific discussion on who may use birth control and derives a far-reaching principle that one whose health (as s/he defines it) would be put at risk by pregnancy may use contraceptive devices. Roth explains this technique of searching for the law's *pshat*:

New and far-reaching conclusions that no rishon had ever stated became acceptable because of the conviction that the rishonim would have stated them if they had had access to all of the same data that could now be brought to bear. To state them now continues the process of tradition. Indeed, it is refusal to state them that constitutes the unacceptable break with tradition. *We* (original emphasis) are the heirs of the rishonim, not those who refuse to follow where their footsteps lead.<sup>35</sup>

By utilizing the historical approach to Judaism and attempting to come up with a particular text's true meaning, Conservative *poskim* believe themselves to be participating in the authentic conversation of Judaism while still advancing the will of modern Conservative Jews.

Moreover, as part of this attempt to discover a law's *pshat*, the Law Committee distinguishes often between *minhag* and *halakhah*. The significance of this tension is played out most clearly in the debate regarding permission to count women in the *minyan*. Philip Sigal considers the disqualification of women from constituting a quorum

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<sup>35</sup> Joel Roth, "Halakhah and History," The Seminary at 100: Reflections on the Jewish Theological Seminary and the Conservative Movement, ed. Nina Beth Cardin and David Wolf Silverman (New York: The Rabbinical Assembly, 1987) 282.

to be a *minhag* which has now lost "its reason and appeal."<sup>36</sup> He labels Josef Karo's ruling in the *Shulkhan Arukh* "mere *minhag*," and calls for its reversal. Sigal uses this understanding of history as an important factor in shaping his *halakhic* process. Rabbi David Feldman, however, who wrote the opposing *teshuvah*, follows the principle of *minhag m'vatel halakhah* and argues that in spite of Catholic Israel's recognition of the equal status of women, females should not be counted in the *minyan*. For Feldman, history plays an equally important, though fundamentally different, role in affecting the *halakhic* process. This tension, then, between *minhag* and *halakhah* results from the Conservative movement's varying approaches to historical analysis that claim that *halakhah* can, but does not have to, follow later authorities.

Robert Gordis adds emphasis to the importance of this process. He writes, "History is neither inimical nor irrelevant to the Halakhah. It is the soil from which the Halakhah springs. Cut off from history, the arena in which men and women live and struggle, the Halakhah is doomed to sterility and death."<sup>37</sup> For this reason Conservative Jewry considers itself more in line with traditional Judaism than the modern forms of Orthodoxy that follow the motto that anything new is against the Torah. Thus the rejection of the *halakhic* principle "*hilchata k'batra'ay*" and the willingness of the Committee to use selective precedents grant enormous flexibility to the CJLS. Like the debate in the *responsa* regarding women in the minyan, Dorff and Silverman's disagreement over the use of Moshe Isserles's recognition of 16<sup>th</sup> century Moravian rabbis' leniency toward the consumption of gentile wine is another example of the questionable use of later authorities. Rabbi Aaron Blumenthal presents the opinions of

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<sup>36</sup> See my chapter on the *responsa* regarding women in the minyan on page 71.

<sup>37</sup> Robert Gordis, *The Dynamics of Judaism* (Bloomington: Indiana University Press, 1990) 96.

Rabbi Joshua Falk and the Maharam, who reject the idea that women could receive *aliyyot*, but then Blumenthal dismisses their opinions as the perpetuation of a *minhag* in opposition to the original *halakhah*. As Rabbi David Ellenson remarks regarding Conservative *halakhah* in the State of Israel: "An explanation for this Conservative position [regarding the rejection of *hilchata k'batra 'ay*] inasmuch as it runs counter to a dominant characteristic of traditional Jewish jurisprudence, may be found in a sociological judgment as to a *tendenz* that has marked the direction of Orthodox legal interpretation during the last two centuries."<sup>38</sup>

After first assessing the practices and desires of Catholic Israel, Conservative *poskim* engage the historical process in order to come to a re-interpretation or a *takkanah* that fits the predetermined aim. A second tool employed by Conservative *poskim* to achieve their pre-set goal is the expressed use of extralegal sources within the *responsa*. In fact, Rabbi Jacob Neusner goes so far as to declare: "Without reference to the truth as it is in the twentieth century (and now twenty-first century), we cannot accept as halakhic any decision, however buttressed by elaborate references to ancient and medieval authorities."<sup>39</sup> Indeed, almost every *responsum* reviewed for this essay utilized one of the sciences: medicine or health care; sociology; psychology; or economics.<sup>40</sup> According to David Golinkin, "Many Orthodox *responsa* are totally unaware of or actively opposed to these disciplines, and even if they do cite medical studies, it is almost never with an exact reference to medical literature."<sup>41</sup> On the other hand, Golinkin proclaims that Conservative rabbis consider it essential to utilize modern scientific methods such as

<sup>38</sup> David Ellenson, "Conservative Halakha in Israel: A Review Essay," *Modern Judaism* 13 (1993): 196.

<sup>39</sup> Jacob Neusner, "Conservative Judaism in a Divided Community," for a Rabbinical Assembly Special Committee on Conservative Judaism, date unknown, 5.

<sup>40</sup> Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: JTSA, 1986) 231-304.

history, textual criticism, and medicine. Certainly many Orthodox *poskim* utilize such extralegal sources, but Golinkin's hyperbole demonstrates the intensity of the value placed on these sources by the Conservative movement.

For example, both *teshuvot* on the permissibility of non-Jewish wine consist of detailed discussions of the modern wine making industry and the implications for *halakhah* thereof. Certainly Joel Roth looks at a number of different biological theories regarding the etiology of homosexuality. Reuven Kimelman presents sociological arguments against the permission of homosexual acts. The *responsa* regarding driving on Shabbat explore engine combustion and the production of electricity in order to take a *halakhic* stand on these modern inventions. As David Golinkin explains, "Conservative rabbis feel that not only is it *permissible* to utilize modern methods of knowledge to write *responsa*; it is *essential* (original emphasis) to do so because you cannot arrive at a correct halakhic decision until you know and understand the facts."<sup>42</sup>

While Joel Roth agrees with Golinkin on the need to utilize modern methods of knowledge, Roth cautions his colleagues on the extent of such use. "Factors judged legally significant by one posek need not be judged legally significant by another," he warns.<sup>43</sup> Moreover, Roth points to a talmudic example to remind his colleagues that extralegal expert opinions have always provided advice and explanation, but the rabbis are the individuals charged with the task of determining the law. In B.T. Sanhedrin 75a,<sup>44</sup> Roth suggests, one learns that even though a certain man's health might depend on

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<sup>41</sup> David Golinkin, *Responsa in a Moment: Halakhic Responses to Contemporary Issues* (Jerusalem: The Institute of Applied Halakhah at the Schechter Institute of Jewish Studies, 2000) 19.

<sup>42</sup> *Ibid.*

<sup>43</sup> Roth, *The Halakhic Process*, 265.

<sup>44</sup> B.T. Sanhedrin 75a reports: Rab Judah said in Rab's name: A man once conceived a passion for a certain woman, and his heart was consumed by his burning desire [his life being endangered thereby]. When the doctors were consulted, they said, 'His only cure is that she shall submit.' Thereupon the Sages said: 'Let



his relationship with a particular woman, the sages prevented the man from engaging in relations with her in order to protect her respectability—a quality considered far more important in this case than the man's health. The rabbis here considered the advice of their extralegal counsel, but they did not allow it to dictate the halakhic ruling.

Actually, though, Roth takes issue with much of the way Conservative *poskim* have arrived at their decisions over the last fifty years. He argues that history and *halakhah* are two distinct fields governed by different canons.<sup>45</sup> “The ability to refer to an historical precedent may simplify the work of the posek just as the adoption of a previous *da'at yahid*,<sup>46</sup> for example, is a simpler halakhic step than adopting a position for which there is no precedent whatsoever,” he argues.

[B]ut it is not the existence of that precedent which validates its adoption in the present. Valid, reasonable and defensible arguments in favor of adopting it must be offered. Careful analysis of the consequences of abrogating the current practice must be undertaken. Issues of the weight of precedent vs. modification of practice must be considered. To argue that the existence of an historical precedent allows or validates its adoption confuses history with halakhah . . . Historical fact alone cannot establish current halakhah.<sup>47</sup>

For Roth, the existence of a precedent does not justify its acceptance or the use thereof, *ipso facto*, as acceptable *halakhah*. Critical scholarship is not equivalent to the process of *pesak halakhah*. Despite his commitment to the principle, “*Ein lo la-dayyan ella mah*

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him die rather than that she should yield.’ Then [said the doctors]; ‘let her stand nude before him;’ [they answered] ‘sooner let him die’. ‘Then’, said the doctors, ‘let her converse with him from behind a fence’. ‘Let him die,’ the Sages replied ‘rather than she should converse with him from behind a fence.’ Now R. Jacob b. Idi and R. Samuel b. Nahmani dispute therein. One said that she was a married woman; the other that she was unmarried. Now, this is intelligible on the view, that she was a married woman, but on the latter, that she was unmarried, why such severity? — R. Papa said: Because of the disgrace to her family. R. Aha the son of R. Ika said: That the daughters of Israel may not be immorally dissolute.

<sup>45</sup> Roth, *The Seminary* at 100, 284-285.

<sup>46</sup> *Da'at yahid*, or “an individual opinion” often refers to a minority stance taken in *halakhic* literature. It is preserved so that future generations may come back to rely on this previously rejected opinion as a basis for reinterpretation—much the same way that a minority opinion is used in American law.

<sup>47</sup> Roth, *The Seminary* at 100, 284.

*she-einav ro'ot*—A judge must be guided by what he sees,<sup>48</sup> Roth believes that many of the *teshuvot* put out by the CJLS fail to hold to a certain systemic process. Then again, there are critics who suggest that Roth's *teshuvot* fail to hold to such a process as well.<sup>49</sup>

Despite his significant academic work in the theoretical world of liberal *halakhah* Joel Roth is perhaps most well known among the laity of the Conservative world for, in addition to non-CJLS *responsum* permitting women to enter the rabbinate, his official *teshuvah* maintaining the traditional prohibition against homosexual acts. But, if Conservative Jewish Law is based on following the will of Catholic Israel, is it simply the matter that Roth believes that a majority of Conservative Jews agree with him in rejecting a homosexual lifestyle?<sup>50</sup> After all, the Conservative *posek* did not point to any survey to justify his rigid stand. More specifically, then, if Conservative *halakhah* always follows the whims of its practicing majority, how has Conservative Jewry managed to maintain as many of the traditional prohibitions as it has? The answer, once again, lies in the teachings of Solomon Schechter. Not only did Schechter proclaim the preeminent importance of Catholic Israel, he taught how leaders of the Conservative movement must proceed in response to what he perceived as the democratic nature of Judaism. "The qualifications required for the leadership of the people [in the days of the Sanhedrin]," Schechter taught, "were a right instinct for the necessities of their time, a fair amount of secular knowledge, and, what is of chief importance, an unbounded love

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<sup>48</sup> Roth, *The Halakhic Process: A Systemic Analysis*, 265.

<sup>49</sup> Walter S. Wurzburger, "The Conservative View of Halakhah Is Non-Traditional," *Judaism* (Summer, 1989): 377-379.

<sup>50</sup> According to Michael Panitz, "Part--but only part--of the reason for the rabbinic push for a return to tradition, and for the endorsement by the core of Conservative Jews of this effort, is receptivity to the rise of Orthodoxy . . . Among the laity, there is a palpable nostalgia for the perceived authenticity of the Orthodox interpretation of Judaism." Michael Panitz, "Completing a Century," *A Century of Commitment*, ed. Robert E. Fierstien (New York: The Rabbinical Assembly, 2000) 129.

and devotion to those over whose interests they were called to watch."<sup>51</sup> Moreover, he posited that the ultimate role of the Sanhedrin was to preserve Judaism and the Jewish people, making compromises where necessary in order to ensure the survival of both entities. Schechter's philosophy concurred with his predecessor Zacharias Frankel, who proclaimed:

The scholars thus have an important duty in order to make their work effective. It is to guard the sense of piety of the people and to raise their spirit to the height of the great ideas. For this they need the confidence of the people . . . The truths of faith must be brought nearer to the people so that they may learn to understand the divine content within them and thus come to understand the spiritual nature and inner worth of the forms which embody these truths. Once the people are saturated with an awareness of the essential truths and the forms which embody them, a firm ground will have been established for adhering to Jewish practices. And if the people then cease to practice some unimportant customs and forms of observances it will not be a matter of great concern.<sup>52</sup>

This act of compromise then serves as the second most important marker distinguishing the *responsa* of the CJLS from those of other movements. Rarely does the Committee abrogate an existing law altogether. Instead, the Conservative *poskim* have sought to make compromises with Catholic Israel so as to provide for the preservation of traditional Judaism in light of the changing practices, needs, and desires of Conservative congregants. Though the custom of women receiving *aliyot* might be widespread today, in the 1950s when the original *teshuvot* came out, Tofield's *teshuvah* that granted women the right only in special circumstances received the majority vote. This *responsum* served as a compromise between a more liberal pole as expressed by Aaron Blumenthal that demanded blanket permission for women to receive the right to an *aliyah* and the concerns of the traditionalists who wanted a slower pace (or no pace at all) of change.

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<sup>51</sup> Solomon Schechter, Studies in Judaism: A Selection, 35.

Also, the *responsa* granting permission to drive on Shabbat limited the leniency to travel to and from the synagogue. Adler, Agus, and Friedman explain this compromise: "Even as the physician cuts off a hand or a foot in order that the patient might survive, a rabbinic court may teach the violation of some *mitzvot* for a time, in order that the totality of Judaism might be preserved."<sup>53</sup> Another example of the attempt to compromise is Bokser's discussion of birth-control, in which encourages married couples to fulfill the *mitzvah* of procreation even though he allows for the use of birth control. Similarly, while the *teshuvot* regarding non-kosher wine give permission to the individual to decide which wine to consume, both *poskim* stop short of blanket permission when it comes to the question of wine for use in Jewish rituals. Instead, the *poskim* offer a compromise between an absolute *heter* and an absolute *isur*. Though often it has had to prioritize one *mitzvah* over another (such as the commandment to participate in public worship over the prohibition against traveling on Shabbat), the CJLS has demonstrated a consistent interest in limiting the fulfillment of the demands of Catholic Israel by injecting elements of Torah-centered Judaism into its lenient rulings.

This democratization of Judaism represented by the willingness to compromise may be seen as well in the Conservative movement's careful steps to include a synagogue's local rabbi as *mara d'atra* and to grant to him/her significant decision-making power. For example, though Elliot Dorff encourages Conservative synagogues to use only *hekshered* wines, he leaves the final decision up to the local rabbi as *mara d'atra*. Likewise the decision whether or not to give women *aliyot* was left for the local rabbi's ultimate approval. In fact, with the exception of the three Standards of the

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<sup>52</sup> Zacharias Frankel, "On Changes in Judaism," *Tradition and Change* ed. Mord Waxman (Philadelphia: Rabbinical Assembly of America, 1958) 50.

Conservative movement,<sup>54</sup> the congregational rabbi may accept or reject virtually any of the CJLS's decisions. Rabbi Philip Sigal reminds his colleagues, "In the halakhah, a permissive conclusion does not invalidate the right to be *mahmir*, to accept a greater stringency upon oneself, to fulfill *lifnim meshurat ha'din*, to accept an observance that goes beyond the requirement of the precise limits of the halakhah."<sup>55</sup> This pluralism satisfies the needs of a rabbi to serve his/her particular community while, at the same time, it allows the CJLS *responsa* to unite Conservative rabbis into a cohesive movement that views tradition through a specific lens.

Perhaps, then, it is this willingness to compromise and to democratize the Conservative movement that allows its *poskim* to slow the tide of change when they think that modernity and the desires of Catholic Israel threaten Judaism as an institution. In the discussion surrounding the question of driving on Shabbat, Rabbi Jack Cohen pleads, "If we can at least show our lay people that we are ready to recognize the legitimacy of their demands for satisfaction of their points of view, we have at least an opening to come to them and say, 'All right, you want some kind of observance which will be meaningful for you. Now what are you going to do about it?'"<sup>56</sup> In other words, if the Conservative rabbis—as defenders of tradition—offer lenient rulings and allow change where possible, then Catholic Israel will hold a greater respect for the rabbis and respond by granting these *poskim* a certain degree of latitude when the rabbis sense a threatening condition.

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<sup>53</sup> See my chapter on the *responsa* regarding driving on Shabbat on page 138.

<sup>54</sup> An opinion becomes a Standard of Rabbinic Practice when a two-thirds majority of those present at an RA meeting vote in favor of a proposition declaring it as such. To date, only three negative statements exist as Rabbinic Standards. Aside from the issue of patrilineal descent, other Standards of Rabbinic Practice include not performing a marriage for a divorcee unless that person has obtained a *get* and not performing or even being present at an intermarriage. *Responsa 1991-2000* ed. Kassel Abelson and David J. Fine (New York: The Rabbinical Assembly, 2002) xi.

<sup>55</sup> See my chapter on the *responsa* regarding women in the minyan on page 66.

<sup>56</sup> See my chapter on the *responsa* regarding driving on Shabbat on page 123.

Rabbi Sanders Tofield uses this consequentialist approach in limiting the opportunities for women to receive *aliyot*. He, along with those who voted in favor of his *teshuvah*, believe that allowing women *aliyot* would amount to permission for men to forsake their religious responsibilities. They believed furthermore that for a woman to receive an *aliyah* might prove embarrassing to a congregation by advertising the fact that seven learned men could not be found. Tofield laments, "Letting down the barriers of women's participation in the rituals of the pulpit would lead to what the rabbis feared—relegating religious observance to women and children. We are getting there fast enough. Should we be responsible for the final push into the chasm of unreality?"<sup>57</sup> By giving in to a majority of the demands of Catholic Israel, Conservative *poskim* reserve the right to slow the path toward modernity where they see fit to do so.

Reuven Kimelman employs this sense of obligation to protect aspects of Jewish tradition as well, when he argues in favor of continuing the prohibition against homosexual behavior and relationships by appealing to the perception that homosexuality poses a threat to Jewish continuity. He claims that male-male relationships reflect a sense of "now-ness" not conducive to procreation and long-term commitment that is vital to the success of the Jewish people. Moreover Kimelman links approval of homosexual relationships with the dissolution of all prohibitions against sexual taboos, and warns that such approval could lead to collapse of the system of *halakhah* altogether. "Once feelings are accepted as the criterion for overturning a prohibition," he states, "every leak in the dam threatens to become a flood."<sup>58</sup> Nevertheless, because of the demands of modernity expressed by Catholic Israel, the question of the *halakhic* status of

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<sup>57</sup> See my chapter on the *responsa* regarding women and *aliyot* on page 60.

<sup>58</sup> See my chapter on the *responsa* regarding homosexuality on page 118.

homosexuals and homosexual relationships has returned to the discussion table and promises to be quite a controversial issue for years to come. Still, though, the *responsa* on homosexuality, patrilineal descent, and other hot topics that appear to contravene the will of some of Catholic Israel derive much of their authority from the willingness of Conservative Jewry to respect its rabbis and its own *halakhic* process. This respect comes, in turn, from the rabbis' willingness to compromise on other issues, and the authority granted to them by their constituents to act as defenders of Jewish tradition.

Rabbi David Golinkin writes, "[T]he Conservative movement is following in the footsteps of Hillel and Rabban Gamliel, of Rabbis Modena and Emden, of Rabbis ben Shimon and Hazan. Unlike the Reform movement, it considers the halakhah binding and obligatory. Unlike Orthodoxy, it rejects the slogan that 'anything new is forbidden by the Torah' and allows the halakhah to change and develop in a natural, organic fashion."<sup>59</sup> This natural, organic fashion is determined, first and foremost, by the will of the people: the practices and desires of a committed group of Conservative Jews called "Catholic Israel." Then, after the Committee on Jewish Law and Standards of the Conservative movement has determined the new moral or ritual demands of its members, its *poskim* attempt to defend permissive leniencies through an *halakhic* process that places great emphasis on the historical study of Judaism in conjunction with the use of as much contemporary scientific knowledge as possible. Finally, the rabbis put clear limits on the extent to which Conservative Judaism may go to satisfy the demands of modernity. This decision will be sent to local congregational rabbis, who hold the ultimate power to initiate or to slow change among members of their individual Conservative synagogues.

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<sup>59</sup> David Golinkin, Halakhah For Our Time: A Conservative Approach to Jewish Law (New York: United Synagogue, 1991) 28.

Of course, in the end, personal conscience remains the final arbiter for the behavior and practice of each individual Conservative Jew.

The *responsa* of Conservative *poskim* demonstrate a clear desire to give voice to the demands of modernity as expressed by contemporary Catholic Israel. Yet, through the authority invested in them by Catholic Israel, these *poskim* set clear limits when the historical customs and traditional laws of the Jewish people call back. Though the *responsa* of the CJLS do not represent an equal balance between tradition and modernity as Rabbi David Golinkin and others have claimed, these *teshuvot* do result from a process that is unique in its own right. Certainly not Reform<sup>60</sup> and definitely not Orthodox, *responsa* of the CJLS are indicative only of the Conservative movement which they seek to guide.

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<sup>60</sup> For a wonderful discussion of the Reform *responsa* literature's approach to Jewish law, please see Rabbi Mark Washofsky's "Introduction: Responsa and the Reform Rabbinate," in Teshuvot for the Nineties: Reform Judaism's Answers for Today's Dilemmas, ed. W. Gunther Plaut and Mark Washofsky (New York: CCAR Press, 1997), xxvii-xxix.



## **Chapter VIII**

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