

Chapter 1

Toward a Gender-Inclusive Account of Halakhah

Leonard D. Gordon

Halakhah, like most legal systems, has been historically unjust to women in at least two important ways: first, by and large, women have been the objects rather than the subjects of laws, and hence women have been unequal to men under the law; second, women have historically been neither lawmakers nor judges, which excludes them from the processes of legislation. These injustices are, obviously, mutually reinforcing.

Does one conclude that law, with its hierarchies, injustices, and rigidity is "not for women," complete with the implication that women are different? (Different and better, to be sure, but nevertheless different.) In America, stuck as we are at the moment with patriarchal structures, feminist efforts have been directed to changing sexist legislation by changing laws, and to bringing women into the system as lawmakers and jurists. When women are "brought in," many people expect that the processes themselves will change, that a female difference will make itself felt, that just as feminist pedagogy can transform the classroom, so too can feminist legislation transform the meaning and operation of the law itself.

Feminist critiques of Jewish law (*halakhah*) have, for the most part, rejected the law altogether on much the same grounds as liberal Judaism's rejection of *halakhah* as a mode of religious expression. Made neither by women nor with women's historical experience or interests at heart, *halakhah* continues to oppress; feminist critics have read *halakhah* as, at best, irrelevant and, at worst, insidious. Jewish defenders of the

law have argued that Jewish law is not what it seems: it may seem oppressive, but it is actually about sustaining and deepening the relationships between men and women. To take a particularly popular example, the menstrual purity laws are said to promote friendship in marriage and to prevent women from being seen as sexual objects. What the feminist critique shares with the Orthodox defense is the assumption that women are different and that *halakhah* is a system designed to respond to and codify that difference in lived behavior.

In a juxtaposition suggested by Judith Plaskow in "*Halakha* as a Feminist Issue," Martin Buber and Carol Gilligan both reject the value of legal discourse as a medium for the expression of the highest human values. Buber writes, "I cannot admit the law transformed by man into the realm of my will, if I am to hold myself ready for the unmediated word of God directed to a specific hour of my life."¹ Gilligan's critique of the role of rule-governed behavior in childhood play is by now well known, and has in fact become the centerpiece of liberal apologetics for the inclusion of women in Jewish professional life. Women as rabbis, cantors, educators, and communal leaders now live under the Gilligan-inspired anxiety of bringing their own distinctive "different voice" to the pulpit and the boardroom. With regard to law, that different voice rejects the ultimate value of law and legal argumentation. According to Gilligan, boys are "increasingly fascinated with the legal elaboration of rules and the development of fair procedures for adjudicating conflicts, a fascination that . . . does not hold for girls."² Plaskow then paraphrases Gilligan's position: "rules for girls are largely pragmatic, they can be discarded when a game is no longer enjoyable for its participants."³ Girls are more tolerant in their attitudes toward rules, more willing to make exceptions, and more easily reconciled to innovations.⁴ Girl's play, in the Gilligan model, is about the significance of building relationships and not about the play and its outcome.

The dichotomy articulated by Buber and Gilligan between law and relationship implies that law, and hence *halakhah* in the Jewish context, is necessarily hierarchical and exclusionary, and therefore antithetical to such basic components of contemporary Jewish feminisms as the insistence on openness, fluidity, the building of relationships, egalitarianism, and a heightened concern for spirituality. This dichotomy has won increasing acceptance within the Jewish world. Furthermore, the addition of Gilligan's gender essentialism to Buber's theory of dialogical relationships adds gender markers to the old spirit/law split. Jewish law becomes irredeemably male, and Jewish spirituality becomes the female redeemer for Israel. Women are once

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again imagined as spiritual, nurturing figures, offering contemporary Israel release from the harsh strictures of God, the law-giving Father. Rather than transforming *halakhah* along the model of the feminist transformations of Jewish liturgy, rabbinic midrash, and communal process, the Buber-Gilligan approach would leave the *halakhah* at the door of the new feminist transformation of Judaism.

Faced with this possibility, it is not surprising that some in the community of those committed personally and professionally to *halakhah* have sought to accomplish a feminist transformation themselves. Beginning as a response to Buber's existential critique of law, and continuing as a response to contemporary Jewish feminisms, the largely male community of Jewish theologians, philosophers, historians of *halakhah*, and historians have rewritten the history of Jewish law, and have thereby laid the groundwork for the creation of the "new *halakhah*" sought by Esther Ticktin, the new "*piskei halakhah*" proposed by Rachel Adler, and the "Halakhic education" that Blu Greenberg writes is "the most important area for reaching final equalization of women in the Jewish community."⁵

After briefly reviewing some highlights of this new revisionist history of *halakhah*, I will suggest how to account for the wide variance between the revisionist account and the lived reality rejected by many Jewish feminists. And finally, I will modestly propose some areas for institutional reform that might enable a broader dialogue between Jewish feminists and *halakhic* traditions. In this way, feminist insights concerning the content, form, and history of Jewish law can help effect change without creating new fixed roles for women as teachers of the Jewish spirit rather than of the Jewish body, and as religious counselors rather than religious decision makers.

Writing in dramatically different contexts, St. Paul, Shmuel Safrai, and Martin Buber all affirm the legal-centeredness of late pharisaic and early rabbinic Judaism.⁶ Building on the legal resources of biblical and postbiblical Jewish literature, the early rabbis expanded Judaism's legal framework to meet the challenges of exile and, eventually, of the destruction of the Second Temple in 70 C.E. The Mishnah, and the Talmud, which is structured as a commentary to the Mishnah's legal and exegetical discourses, have been understood as the foundation stones upon which the legal edifice of the later codes and modern responsa literature are based. Written in the rabbinic schoolhouse for the rabbinic elite, these documents reinforce the essential hierarchies of their times. So is articulated the traditional account. The conclusion of the Mishnah's fourth division, *Nezikin*, on Civil Damages, is exemplary:

(Horayot 3:8) A. A priest takes precedence over a Levite, a Levite over an Israelite, an Israelite over a *mamzer* [the offspring of a forbidden union], a *mamzer* over a *Netin* [see Joshua 9:27], a *Netin* over a proselyte, a proselyte over a freed slave.

B. Under what circumstances?

C. When all of them are equivalent.

D. But if the *mamzer* was a disciple of a sage and a high priest was an *am haaretz* [unlearned person], the *mamzer* who is a disciple of a sage takes precedence over a high priest who is an *am haares*.⁷

Thus when the rabbis gathered in the town of Yavneh along the coast of the land of Israel to reflect on the destruction of the Second Temple and the loss of political independence, they worked, first and foremost, to establish order and *stasis* in the midst of the chaos of war. With the boundaries between Israel and the other nations falling around them, with Roman soldiers on the Temple Mount, the rabbis restated and added to the laws mandating separation within Israel, building new and revised social hierarchies. Eventually they also added to the significance of gender difference in the *halakhah* as purity rules—other than those regarding menstrual impurity—were gradually removed from the system.

This view of the history of early rabbinism, supporting as it does the feminist critique of *halakhah*, has been challenged in recent decades on both exegetical and historical grounds. Jacob Neusner has denied that the early rabbinic enterprise centered around division and separation as an end in itself. He posits that "the principal message of the Mishnah is that the will of man affects the material reality of the world and governs the working of those forces, visible or not, which express and effect the sanctification of creation and of Israel alike."⁸ For Neusner, the point of early rabbinism was precisely the move away from hierarchy, class status, and a mechanical view of holiness to a human-centered view that places the intention of the individual Israelite at the center of creation. This reading provides a powerful rationale for praying in a circle and decentering rabbinic authority in our modern context.

The historian Shaye J. D. Cohen summarizes the contribution of the rabbis who met in the town of Yavneh in terms even more reminiscent of Gilligan and Plaskow:

The major contribution of Yavneh to Jewish history [was] the creation of a society which tolerates disputes without producing sects . . . No previous Jewish work looks like the Mishnah because no previous Jewish work, neither biblical nor post-biblical, neither Hebrew nor Greek, neither Palestinian nor diasporan, attributes conflicting legal and exegetical opinions to named authorities who, in spite of their differences, belong to the same fraternity. The dominant ethic here is not exclusivity but elasticity.⁹

The goal of the rabbinic movement at its inception was to include the Jewish people under one "big tent" in the aftermath of the divisions that had led to the disastrous wars against Rome. Exemplary of Cohen's reading, though not cited by him, is the following passage taken from the Mishnah's fourth division, tractate *Eduyyot*. This tractate stands out in the Mishnah as an anthology of legal topics arranged around such lists as those matters on which the Houses of Hillel and Shammai reversed their traditional rulings, and lists of matters on which the majority of the rabbis enforced compromise and the principle of majority rule against those who held fast to extreme and divisive opinions. In Mishnah *Eduyyot* 4:8, the Houses dispute matters of marriage and cleanliness. Although they reach no consensus, the Mishnah concludes that:

I. Notwithstanding that these declare ineligible and the others declare eligible, yet the House of Shammai did not refrain from marrying women from the House of Hillel, nor the House of Hillel from marrying women from the House of Shammai.

J. And [despite] all the disputes about what is clean and unclean, wherein these declare clean and the others declare unclean, neither refrained from making clean things with the other.¹⁰

One might be tempted to dismiss the larger significance I propose for the conclusions drawn by Neusner and Cohen. After all, they may simply be noticing that in its first stages, the *halakhic* system was more metaphor than reality. But certainly by the era of the two Talmuds and the grand codes of the medieval period, the pressures of ruling Israel had turned the rabbis from idealist philosophers to hard-nosed, male lawyers and judges.

Perhaps this is so in reality, but it is not in contemporary scholarship. Thus, David Kraemer finds the Babylonian Talmud's main point to be the impossibility of determining truth in legal cases. Rather than being an attempt to uncover legal principles for the governance of Israel, the Talmud emerges as a document seeking to reconcile reason and revelation through the acknowledgment of the need to compromise even in matters of ultimate meaning. He writes that in the Talmud:

reason ultimately emerges to claim a well-earned place in the center of the system, and even to become "Torah." As it does, any possible conflict between revelation and reason is eliminated by definition, because, having been included in Torah, reason too is now part of revelation. The two poles become, in the Bavli, complete partners in the promulgation of a much compromised truth.¹¹

If the Talmud emerges as a document of postmodernism, relativizing truth, and recognizing the limitations of both reason and revelation, then where can we locate the start of the patriarchal, univocal, hierarchical, closed *halakhic* system? Certainly not in the law code of Maimonides. Menachem Kellner's *Maimonides on Judaism and the Jewish People* assures us that the author of the most comprehensive code of Jewish law intended his code as a companion to the *Guide for the Perplexed*, which in turn was designed to teach philosophically minded Jews of the ultimate union of Jew and Gentile that will precede the messianic world to come. For Kellner's Maimonides: "The law as a whole . . . aims at two things: the welfare of the soul and the welfare of the body . . . Between these two aims, one is indubitably greater in nobility, namely the welfare of the soul—I mean the procuring of correct opinions."¹² Unlike Kraemer's Talmud, Kellner's Maimonidean Code does not affirm diversity of opinion, but it does teach the ultimate equality of all humanity, an equally important contemporary and feminist value not frequently associated with rabbinic *halakhah* in the feminist imagination.

A few further examples will have to suffice in this brief account. In his study of the rabbinic mindset, David Weiss Halivni points to the exemplary work of the medieval *peshat* exegetes who "systematically and unrestrainedly maintained the freedom to explain the Bible differently from, and in opposition to, accepted *halakhah*."¹³ And finally, the late Rabbi J. B. Soloveitchik, in his classic work on the *Halakhic Man*, notes that his "deepest desire is not the realization of the

Halakhah but rather the ideal construction which was given to him from Sinai, and this ideal construction exists forever."¹⁴

Ultimately, even though almost all of Jewish literary creativity during the rabbinic era is legal in character, it turns out that an entire school, or set of overlapping schools, of contemporary rabbinics scholarship deny that legal discourse in Judaism is about law at all. The *halakhic* classics of medieval Judaism have been re-presented to us as community-building texts, seeking to overcome differences of social class among Israel, to promote compromise in matters of legal dispute, to reconcile the conclusions of reason and revelation, and ultimately to undo even the chasm that has for so long separated Jew from Gentile. We are given a *halakhic* system more concerned with process than results and more focused on bringing communities together than on building the boundaries that might keep them apart. And finally, we are told that the rabbinic system of *halakhah* is human centered, removing the ultimate hierarchical relationship from our active consciousness. The community of rabbis insists on the human prerogative to shape law in an ongoing, fluid process, a process that excludes God as too ultimately other to enter into a renewed role as the guardian of Israel.

In spite of the apparent feminism of these constructions of *halakhah*, this contemporary reading of rabbinism avoids the issue of gender. Neusner's analysis of gender is limited to a footnote defending his use of gender-specific language in describing the Mishnah's laws.¹⁵ Cohen's history of the period avoids all reference to the domestic life of Israel.¹⁶ Kellner's frequent references to the Aristotelian legacy of Maimonides ignores the question of whether, according to Aristotle, the souls of women were in any way equal to those of men. The all-male contributors to *Back to the Sources*, a standard handbook on the glories of classical Jewish literature, also fail to comment on the exclusion of women by this tradition.¹⁷

Thus we find that male scholars, explicitly and implicitly responding to the critiques of *halakhah* popularized by Buber's existentialism and Gilligan's social psychological feminist theories, have reimagined elements of the classical traditions in ways that may make that tradition usable in a feminist context, but they have done so without confronting the exclusion of women from that tradition. In this way, patriarchal power at once assimilates the feminist critique and domesticates it. The rabbis of the Talmud, we are assured, have always known that which contemporary feminist theorists present as new: they have long since assimilated the critique of heteronomy and hierarchy,

striking the perfect balance between unity and difference, between the male emphasis on order and separation, and the feminine stress on connectedness and unity.

Whatever the shortcomings of this new reading of the tradition as scholarship and as a response to the feminist critique of law, it does point out the possibility of a feminist revisioning of *halakhah* for our generation. Perhaps we can accept Gilligan's analysis in order to shake up our assumptions about the universality of *halakhah* as a vehicle for spiritual expression in Jewish communities, and it may be possible to do so without falling into the essentialist trap of saying that male *halakhists* need to learn to value their female, relational side. We can recognize that the *halakhic* system, even during its centuries as an exclusively male domain, functioned along two parallel trajectories, as a system designed to preserve a functioning community, and as a system designed to point to and actualize an ideal of unity. For many centuries rabbinic Judaism worked well within that tension for its men. The challenge before some of us now is to see if a transformed rabbinic system can work both for women and men.

If contemporary Jewish feminists have reclaimed the discourses of midrash, liturgy, and history without insisting, from the first, that these genres account for their role in the oppression of Jewish women in the past, perhaps the language of *halakhah* can be reclaimed as well. Rightly or wrongly, for better and for worse, status in parts of the Jewish community is still based on Talmudic scholarship, and religious commitment is measured by the seriousness with which communities and individuals respond to their *halakhic* systems. Communities that stand outside of the discourse of law in Judaism disempower themselves, whatever their motivations.

To facilitate the incorporation of new communities into the study and practice of *halakhah*, historians of *halakhah* must now enforce gender as a category in their analysis of each Talmudic discussion and each transition in the history of rabbinic authority. What role did women play in the formation of law? How did transformations in the social role of women find expression in *halakhah*? What alternative models of decision making existed within women's communities? No easy answers should be assumed, and scholars should never imagine that it goes without saying that women were, at any given moment, excluded from the *halakhic* process.

However much women may have been excluded from positions of power in law historically, this historical exclusion has ironically led to a self-exclusion in our contemporary moment. Jewish law, like American

law, cannot be discarded. When feminism joins liberal Judaism in self-exclusion from *halakhah*, feminism risks reinforcing the characterization of women as "Other" within Jewish systems. *Halakhah*, like American law, still requires feminist revision.

NOTES

1. Martin Buber, "Revelation and Law," *On Jewish Learning*, ed. Nahum Glatzer (New York: Schocken, 1965), 111. Cited in Judith Plaskow, "Halakha as a Feminist Issue," *Melton Journal* (Fall 1987): 5.
2. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982), 10. Cited by Plaskow, *Ibid.*, 4.
3. *Ibid.*, 4.
4. *Ibid.*, 4, citing Gilligan, *In a Different Voice*, 10.
5. Esther Ticktin, "A Modest Beginning," *The Jewish Woman*, ed. Elizabeth Koltun (New York: Schocken, 1976), 129; Rachel Adler, "The Jew Who Wasn't There: *Halakhah* and the Jewish Woman," *On Being a Jewish Feminist: A Reader*, ed. Susannah Heschel (New York: Schocken, 1983), 17; Blu Greenberg, "Judaism and Feminism," *The Jewish Woman*, 183.
6. In the case of Paul, his view of Jewish law may have been more complex than is generally assumed. See, for example, E. P. Sanders, *Paul, the Law, and the Jewish People* (Philadelphia: Fortress Press, 1983). Shmuel Safrai, "Oral Torah," "Halakha," *The Literature of the Sages: First Part: Oral Tora, Halakha, Mishna, Tosefta, Talmud, External Tractates*, ed. Shmuel Safrai (Philadelphia: Fortress Press, 1987), 35-209; Martin Buber, *Two Types of Faith* (New York: Macmillan, 1951).
7. Cited in the translation of Jacob Neusner, *The Mishnah* (New Haven: Yale University Press, 1988), 695.
8. Jacob Neusner, *Judaism: The Evidence of the Mishnah* (Chicago: University of Chicago Press, 1981), 271.
9. Shaye J. D. Cohen, "The Significance of *Yavneh*: Pharisees, Rabbis and the End of Jewish Sectarianism," *Hebrew Union College Annual* 55 (1984): 29.
10. Neusner, *The Mishnah*, 651. For a more detailed examination of this passage in the context of Mishnah tractate *Eduyyot* and of the Mishnah as a whole, see Leonard Gordon, "Who Were the Rabbis? Why Do We Care?" *Reconstructionist* (Summer 1991): 21-23; and "Law, Theology and Pluralism in Earliest Rabbinic Judaism," *Journal of the Society of Rabbis in Academia* (Summer 1991): 57-60.
11. David Kraemer, *The Mind of the Talmud: An Intellectual History of the Bavli* (New York: Oxford University Press, 1990), 189.
12. Menachem Kellner, *Maimonides on Judaism and the Jewish People* (Albany: State University of New York Press, 1991), 69, citing Maimonides' *Guide for the Perplexed*, III.27.
13. David Weiss Halivni, *Midrash, Mishnah and Gemara: The Jewish Predilection for Justified Law* (Cambridge: Harvard University Press, 1986), 105.
14. Rabbi Joseph B. Soloveitchik, *Halakhic Man* (Philadelphia: Jewish Publication Society, 1983), 23.
15. Neusner, *Judaism*, 270. See also Neusner's discussion of the Mishnah's division of women in *Judaism*.

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16. Shaye J. D. Cohen, *From the Maccabees to the Mishnah* (Philadelphia: Westminster Press, 1987).
17. Barry Holtz, ed., *Back to the Sources* (New York: Summit Books, 1984).

NEW YORK UNIVERSITY PRESS
New York and London

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Library of Congress Cataloging-in-Publication Data
Gender and Judaism: the transformation of tradition / edited by T. M. Rudavsky

p. cm.

Includes bibliographical references.

ISBN 0-8147-7452-0 (cloth). --ISBN 0-8147-7453-9 (paperback)

1. Women in Judaism--Congresses. 2. Sex role--Religious aspects--
Judaism--Congresses. 3. Feminism--Religious aspects--Judaism--
Congresses. 4. Jewish women--Religious life--Congresses.
5. Jewish literature--Women authors--History and criticism--
Congresses. I. Rudavsky, Tamar 1951-

BM729.W6G45 1994

296' .082--dc20

94-28518

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Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1