

# **A Prolegomenon to a Modern Orthodox Theory of Jewish Law**

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Rabbi Alan Yuter, after many years of service in the American rabbinate, went on aliya with his wife, and they live in Jerusalem. He lectures for CJCUC, Rabbi Riskin's interfaith outreach program, and and Torah Reeve, a Modern Orthodox adult education network. This article appears in issue 30 of Conversations, the journal of the Institute for Jewish Ideas and Ideals.

Modern/Open Orthodoxy has emerged as the new, bold, and dynamic trend in the United States and Israel. It synthesizes Orthodoxy's commitment to Jewish law, memory, and tradition with the social reality it happens to inhabit.

R. Mordecai Kaplan once observed that the Conservative Movement in American Judaism is no more than a convenient coalition of "traditional" Reformers and "liberal" Orthodox practitioners. Ironically, Reconstructionism's founder, who himself did not believe in prophecy, was here prophetic. The center of the American Jewish continuum could, would, and did not hold. Conservative Judaism's signature slogan, "Tradition and Change" describes its living tensions, but it is not a first principle. By its nature, "Tradition" negotiates the creative tension between the unchanging sacred Book and the pushes, pulls, and pains of an irresistible, secular present. By substituting a vague, undefined "Tradition," which changes slowly, for the eternal religious anchor called "Torah," Conservative Judaism's Jewish law was, for Kaplan, reduced to folkways, becoming "sancta," and the Torah was no longer "from Heaven," the historical expression of God's contract with Israel. The Conservative rabbinic community is now reconsidering its ban on intermarriage. The demographic market for this indefinable, and for many, indefensible social/religious communal product seems to be shrinking rapidly.

Orthodoxy, by contrast, is growing demographically and divisively. Orthodox Jews marry at a younger age, creating more stable—and larger—families than do less-observant Jews. In Israel, 25 percent of Modern or Open Orthodox and 10 percent of Hareidi Orthodox do leave the communities into which they were born. But Orthodoxy's retention rates are relatively high when compared to non-Orthodox Jewry or non-affiliating Jews. Neither the Conservative and Reform laity nor clergy enjoy Orthodoxy's retention rates among their offspring. Yet Orthodoxy's two contending streams remain rather impatient, if not unhappy, with each other. While Orthodoxy's extremes are easy to identify, Orthodoxy's center interacts with both Hareidi and Modernist Orthodox streams, albeit with an uneasy ambivalence.

Hareidi Orthodoxy proudly proclaims that it alone is Torah compliant; it points to its growing demographic numbers as well as the validating attraction of newly Hareidi "penitents," who have undergone an ideological, "conversionary" experience. This Orthodoxy regards the Torah to be divine, but is readable and understandable only by its own elite, called the "*gedolim*," i.e. the "great ones." Their human words reflect God's will in and for our time. Hareidi policy proclaims that Jewry requires taller and stouter walls in order to keep troubling ideas from intruding into its sacred precincts. Forbidding owning televisions, discouraging computers for anything but professional use, listening to and being influenced by non-Hareidi media, and limiting secular studies are accepted if not required communal norms. Compliance to these social policies is a condition of Hareidi identity. Mandatory modesty codes, "accepted" social/religious expectations, and the ever-present threat of expulsion for non-compliance all contribute to Hareidi communal cohesiveness. This cohesion demands serious commitment and comes with a heavy social cost. Without a good secular education, supporting its larger families is a daunting task.

Hareidi full-time Torah study is a spiritual and social activity but is not permitted to become a creative intellectual enterprise. Torah's true content *may not* be found in the plain, common sense, grammatical understanding of the Torah's sacred library; it may be found only in the narrative that Hareidi rabbinic leaders read into the Torah canon. Unless one is a "*godol*," a Hareidi-approved great rabbi, one does not even have the right to express a reasoned opinion or reaction to what one learns. Sinai's "Tradition" is not limited to the documented Oral Law library; it must be proclaimed by the "*godol*," whose word is Torah incarnate. This Orthodoxy is programmatically hyper-strict because its approach to Jewish law is loose-constructionist. Ever new stringencies emerge in order to enable an individual to express one's piety, validate virtuosity, and to demonstrate exactly

how religiously and socially worthy one really is.

Modern, Open, or cosmopolitan Orthodoxy also claims to follow Jewish law, albeit far less rigorously than Hareidi Orthodoxy. For this “Modern” Orthodoxy, strictness beyond the letter of the law is neither commanded nor valorized by the Law, but only serves to render Jewry more distinctly and counter-culturally “other.” Jewish law’s norms only require, forbid, and when silent on a given issue, actually authorize individual autonomy.

Like its Hareidi counterpart, Modern Orthodoxy’s commitment to Shabbat observance, including acquiring a residence near a synagogue, fosters a sense of belonging that is reinforced by Orthodox educational and social institutions. These institutions foster Jewish behaving, belonging, and generally—but not always—believing. However, Modern, Open, or cosmopolitan Orthodoxy does not erect extra stout walls and fences to keep troublesome modernity out—or to lock insiders in.

In both Israel and in the Diaspora, Modern Orthodox Jewry works for a living and its offspring are expected to master a dual—a Jewishly religious and utilitarian secular—education. In Hareidi Orthodoxy, piety is measured by culture compliance, and social status depends upon wealth, communal standing, perceived erudition, and pedigree; raw talent or work product assessment are secondary considerations. Furthermore, the Modern Orthodox educational work product is assessed quantitatively; though socially valued, piety alone is socially insufficient.

Some find the dual, i.e., secular modern and religiously Orthodox lifestyle too onerous to endure, the \$25,000 tuition per child per year is often beyond parental means, and the high housing cost of Modern Orthodox neighborhoods is problematic. Israeli Modern Orthodoxy also tends to be middle class, ritually observant but not obsessively so, fretting about providing housing for to-be-married children, and worrying that military service will not erode their children's religious identity or render them war casualties.

Hareidi education consciously and constantly reinforces its ideology and social construction of reality. Its approach to Jewish law is oracular, not textual. The Great Sage is self-proclaimed to be everybody's teacher—and as such religiously superior to those who are not Great Rabbis. He alone is the guardian of *masorah*, the undefined, not codified culture of the Hareidi Jewish street. Hareidi society penalizes and marginalizes those who question “God’s word” as mediated by the Great Sage.

In point of fact, Jewish law's actual and identifiable prescriptions and Hareidi culture norms are not the same. Talmudic law considers a woman's shame to be sufficient grounds for allowing an abortion (*Arakhin* 7b), it *requires* drafting both men *and* women in defensive Israeli wars (*Sota* 44b), yet *forbids* clapping, dancing (*Betsa* 31a), and women's wigs on the Shabbat (*Shabbat* 64b). Latter-day saintly rabbis interpret these rules into disuse while inventing new rules unimagined by the talmudic sages, like not cutting a toddler's hair until age three, discouraging "important" women from their obligatory reclining at the Passover *Seder*, forbidding women to learn Oral Torah (see, however *Tosefta Berakhot* 2:12), and disallowing the required pre-Shabbat bathing on the Shabbat eve before the 9<sup>th</sup> of Av fast. Calling these inconvenient facts to the public's attention is correctly seen as being subversive or controversial; these facts show that Hareidi Orthodoxy is a Judaism of ritually rigorous, modernity-denying, social control. The learner may not dare to understand or apply sacred texts. Any and every social act must be filtered, processed, and approved by the Hareidi rabbinic elite.

When I was serving as Rabbi of Congregation Israel in Springfield, New Jersey, I raised a question to the head of a Hareidi yeshiva that had bought a church building for use by the yeshiva. "How do you justify entering the church facility's sanctuary, as the congregation prays to the Christian hero as if to a 'god'?" I was informed that since the particular Protestant denomination does not use statues, i.e., idols, in its rites, the premises are not considered to be idolatrous. I was also told that an Israeli Hareidi *gadol* said that it was on these grounds that it is permitted to enter the church sanctuary. I suggested, somewhat subversively, that 'Avoda Zara is not only idolatry, it is any artificial, invented religion. After all, making offerings to the "spirit" of the archangel Michael (*bHullin* 40b), like praying to the Christian hero, are equally forbidden acts. My naïveté led me to "correct" a Great Sage by calling attention to an inadvertent—and embarrassing—error. One does not dare to contradict the Great Sage, because his ruling is canonical, his charismatic right to innovate unquestionable, and his leadership authority not subject to peer review because, to Hareidi ideology, the *gadol* is without review.

The same R. Moses Sofer who proclaimed that "innovation is forbidden according to Torah law" also claimed, rather inconsistently, that a popular custom may overrule a rabbinic law, like the popular Orthodox usage permitting clapping on the Shabbat (see *bBetsa* 30a). But according to Jewish law, innovation *is* permitted. Being Hareidi is not really about being *more* Orthodox, it is about being counter-culturally "other." Hareidi Orthodoxy has the right to advocate for

its agenda in the free market of ideas. But those who adopt alternative Orthodox narratives, ideologies, or agendas have a right to their positions as well. The Modern Orthodoxy advocated in this article is based upon a plain, common sense reading of the Oral Law canon, which is to be applied in a socially appropriate contemporary fashion.

Like Maimondes, Modern Orthodoxy views halakha as Law. Law is based on norms, or "ought" rules, arranged hierarchically. When Rav Ashi died (428 c.e.), the age of "*Hora'ah*," apodictic rabbinic legislation, lapsed. There are in Torah law positive, i.e., "to do," and negative, i.e., "*not* to do" rules. Torah laws have greater valence and may not (generally) be overridden by rabbinic laws, and customary practice, while binding locally, may not override biblical (like popular if anomalous forbidding the intoning of *Birkat Kohanim* in the Ashkenazi Diaspora) or rabbinic laws (*mayim aharonim* in our time). The medieval Ashkenazic claim, "The customs of Israel are Torah," is not consistent with Oral Torah Judaism. After all, Torah is the word of the Lord (Isaiah 2:3), not mere customary convention. When a legitimate custom, a custom that does not contradict higher grade rabbinic or Torah law, is accepted by all Israel (e.g., the daily evening prayers, the man's *kippa* for prayer or Torah study, the fast of Esther), these customs *then* become binding upon all Israel, just like the Talmud of Rav Ashi, which was the last Oral Law document to be accepted by all Israel.

Modern Orthodoxy has been compared to the Conservative Movement by its Hareidi detractors. However superficially similar Modern Orthodoxy and Conservative Judaism may appear to the untrained eye, there are critical differences. Although professing a commitment to "pluralism," Conservative Judaism is openly hostile to what it takes to be an arcane, sexist, Orthodoxy. Its Melton approach to adult Judaic studies is intellectually critical but ironically like Hareidi Orthodoxy, it does not allow the religion of the living community to be shaped by the official religious Jewish benchmarks memorialized in the sacred library. Non-Orthodox Judaism's social content is not determined by the canon's content, but by the demands of its dues-paying client population.

For Conservative Judaism, the tradition's mandating a practice is insufficient to render that practice mandatory for either its laity or clergy. Ultimate values are determined democratically and by communal consensus. Modern Orthodoxy submits to the claims of the law recorded in the law. In 1934, R. Mordecai Kaplan wrote that the Jewish past gets "a voice, not a veto."

Simply put, Modern Orthodoxy *is* prepared to permit what Jewish law does not forbid. As long as the Oral Torah law is not violated, changes in usage, policy, and

ritual may be considered. Other Orthodox voices identify and conflate popular usage with Sinai's law. For Modern Orthodoxy, changes in usage that do not violate Jewish law are legitimate and permitted. Statutory Oral Torah law, not the tradition of nostalgic taste, is the bar of Jewish propriety. Its married Orthodox female clergy usually cover their hair, by hat and not with a wig (see b*Shabbat* 64b), affirm family purity, reject unisex *minyanim*, or improperly serving on a rabbinical court. In Orthodoxy, rabbinic "ordination" testifies that its holder has been vetted to be halakhically knowledgeable, professionally competent, and religiously committed. In Liberal Judaism, ordination is a professional credential that has market value, but does not necessarily attest to deep Jewish erudition.

The contrasting approaches to the ordination of women illustrate how Conservatism and Modern Orthodoxy differ. Modern Orthodoxy is prepared to change usage, but not to reform, reject, or overturn Torah law. But Conservative Judaism ignores Jewish law when halakha's norms conflict with the secular, modern, ethos because the pull of secular America's values is irresistible. Conservative Judaism consciously ignored the Law regarding women counting in *minyan*, while the women in the rabbinate are all well informed Orthodox leaders who observe Jewish Law seriously, sincerely, and smartly.

Modern/Open Orthodoxy would, however, be wise to take its detractors' criticism to heart, if only to insure responsible decision making and to avoid agenda driven policies. When secular values conflict with Jewish values, which *ethos* will Modern/Open Orthodoxy adopt? The secular European/American ethos has accepted homosexuality to be morally acceptable. Every non-Orthodox Jewish stream has accepted homosexuality to be morally normative, as have liberal Protestant denominations. *Gezeirat haKatuv*, the unambiguous Torah line in the sand, does not condone male homosexual activity (Leviticus 18:22, 20:13). Modern Orthodoxy will rightly relate to homosexuals with respect, welcoming them in their congregations, protest secular anti-LGBTQ legislation, but will not and may not contradict or deny the Torah's clear mandate. It will live with this tension, as life is often untidy, inconsistent, and conflicted. But being Orthodox, the Open wing of Modern Orthodoxy accepts the "other" along with the "Torah," and leaves God to be the ultimate judge *Avot* 2:4).

"Tradition" is understood very differently by Orthodoxy's contending streams. Hareidi Orthodoxy's sociology prevents women from being "actors" in the synagogue; its benchmarks are created by inherited culture usage. But the Talmud explicitly permits women to perform acts, like leaning on the sacrificial animal, that are addressed to men (*'Eruvin* 96a, *Hagiga* 16b). "Tradition," what

one Hareidi leaning Orthodox rabbi called the “non-codified” Judaism adopted by Hareidi Orthodoxy, invests legislative power in the subjective, non-reviewable hands of the Hareidi elite. Talmudic precedent is now subject to Hareidi veto.

Maimonides maintains that the local rabbi has the jurisdictional right to rule for the community he serves, limited only by talmudic legislation. One renowned Yeshiva University rabbi has coined legal concepts called *middas haTseinius*, the modesty trait, *middas haHistasterus*, the interiority trait, and *ziyyuf haTorah*, falsifying Torah, which may be invoked by him to forbid in communal practice what is not forbidden by formal Oral Torah statute. Because these newly minted legal rules are proclaimed by the Great Sage, who claims to be guided by divine providence (*Sotah* 4b), they must be accepted as legally binding without question or review. The authority to legislate Jewish law for all Israel by apodictic decree is affirmed by Yeshiva Orthodoxy to be operative in modern times, even though this legislative power (*hora’ah*) has long since lapsed. In other words, Modern Orthodoxy’s Hareidi detractors change Jewish *law* so that their culture of *the old time religion* does not appear to change. If a practice was good enough for our ancestors, it ought to be good enough for us.

These two Orthodox Judaisms offer conflicting sources of religious authority. Hareidi Orthodoxy maintains that the Oral Law library may be reviewed and revered, but it may not be read, understood, or applied by anyone but their elite. This Orthodoxy’s Great Rabbis articulate narratives that empower them to be Orthodoxy’s singular, spiritual anchor. These rabbis own, in their view, the Torah franchise.

By contrast, Modern Orthodoxy’s rabbis openly ask what the law permits, requires, and authorizes. Like their medieval forbearers, these scholars teach, suggest, and persuade; they do not intimidate, bully, or deride. These rabbis are educational resources, not apodictic tyrants. If Orthodoxy postulates that the Torah text reflects God’s word, its advocates take pains not to misstate what the Law really requires. Holy hyperbole is no virtue and being extra strict is not a statement of personal piety or propriety.

Open/Modern Orthodoxy’s rabbis formulate an alternative narrative of Jewish life. But their benchmark is Jewish Law, not Western secularity. Respect for human dignity (*kavod haBeriyot*), good feelings (*nahat ru’ah*), social cohesion (*darkei shalom*), and doing what is right and good (*ve’Asita haYashar ve-haTov*), are all legal factors when considering how halakha ought to be applied when confronting the contemporary Jewish reality. Each Orthodoxy challenges its competitor; may “the zealotry of scribes increase wisdom” (*Bava Batra* 21a).

This Modern halakhic Orthodox Manifesto maintains that

1. Orthodox Judaism is grounded in the doctrine that God's will is encoded in the Torah sacred library, idiomatically rendered "Torah from Heaven."
2. This doctrine, "Torah from Heaven," is Judaism's legal "Basic Norm" that affirms that God is the King, Who commands that the Torah laws be obeyed. And because these Laws are no longer in Heaven (Deut. 30:11-14), they are understandable, livable, and doable in everyday life.
3. These Torah laws are subject to review and application on the basis of the hermeneutical rules which determine whether an act, a doctrine, or a policy is in fact a legitimate rule of the halakhic order.
4. "Modernity" is not stigmatized by Jewish law, which does not explicitly endorse or condemn either the political Right (which stresses law and order and the value of Tradition) or Left (as evidenced by the prophetic call for social justice and King Solomon's higher taxes, which paid for enhanced social services). Modern Orthodoxy is itself neither politically Right or Left, but is based on and biased by Torah values. Israeli Modern Orthodoxy boasts both Naftali Bennett, a religiously tolerant Orthodox political hawk, and Elazar Stern, an Orthodox advocate for Land for Peace negotiations with the Palestinian Authority. Both are Zionists and patriots.
5. Modernity's scientific method, widened intellectual openness, and technological advances are welcomed; its sexual libertarianism, the dimming of spiritual insight, and the secularity of the public square, are to be bemoaned.
6. Modern Orthodoxy affirms Zionism, the nineteenth-century nationalist movement of the Jewish people.
7. Modern Orthodoxy adopts the mindset, mood, and method of the secular academy. Jewish law does not forbid secular studies. Some very great rabbis have imbibed worldly wisdom, and the spiritual thrill of discovery outweighs the "danger" that non-sacred study might undermine religious faith. An academic reading of the Jewish literary and historical tradition provides the student with the tools for discovery; while this empowerment does undermine the Hareidi narrative, this sensibility and mindset enable Orthodox academic Torah learners to read, understand, and suggest alternative options for Orthodoxy.
8. Modern Orthodoxy enhances the status, standing, and respect for Jewish women in community life. The tradition encoded in the sacred canon trumps the "Tradition" of the popular, remembered past.

9. Hareidi and Modern Orthodox Judaism have different hidden curricula and visions of the ideal Jew. The Hareidi Jew is expected to comply with the apodictic decrees of his or her *gedolim*, and these reviewers are not subject to review. The Modern Orthodox Jew is expected to comply with the Judaism encoded in classic texts of halakha, to engage in critical thinking, and to draw on the studies of the academic world.

The Modern Orthodox rabbi is a resource, not a ruler. Since the rabbinic mission is to teach Torah, the Modern Orthodox must be steeped in the Classical Tradition while remaining aware of the challenges posed by secular reality. The rabbinic mission is not to reconstruct a replica of a remembered, nostalgic past; it is to apply Torah law appropriately in the contemporary present. In order to be a rabbinic model for the community, the rabbinic person needs to have the courage to negotiate halakhic literature without being intimidated. People who fear people have little energy left to have fear of Heaven.