

# Halakhic Thinking re: Mechitsah

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## The Low Down on the Height of the Mechitsah

### Toward Defining The Contemporary Orthodox Identity

By Alan J. Yuter

The synagogue *mechitsah*, the partition separating women from men in the Orthodox shul, has evolved over time to become *the* defining distinction between what is accepted to be authentic Orthodox Judaism that the Torah law prescribes and non-compliant, non-Orthodox communities. As with any culture, a person's actual opinions are inevitably conditioned by one's teachers and peers, rabbis and rebbes, congregations and communities, and peers and friends.<sup>[i]</sup> The polemic and hyperbole that has been applied to the synagogue *mechitsa* often leaves dissenters with the hard choice of remaining silent and compliant or as being marked as an outsider. The most efficient way to be accepted as an Orthodox Jew in good standing before God is by that person adopting an unquestioning and uncritical submission to the designated, rabbinic elite. Principled, idiosyncratic commitments are less valued than deferring to the Orthodox elite.

People often allow their personal piety to be worn on their sleeves for observers to notice. The easiest and socially inexpensive way to proclaim one's ideological orthodoxy is by denouncing those who may not conform to the culture Orthodoxy's benchmarks. Thus, lower *mechitsot*, or partitions segregating women from men in the Orthodox synagogue, may imply lower and possibly inadequate religious standards. If one is prepared to endorse a less than adequately sized partition segregating the genders in the synagogue prayer setting, one's "fear of Heaven" may also be suspect.

Authentically religious Jews look *into* their canonical books and not only to uninformed peers or people mistaken to carry canonical or statutory authority. The Orthodox Judaism that is encoded in the Oral Torah library only canonizes books; other religions often canonize people as well. Orthodoxy's currently enfranchised elite are said to possess the Holy Spirit,<sup>[ii]</sup> which bestows upon them the ability, expertise, and authority to parse the Canonical Oral Torah library, understand its message, and to articulate its normative implications, that God speaks to Jewry in their voice alone. Thus, the Great Rabbi is singularly entitled to read intuitively and knowingly between the Torah's lines but no one else has the right to read, understand, or apply the Torah Canon's actual, plain sense meaning.<sup>[iii]</sup>

There are two major approaches to Law in general and to the *Halakhah*, Jewish law, in particular. The *Legal Formalist*, or *Legal Positivist*, examines the legal systems<sup>[iv]</sup> the "ought to do" and ought *not* to do" legislated rules which are interpreted and applied but are not created by the judge. In contrast, *Legal Realism* maintains that the Law *is* made by the judges when rendering real life legal decisions.<sup>[v]</sup> While the Old Babylonian Codex Hammurabi records Hammurabi's Legal vision, his *Letters* reveal that his personal behavior did not conform to his own Code's normative benchmarks. In Old Babylonian culture, Legal Realism reigned.

A plain sense reading of the Torah seems to present a *Positive* legal order according to which God's command, "obey the norms of the Torah contract," is

the Basic Norm of Jewish Law. The Hebrew idiom for Judaism's "Basic Norm" is "*ol malchut shamayim*, the "yoke of Heaven's Kingdom," according to which God the Creator is accepted as Israel's King and Commander, as well.

Genesis 1:3 reads "And God said/issued an imperative, 'let there be light,' and there was light." The canonical Hebrew imperative, *vay-hi or*, literally "light, be[!]," is immediately followed by "*vay-hi or*, "light came into being." While the Semitic root "*amr*" usually means "say" in Biblical Hebrew, in Arabic, Aramaic, and occasionally even in Biblical Hebrew,<sup>[vi]</sup> "command" is the preferred rendering. Note that the command's fulfillment report employs the same diction as the command itself. This semantic device indicates that God the Creator is also God the Commander, and God expects exact compliance with the divine directives. When compliance takes place, God rewards the well-performing person with sanctification,<sup>[vii]</sup> or holiness,<sup>[viii]</sup> but the consequence for non-compliance with God's command is death.<sup>[ix]</sup>

Hebrew Scripture's Law requires precise adherence to the Lawgiver's actual words, as evidenced by Scripture's consistent concern for exact compliance with God's word:

13 "Now all has been heard;  
here is the conclusion of the matter:  
Fear [=hold in a state of awe and

wonder/take seriously] God and keep

His commandments,  
for this is the duty of all mankind.  
14 For God will bring every deed into

judgment, including every hidden thing,  
whether it is good or evil."<sup>[x]</sup>

From these Hebrew Scriptural witnesses, we conclude that, for Biblical theology, God the Commander “stands” at the top of the Torah’s hierarchical order of legal norms. Israel is held to account regarding its adherence to the exact, specific norms that are memorialized in the Torah’s actual words. Scripture explicitly commands vigilance when anticipating unscrupulous pretenders to legitimate legislative authority who would dare to add to or to detract from Torah Law.<sup>[xi]</sup> However, Legal Realists’ personal sense of what might be considered to be reasonable to the intellectual elite who may, on occasion cancel the legislated norm if they deem the norm to be unworthy. Legal Realists’ tend to be cultural aristocrats who in antiquity might validate their power by means of miracles—or by exploiting the art of allusion—in order to present themselves in everyday life to be the Creator’s duly ordained deputies, and in modernity as those who are able to establish what “is proper and good” in God’s eyes.<sup>[xii]</sup>

According to Positivist *Halakhah*, the statute/norm is unalterable, *unless* the given norm is revoked by a Bet Din [=rabbinical court] greater in wisdom and number than the court that issued the initial ruling<sup>[xiii]</sup> or provides for its own suspension.<sup>[xiv]</sup> Since a plain sense reading of the Written Torah document indicates that God’s words are to be taken face value, we have adopted the Positivist/Formalist position in this study. <sup>[xv]</sup> Taking the Commander’s diction as the Divine word, the *Halakhic* Positivist must pay close attention to the legal text’s lexicon, syntax, and diction when defining the norm encoded in the canonical text. Below we will examine the *mechitsah* issue from both Legal Realist and Legal Positivist perspectives. In Talmudic literature, the idiom “*mechitsah*,” or partition wall, is attested in the laws of plantings, in order to avoid mixing diverse seeds, the *sukkah* wall, and the *eruv*, the merging or enclosure of courtyards into one single residence, permitting carrying within its perimeter on Shabbat. According to Jewish law, a kosher *eruv* also requires a walled perimeter that is more enclosed than open, and the *eruv* arrangement enjoys the consent of every non-Jew and non-observant Jew residing within the *eruv*’s perimeter. There is no mention of a synagogue *mechitsah* requirement in the canonical Babylonian Talmud or related literature, the medieval Maimonidean *Yad*, or the early modern *Shulhan ‘Aruch* legal compendium. There is no textual evidence of a positive

Torah norm requiring a synagogue *mechitzah* in the Oral Torah canon. But we do know that men, women, and children heard the Torah being read in the women's section of the Temple on Yom Kippur[xvi] and on the Sukkot holiday during the *Haqhel* ritual.[xvii]

Rabbi Moshe Feinstein and others argue that the “great reform” [Hebrew, *tiqqun gadol*] made for the intermediate *Sukkot* festival day ritual of water drawing in the Temple is the “source” for the synagogue partition being viewed as a Biblical prohibition.[xviii] A formal separation of women and men was made in the Temple based on an obscure passage preserved by the Biblical Chronicler.[xix] There are three Formalist difficulties with this rendering. According to the formal principles of Jewish law, Torah law does not derive from any Biblical post-Pentateuch book,[xx] and I-II Chronicles were among the last books of Hebrew Scripture to have been composed, by all accounts.[xxi] Second, the idiom *tiqqun*, or “enactment,” is not a divinely *authorized*, but necessarily *human*, positive rabbinic law that semantically cannot be a Biblical obligation.[xxii] This difficulty was also addressed by the ultra-Orthodox R. Yom Tov Schwartz, who answered [*me'anneh*] the letters, *Iggarot*, or responsa, of R. Feinstein.[xxiii] Third, Jewish Law does not require basins, animal or grain sacrifices, or necessarily raised women sections in contemporary Orthodox synagogues. Oral Law norms alone provide the instances in which the synagogue functions as a miniature Temple. And men *were* welcome in the Temple's women's section on occasion, as noted above.

R. Feinstein was scandalized with mixed gender seating during synagogue based prayer, and he claimed that this gender mixing and contact, even if unintentional, violates a *presumed* Torah norm prohibiting levity or *qallut rosh*. [xxiv] According to the Talmud, one may not engage in *qallut rosh* in a synagogue, indicating that the entire category is conventional but not covenantal.[xxv] I do not recall that avoiding *qallut rosh* was ever viewed as a Pentateuchal obligation. Nevertheless, R. Feinstein is unwavering regarding the synagogue *mechitzah* in spite of the fact that it goes unmentioned in the Oral Torah canon, but he does not object to eating in *shteibels*, or small chapels of Hassidic prayer.

By defining these small *synagogues* as *batei midrash*, dedicated study rooms, the leniency of allowing eating in a *bet midrash* is somehow transferred to the small chapel. While the Talmud does not mention, much less forbid, mixed gender settings per se to be *qallut rosh*, eating in the synagogue is most assuredly forbidden as an instance of *qallut rosh*.[\[xxvi\]](#) R. Feinstein's vehemence has carried the day in Orthodox culture, and the *mechitsah* has become a defining feature of institutional Orthodoxy.

A close reading of R. Feinstein's Introduction to *Iggarot Moshe* reveals the mindset of a Legal Realist, and *not* of a Legal Positivist. While affirming a perfect Torah law *de jure* to be a Positive legal order, R. Feinstein observes that a perfect Torah cannot be responsibly applied literally, perfectly, or at face value in an imperfect, human, social reality. R. Feinstein hereby adopts the Legal Realist perspective whereby the judge who is a Great Torah sage is authorized, obliged, and able to fill Orthodoxy's leadership vacuum, rule on pressing matters of law, and to determine appropriate policy for the Orthodox community in its immediate current culture context. His concern for the dire dangers challenging Orthodoxy suggest that in emergency situations and when called for, the Law itself may be suspended.[\[xxvii\]](#) Realizing the danger of invoking the Torah's emergency clause by suspending the Law in a fashion that may appear to be compulsive, cavalier, and capricious, the Positivist Maimonides immediately cautions the legal decisor regarding danger of the slippery slope should this norm be invoked often or irresponsibly.[\[xxviii\]](#)

As a Great Sage to whom dicey questions were so often directed, R. Feinstein not only had to rule correctly, as the religious authority of his community, he was obliged to lead responsibly as well. He could not and did not consider the positive statute alone; he took into account the social contexts, tradeoffs, consequences, and implications of his decisions as they are applied in the real world. He also had to rule wisely and convincingly,[\[xxix\]](#) which sometimes requires compromise and trade-offs. After all, he did not have a police force to enforce his rulings. His moral authority was all that he had in his possession, and that he needed to do his



job.

Legal Positivists might not be sufficiently sensitive to challenges to Orthodox social culture, communal expectations or policy, because they focus upon *Halakhah's* explicit, recorded norms. Mixed-gender synagogue prayer was *the* issue that identified R. Feinstein as the outstanding Orthodox Legal Realist of his time. On one hand, mixed gender synagogue seating profoundly offended the community's sensibilities, but to date there has been no success at all in identifying a Canonical, Oral Torah document that reports this assumed, positive legal norm.

R. Avrohom Gordimer, who is both a lawyer and an Orthodox activist, explains how Orthodoxy's living culture, or "Tradition," also known as "*Masorah*," really works. His words read like a Legal Realist manifesto:

*"Mesorah reflects enduring and traditional practices that are based on solid halachic and/or hashkafic (ideological and attitudinal) considerations, when such considerations are not formally codified or patently evident. In the case of synagogue ornamentation, the synagogue is classified as a Mikdash Me'at, a 'Miniature Beis Ha-Mikdash' (Holy Temple), and, as such, must reflect the highest degree of holiness and dignity. Anything that hints at Kalus Rosh (secular levity or amusement) is disallowed. This tradition and sentiment, which is based on halachic and hashkafic concepts yet is not codified specifically in terms of the actual adornment of the synagogue, forms the Mesorah as to the appropriate physical decor of a shul (and precludes introducing superhero or sports themes, as appealing and "Jewish" as they may seem)."*[\[xxx\]](#)

Orthodox Legal Realism elevates and reifies habit, appropriateness, expectations, and mimetic usage into actual law, and significantly, it also affords its own rabbinic elite immunity from review when their decisions differ from the "official religion," what is taken to be a divinely inspired Oral Torah mandate. According to this approach, rational discussion assumes that the question is in fact subject to rational discourse and public review. But Gordimer's "Tradition" is a social or taste culture, not the true legal order prescribed by the Written and Oral Torah library.[\[xxxi\]](#) This Judaism maintains that the "customs of Israel are Torah," [\[xxxii\]](#) but Torah is "the word of the Lord,"[\[xxxiii\]](#) and social customs are clearly

not divine mandates. Since social customs are not the word of the Lord, but are accepted as distinctly human, social constructs, customs cannot generate the sanctity of a divine order appropriately fulfilled.[\[xxxiv\]](#) Keenly aware not only of the Hartian “rules of obligation,” i.e. the *Halakhah*’s prescriptive norms, the Legal Positivist is also mindful of the “rules of recognition,” the rules that confirm a given norm’s validity. As opposed to Rabbis Feinstein and Gordimer, the Maimonidean Positivist understands “Tradition” to be the Oral Torah transmission from Moses to R. Ashi, with whom *hora’ah*, the authority to legislate apodictic legislation, comes to an end.[\[xxxv\]](#) According to this school of Orthodox thought, “Tradition” is the publicly vetted Oral Torah legal order transmitted from one generation’s *Bet Din ha-Gadol* to the next.[\[xxxvi\]](#) It is what Israel ought to do according to the Torah covenant; it is not necessarily what Israel happens to do in everyday life.

Mixed gender synagogue seating violates [a] the traditional, historical practice of Jewry until the 19<sup>th</sup> Century, [b] traditional expectations of living continuity, and [c] its implementation often leads to future communal turbulence. Since family seating presented a mortal threat to Orthodox synagogue expectations, membership, theology, and leadership models, R. Feinstein the community leader formulated his substantive political/theological agenda, the goal of which is the preservation of *Yiddishkeit*, the living Eastern European, traditional culture guided by Great Rabbis whose Torah learning and principled piety provided the source of their authority and power. In Eastern Europe, Yiddish was that Jewish language by which they proclaimed that the local Jewish population was neither Russian nor Polish by nationality.[\[xxxvii\]](#) R. Feinstein strained to minimize the social dislocation caused by the migrations, with *Yiddishkeit* culture providing the social glue that sustains “traditional” Jewish life. This agenda may be gleaned from his many responsa:



R. Feinstein strives to preserve Orthodox social culture as it was preserved by Jewry's ancestors. Compliance with contemporary rabbinic directives is a much more valued disposition than the creative individualism of independent minds.

Changes in Jewish culture are usually socially disruptive because they foster assimilation and undermine current religious standards and commitments. The Orthodox Legal Realist "Tradition of Israel" is the real life culture—as well as Law—of the *Haredi* Orthodox elite.

No change in usage or policy may be implemented without the approval of the Great Sages.

Orthodox Judaism must resist any, all, and every deviation that threatens the integrity of Orthodoxy's *Halakhah*, ethos, and ideological narrative. Pretenders and competitors to Orthodoxy are so religiously illegitimate that it is even forbidden to officially communicate with them.

Mixed gender prayer may choreograph the unorthodox notion that God "must" agree to the radical egalitarianism of the secular, intellectual elite. For the unorthodox rabbinic elite, "God" is usually a concept, but is neither the Creator nor Commander of the cosmos. Given the emergency principle cited above, [\[xxxviii\]](#) R. Feinstein's Legal Realism might actually be compatible with Legal Formalism because the emergency principle allows rabbinic discretion, and even law suspension, during emergencies.[\[xxxix\]](#) Extreme threats on occasion may require extreme responses. Liberal Jewish ideologies do not, with few exceptions, affirm a God Who commands, makes distinctions between individuals, and Who holds humankind to account for what it does. Mixed gender "prayer" violates the *Yiddishkeit* religious ethos and must be regarded and resisted as a counterfeit cult.

Rabbi Joseph B. Soloveitchik argues that the synagogue gender separation is a Biblical requirement and the absence of this separation violates the rule of “thou shalt not see a matter of nakedness.” [xli] He also declares that the *mechitsah* must be “attributed” to an uncited, unidentified rabbinic enactment. In order to convincingly stress the “Biblical” nature of the separate seating in the synagogue requirement, R. Soloveitchik appropriately cites a Torah verse to justify his claim. [xli] But there are two problems with this assertion. Rabbis functioning after the Talmud came to closure simply do not possess the *Halakhic* authority, jurisdiction, or standing to derive apodictic laws from Biblical texts.[xlii] Such claims also require the approval of the Supreme Court of Israel, the *Bet Din ha-Gadol*. As noted above, the juridic power to create or legislate apodictic rabbinic norms has sadly lapsed in our day. And the Torah does not provide for oracular legal promulgation,[xliii] at least for the Legal Positivist. Since the Talmud does not explicitly claim that mixed seating violates Biblical law, the claim that it does is problematic, at best. A learned colleague suggested that R. Soloveitchik “must” be referring to Maimonides, Laws of *Shema* 15:3, which disallows praying in the presence of “nakedness,” the external sex organs, or excrement. Jewish law only requires that women cover those body parts that by social convention are covered.[xliv] Simply put, a woman may not dress provocatively. But *if* women are properly clad, why would mixed synagogue seating be forbidden according to Torah law? R. Soloveitchik actually allowed mixed gender classes at his Maimonides Day School for Torah study, which like prayer, may not be performed in the immediate presence of either nakedness or excrement. And since classroom furniture is more exposing than synagogue pews, there is greater risk of visual impropriety in the day school classroom than in the synagogue sanctuary. The assertion that one may not fulfill the *shofar* requirement in a mixed seating synagogue setting is anomalous because a ritual slaughterer who slaughters while stark naked has acted improperly, his act of slaughtering is not disqualified either by the absence of the slaughtering benediction or by his lack of clothes.[xlv] Perhaps R. Soloveitchik attaches the protocols of prayer to the *shofar* blast. If the *shofar* is a prayer without words,[xlvi] then the *shofar* rite should be performed with the same solemnity, and protocol, as prayer.

R. Soloveitchik's imputation of the *mechitsah* requirement to a Rabbinic decree is a similarly challenging claim. If a proposed norm is not memorialized by and recorded in the Oral Torah canon for citation, it is simply is not a valid norm. The claim that a restriction exists by conception or imputation but without citation conflicts with Oral Torah principle that the absence of evidence may not be construed to be evidence of absence.[\[xlvi\]](#) On one hand, the synagogue partition "requirement" does not appear in any extant Talmudic text and it is also unattested in the classical legal compendia. On the other hand, the Tosafist report [\[xlviii\]](#) that the partition may be erected on the Shabbat for "conventional modesty" is evidence [a] that *mechitsot* were part medieval Jewry's religious inventory, [b] the *mechitsah* institution is neither Biblical, as argued by R. Feinstein, nor Rabbinic, as proposed by R. Soloveitchik. While the classical Rabbinic canon seems to be silent regarding mandatory gender separation during communal prayer, the [c] historical development of gender separation for formal communal events yields a very proper, appropriate policy **the function of which** is to preemptively avoid 'erva, or sexual improprieties. After all, a practice that is adopted by all of Torah compliant Jewry does become binding Jewish law, [\[xlix\]](#) and on this ground the *mechitzah* is mandatory.

Rabbis Soloveitchik and Feinstein may have thought that the *mechitsah* message defines a distinct Orthodox identity in opposition to the egalitarian radicalism of the non-Orthodox streams, which reject the God Who commands and makes distinctions.[\[1\]](#) Since homosexuality has been accepted to be "normative" for every non-*Halakhic* stream in Jewish life, the Orthodox Rabbinic fears were actually prophetic and their emergency-driven *Halakhic* hyperbole aimed—in retrospect successfully—in protecting their laity's thick Orthodox culture.

The *mechitsah* issue has had a life of its own within Orthodoxy. In a taped lecture, R. Isochor Frand, a teacher at Baltimore's Ner Israel Yeshiva, contrasts R. Feinstein's relatively "liberal" position to the more rigorously strict Hungarian position. But Frand neither addresses nor cites R. Soloveitchik's consistent position, that the statutory *mechitsah* height is 10 handbreadths, or 40," which is

also the required height of the *Sukkah* and *eruv* wall, as well. In other words, once a wall is required, the Oral Torah definition of a wall being 40” long of necessity applies. Protective rabbinic extensions of, or fences around, Torah law are designed to prevent the community from sinning,<sup>[li]</sup> unwittingly or accidentally. When Nadav and Avihu invented an invalid, unauthorized cultic rite—they raised a “foreign” fire on the Tabernacle altar, which God did not command them to present, and lost their lives because they dared to intuit how to approach the Lord’s sacred Presence.<sup>[lii]</sup> The Torah insists that one may neither add to nor subtract from the Law, even if one does possess oracular powers.<sup>[liii]</sup> According to Jewish Law, the 40” partition rises to the sky, following the rabbinic rule of *gud asiq*. By claiming that the synagogue partition serves to implement the gender segregation that prevents levity and inappropriate license [R. Feinstein], or to avoid visual impropriety [R. Soloveitchik], Great Rabbis’ instincts, intuitions, and Torah informed internalized sense of propriety have assumed *post facto* *Halakhic* validity, and are part of the Legal Realist’s toolbox.

*bQiddushin* 81a does report that *ad hoc* partitions were occasionally erected to prevent intergender immodesties. But the claim that the synagogue gender partition *originates* as a duly legislated Oral Torah norm cannot be made on the basis of the currently available textual evidence. R. Chaim Navon echoes our finding:

“What about a *mechitza* in the synagogue itself? Here the solid, unequivocal and consistent custom in all Jewish communities is that there should be a *mechitza* in the synagogue during prayer times. Jewish prayer is conducted in the framework of total separation between men and women. No halakhic authority challenges the obligation to have a *mechitza*. Nevertheless, it is not at all clear that this practice has an unequivocal halakhic foundation.<sup>[liv]</sup>

In my view, the gender separation for communal Jewish prayer is an evolved, after-the-fact normative obligation. When asked at my pre-employment Baltimore B’nai Israel interview why I insisted on maintaining the *mechitsah* in the sanctuary, I responded that

“my personal work product requires gender segregation for shul based prayer. I am unable to do my job, that is serve a *Halakhic community*, without it. Without the *mechitsah* in place, I am unable to be a believable advocate for Torah because I would have forfeited my own membership in the community of the committed. I am unable to sell a congregational community to prospective members as a social and spiritual home that did not segregate the genders, because the *mechitsah* reminds that segment of Jewry that would consider my work product and mission appropriate, that men and women *are* different, distinctions individuate every person into a unique carrier of God’s image, and protocols are always in place to remind Jewry that sexual activity is proper only with one’s spouse, in a state of ritual purity and sanctity.”

Just because there is no clear canonical source of obligation for the *mechitsa* does not necessarily mean that the *mechitsa* should be removed. The synagogue *mechitsa* reminds Jewry what is unique to the Torah’s religious narrative:

God created both animal and vegetable life in male and female types.  
There is both order and meaning in Creation.

God created the human animal in the Divine image, “male and female [He] created them.”<sup>[iv]</sup> While the genders are distinct, the Divine image inheres equally in both.

Scripture commends and commands that the genders relate to each other in sanctity and with restraint. In a secular age in which many assume that there is neither Judge nor judgment, people crave pleasure now and they do not want to wait, where Naturalism proclaims that transcendence is a myth, free will—and personal accountability—an illusion,<sup>[vi]</sup> the *mechitsa* choreographs a robust, contrarian narrative to modernity’s naturalistic secularism. The God Who created the cosmos by distinguishing between light and dark, heaven and earth, solid land and liquid seas, is also the same God Who commands humankind to holy.

Rashi sees sexual restraint as the instrument by which holiness is generated.<sup>[vii]</sup> Maimonides’ Book of Holiness deals with the laws regarding sex and food, that is how Jews ought to respond to their basic human drives. By reminding Jewry that there is a Judge and

judgment, there are objects and behaviors that are forbidden by God, and others that are permitted. In my view, a tasteful *mechitsa* choreographs these overarching values.

This summary only represents my view, apologetic, and Jewish construction of reality, as a Legal Positivist. Most Orthodox rabbis are Legal Realists. R. Feinstein's *mechitsa* responsa, when read from a Legal Positivist perspective, are problematic. But in his Introduction to *Iggerot Moshe*, R. Feinstein concedes that it is impossible to apply the pure Torah law in real life. When popular Orthodox practice conflicts with Oral Torah norms, R. Feinstein will defend popular practice against what appears to be an unambiguous Oral Torah directive. For example, He permits standing for the Ten Commandments<sup>[lviii]</sup> and clapping and dancing on holy days,<sup>[lix]</sup> but will not forbid smoking cigarettes because otherwise pious Jews and Great Rabbis smoke.<sup>[lx]</sup> I am unaware of a rule of recognition that claims that if everyone does a forbidden act, the act somehow becomes permitted.<sup>[lxi]</sup> The sacred community and its rabbinic elite are *de facto* sources of law in Orthodox Legal Realism. Clarifying R. Soloveitchik's "two traditions,"<sup>[lxii]</sup> R. Avrohom Gordimer<sup>[lxiii]</sup> affirms that in addition to the recorded, Positive Oral law norms, Orthodox *Yiddishkeit* culture is a second, also unwritten Oral Torah, compliance with which is mandatory and is not subject to review or challenge. This popular culture is R. Soloveitchik's "second type of Tradition."<sup>[lxiv]</sup> His "first type of Tradition" is Maimonides' Legal Positivism. For Maimonides and the Legal Positivists, this is the *only normative* Jewish Tradition. "Two tradition Orthodoxy" affirms that the "customs of Israel are [also] Torah" understands Torah to be revealed in the life of the sacred community as well as in the sacred library. According to this Orthodoxy, the *mechitsa* reflects the unwritten Oral Torah according to which Great Rabbis are able to intuit as they promulgate law as Legal Realists, creating law for a living community. Because Maimonides disapproved of adding *piyyutim* [liturgical poetry] to the prescribed, formal prayers,<sup>[lxv]</sup> R. Soloveitchik does *not* regard Maimonides to be a *Halakhic* man,<sup>[lxvi]</sup> precisely because Maimonides does not accept this second type of Tradition to be normative.



*Halakhic* Legal Positivism observes

that lacking an explicit norm in the Oral Torah that establishes the synagogue *mechitsa* is a requirement, with some evidence that the original modesty *mechitsa* was an *ad hoc* response to situational intergender impropriety, it must nevertheless be maintained because it was a practice accepted by all Israel.

Modern Orthodox circles prefer the “letter of the law” Legal Positivist position because this point of view focuses upon legislated norms but not the habits, folkways, and conventions. As long as the Law is fulfilled, non-Jewish cultures, ideas, and interests may be explored, and if found to be compatible with Torah, they may even be adopted.<sup>[lxvii]</sup> Modern Orthodoxy maintains that whatever is not forbidden by formal Jewish law is permitted, carving out a social space for legitimate Orthodox autonomy.

For this version of Orthodoxy, Torah is an accessible, readable, object/*heftsa* documentary trove which contains norms that command, forbid, and when silent permit and authorize autonomous behavior, nurturing, fostering, and cultivating a citizen who is able to assess the communal elite fairly, generously, and honestly.

*Halakhic* Legal Realism transfers the power of norm creation from the *object* /*heftsa* of the canonical *text* to the *person/gavra* of the rabbinical *judge*.

Jewish Legal Realism from the time of the Tosafists has proclaimed that the “customs of Israel [are considered to be]

Torah” which, like Oral Torah legislation, must be accepted as if they too were the “word of the Lord.”

Jewish Legal Realists are less bound by the canonized statute than they are by their own intuitive sense of *Halakhic* and social propriety. Conflicts between the canonized Oral Torah norm and the accepted community practice are often resolved by deferring to the community’s present sense of propriety.

Religious Legal Realists’ rulings are not usually subject to review, because [a] their spokespeople often speak in a prophetic or divine voice,<sup>[lxviii]</sup> [b] with dissent derided as improper. <sup>[lxix]</sup> Jewish Law assumes that *Halakhic* mistakes are not heresies but errors,<sup>[lxx]</sup> because people are supposed to be judged generously, with the benefit of doubt. <sup>[lxxi]</sup> Great Rabbis rarely invoke legal theory, because their authority derives more from Max Weber’s traditional and charismatic leadership models than from reason. Appeals to reason may be assessed and challenged,<sup>[lxxii]</sup> which is not the case for traditional and charismatic leadership. While Raabad follows the opinion of the individual he deems to be the greater rabbi, Maimonides, anticipating Weber, accepts the most compelling, rational claim, based on the facts and the logic of the case.<sup>[lxxiii]</sup> When first dealing with the *mechitsa* issue over 40 years ago,<sup>[lxxiv]</sup> and reading the data as a Legal Positivist, I discovered that non-Orthodox thinkers are informed but not obliged by the Oral Torah Law. I also realized that institutional Orthodoxy is not as *Halakhically* consistent as one would expect. Torah cannot be both *minhag Yisrael*, what Jews happen to do, and “the word of the Lord,” or what Jews ought to do. A Legal Realist who is guided by intuition, who believes that Israel received a virtually inerrant mimetic culture that is the contemporary expression of God’s will, would regard the synagogue *mechitsa* to be an embodiment of a Torah ethos. But a Legal Positivist defines Torah inductively by exposing the Torah polity’s ethos that is created by the *Halakhic* norms.

If one adopts Legal Realism, the Law is always able to be responsive, because proceeds from the judge rather than from the legislature it; and if one adopts Legal Positivism, one is able to guide one's actions based on public information and expectations. The Positivist judge is an umpire, applying but not daring to create law. Orthodox Legal Realists have no patience the Positivist's relentless focus on the statute, norm, and rule. They have determined that Orthodoxy requires the synagogue *mechitsa* and they assign an appropriate valence to that requirement. The Positivist might argue that while there is no clear norm requiring the synagogue *mechitzah* and there is even some *reasonable* evidence, cited above, that there never was such a rule requiring the *mechitsa*. Culture aristocrat that he/she is, the Legal Realist will not allow the naked letter of the law to subvert the practice that elite presumes to be right and good. Note well that in most political arenas, the Positivist is the reactionary/conservative and the Realist is the radical/liberal. This is *not* the case for contemporary Orthodoxy. Orthodox modernists *are* bound by the Positive Jewish law, but not by nostalgia, habits, or folkways. The Oral Law does not forbid all assimilation; it only forbids what it explicitly forbids by formal norm. And since neither Maimonides nor the Talmud speak of a second, undocumented "tradition" that conflates what Orthodox Jewry happens to do with what it is obliged by its Torah Law to do, Orthodox Legal Positivists will not necessarily be bound by this undocumented, and unvetted, "tradition."

The canonical Tradition rules that for a *Milhemet mitsvah*, a war fought for the security of the Jewish land, people, or state, everyone, even the bride and groom, are conscripted.<sup>[lxxv]</sup> The *Hazon Ish* disagreed vehemently with this Oral Torah norm,<sup>[lxxvi]</sup> objecting to women's military service on moral, or cultural grounds. But he does not offer a legal argument. Instead, he appeals to the immortality of coercion and the sexual license associated with military life.<sup>[lxxvii]</sup> Acutely aware of the tension between Orthodox Jewish law and current Orthodox cultural sensibilities and norms, R. Alfred Cohen observes:

"At all times, authentic Jewish leadership is not constricted by the niceties of academic precedent but acts from a broader and deeper appreciation of halachic norms, which may take precedence over considerations. We also have to realize that rabbis employ a variety of methods in arriving at a Halachic conclusion, so that at times there is a certain anomaly in their conclusions."<sup>[lxxviii]</sup>

Cohen concedes that God's word, as it appears in the Canon, does not always reflect w

[i] Maimonides, *De'ot* 6:1.

[ii] See Bernard Weinberger, "The Role of the Gedolim," *The Jewish Observer* (October 1963), p. 6. This author suggests that only truly holy people are capable of appreciating—and understanding—Torah's holy texts. In other words, unless one is vetted to be a "Great Rabbi," or *gadol*, one is not entitled even to suggest an opinion, because

such a person is probably not guided by the "Holy Spirit."

[iv] I prefer Hans Kelsen, *Pure Theory of Law*, trld. M. Knight (Berkeley, Los Angeles, and Landon: University of California Press, 1967).

[v] [https://archive.org/details/bramblebushonour0000llew\\_k3l9/page/n1/mode/1up](https://archive.org/details/bramblebushonour0000llew_k3l9/page/n1/mode/1up) and <https://la.utexas.edu/users/jmciver/357L/BrambleBush.PDF>.

[vi] As witnessed by Psalms 33:9. When Scripture reads: "*Va-yomer Adonai el Moshe leymor* [as per Exodus 4:4, 21, and elsewhere, the root *amr* should be understood as "command." In most instances *leymor*, usually rendered "as follows" or "saying," will precede an imperative verb.

[vii] Numbers 15:40.

[viii] "Holiness" seems to be divine energy. See the parallelism of Psalms 150:1 [*qodsho* parallels and defined by *'uzzo*].

[ix] Especially Genesis 2:17 and Deuteronomy 30:17.

[x] Ecclesiastes 12:13-14.

Deuteronomy 13:1-5.

[xii] See Deuteronomy 6:18. In his commentary to this verse, Nahmanides first explains that people ought to orient themselves to God's point of view, which is the Legal Positivist perspective. But for Nahmanides, being "proper and good" carries a meta-*Halakhic* valence, because the Biblical instances of being "proper and good" are not exhaustive, making the Legal Realist judge the Legal Realist judge the arbitrator of propriety. In his introduction to Genesis, Nahmanides claims that the Torah's letter may be organized differently. While this claim is compatible with Legal Realism, because it renders its meaning indeterminate, it clashes sharply with Maimonides, *Eight Chapters* "this Torah will never undergo change."

[xiii] b*Megillah* 2a, b*Mo'ed Qatan* 3b, b*Gittin* 36b, b'*Avodah Zara* 7a and 36a.

[xiv] Like b*Berachot* 19b, the laws regarding preserving human dignity.

[xv] b*Betsa* 36b unambiguously disallows handclapping, thigh slapping, and dancing on Jewish holy days. At *Shulhan 'Aruch* OH 339:3, Maran Karo duly records the Oral Torah's restrictive norm, as befits a Legal Positivist. However, R. Isserles the Legal Realist first argues that today, i.e. in his own

contemporary times,”we allow people to do these acts and to sin unintentionally.” In other words, these acts are tolerated but are not approved. His second opinion, that the law need not be nullified by a *Bet Din ha-Gadol*, because the reason that motivated the legislation, had lapsed. R. Isserles apparently believes that the post-Talmudic Great Rabbi, as evidenced here, may override Oral Torah norms. The Legal Positivist Maran Joseph Karo simply records the norm as it is legislated, while Rabbi Isserles, the Legal Realist [a] justified the integrity of his community regarding its non-compliance with the higher grade Oral Torah norm, [b] rejects or ignores Talmudic law when that law appears to be arcane or incompatible with the community’s sense of propriety. Maran Karo merely memorializes the norm encoded in the canon; R. Isserles on occasion creates the Law. At his Introduction to *Darkei Moshe*, R. Isserles concedes that he takes the Oral Torah norm into account as he strives to justify popular culture, even against the Canonical library’s actual norms. Also note that for R. Isserles, charisma is attached to the great rabbinic personality, who is authorized, as with holy day clapping and dancing, to allow for dispensation,

[xvi] *bYoma* 69a-b.

[xvii] *bSotah* 41a.

[xviii] *bSukkah* 51b. See also R. Moshe Feinstein, *Iggerot Moshe*, *Orah Hayyim* 1:39.

[xix] I Chronicles 28:19.

[xx].*bHagiga* 19b.

[xxi] H.L.A. Hart’s “rules of recognition” determine whether a norm or legal claim is valid. At *The Concept of Law* (Oxford, 1961), p. 99, Hart explains that the “rules of recognition” determine what rules of obligation, or norms, are indeed part of the given legal order. For Judaism’s legal order, one must demonstrate that a rule is “recognized” as a norm within the order if one wishes to assign a legal valence to that norm.

[xxii] See Deuteronomy 17:8-13 for the Written Torah’s authorizing of the Oral Torah’s rabbinic power to legislate for all Israel, which is localized in the *Bet Din ha-Gadol*, the *Halakhic* supreme court. “Enactments” [*taqanoṭ*] are positive, i.e. “to do” rabbinic norms. Maimonides, Introduction to the *Yad* compendium.



[xxiii] Yom Tov Schwartz, *Me'anneh la-Iggerot* (New York, 1964), pp.31-42. This Haredi voice objected to many of R. Feinstein opinions, which he believed was too accommodating to secular American culture. The word "*me'anneh*," literally an "answer," assumes a polemical tone because its use of the intensive *pi'el* conjugation signifies a thematic disapproval and should be best rendered "retort."

[xxiv] b*Megillah* 28a.

[xxv] When levity took place, then the *mechitsah* was installed. b*Sukkah* 51b.

[xxvi] b*Megillah* 28a.

[xxvii] Maimonides, *Mamrim* 2:4.

[xxviii] *Ibid.* 2:5.

[xxix] Introduction to *Iggerot Moshe*, *Orah Hayyim*, vol.1

[xxx] Avrohom Godimer, <https://cross-currents.com/2015/11/16/what-is-mesorah-tradition-%D7%9E%D7%90%D7%99-%D7%9E%D7%A1%D7%95%D7%A8%D7%94/>.

[xxxi][xxxi][xxxi][xxxi][xxxi] Hebrew Scripture maintains that there is no individual who is exempt from the law [Ecclesiastes 12:13-4], and there is no one who does not sin [Ecclesiastes 7:20]. The Torah puts the Head Priest [Leviticus 4:3-12], at head of the Israelite polity [Leviticus 4:22], or the Israelite polity itself [Leviticus 4:13] on notice that they do not possess sovereign immunity. Abraham questioned God's decision to destroy Sodom and 'Amorah [Genesis 18:23], and Moses challenged God's apparent lack of proportion in meting out punishment, "one man [=Qorah] sins and You are in frothy rage regarding the people [Numbers 16:22]?" The monarchs of ancient Israel were regularly held to account for their murderous abuse of power. II Samuel 12:7 describes the Prophet Nathan holding David to account for the death Uriah and I Kings 21:18 reports Elijah's sarcastic rebuff of

Ahab, “have not committed murder and also taken possession as the heir to deceased’s estate?” My expanded translation reflects an exegetic unpacking of this very thick text.

[xxxii] Prof. Israel Moshe Ta Shma discovered this idiom’s first occurrence to be at the end of the 12<sup>th</sup> Century, *Minhag Ashkenaz Qadmon* (Jerusalem: Magnes, 1994), p. 27, and boldly calls the reader’s attention to the fact that medieval Ashkenazi Judaism’s approach to communal custom is inconsistent with Oral Torah jurisprudence. But the medieval Ashkenazi evolved popular communal practice into binding rabbinic Law, which is echoed in Gordimer’s sense of “Tradition.”

[xxxiii] Isaiah 2:3.

[xxxiv] see <https://www.etzion.org.il/he/philosophy/great-thinkers/rambam/%D7%91%D7%A8%D7%9B%D7%94-%D7%A2%D7%9C-%D7%9E%D7%A0%D7%94%D7%92> and <https://www.etzion.org.il/he/philosophy/great-thinkers/rambam/%D7%91%D7%A8%D7%9B%D7%94-%D7%A2%D7%9C-%D7%9E%D7%A0%D7%94%D7%92>.

[xxxv] R. Soloveitchik believes that *Halakhic* authority is charismatic. See my “The Nuanced Ambiguities of R. Joseph B. Soloveitchik’s Thought,” A Review Essay of Dov Schwartz, *Religion or Halakha: the Philosophy of Rabbi Joseph B. Soloveitchik*, trans. Batya Stein (Leiden and Boston: Brill, 2007) *Review of Rabbinic Judaism* 12.2 (2009), pp. 232-233, notes 13 and 14. At “*Shenei Sugei Masoret* [two types of tradition], in *Shiurim le-Zeicher Abba Mori* (Jerusalem, 1993), reveal the two very distinct versions of Orthodox culture outlined above, the “tradition” of inherited culture” and the Great Tradition that is encoded in the canon, outlined in Maimonides introduction to the *Yad*.. The preference of both R. Soloveitchik and his son, Prof. Haym Soloveitchik, “Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy,” in *Tradition* 28:4 (Summer, 1994), is for the primacy of the second sense of Tradition, which is mimetic usage, the “Tradition” endorsed by Gordimer, cited above. Once unpacked, these essays reveal two very distinct versions of Orthodox culture, the “tradition” of inherited culture” and the Great Tradition encoded in the canon. I suspect that Prof Haym Soloveitchik’s use of the “reconstruction” idiom was both boldly chosen and deliciously subversive. He regularly calls attention to the disparities between that “orthodox” religion, the “Tradition” of the Oral Torah library and the *Yiddishkeit* mimetic street culture, which may now be understood as a civilization. While the Legal Realist looks to how the Law’s is put into the practice by the community of the committed, the Legal Positivist will judge the community based upon the canonical benchmarks, the legislated norms of the legal order. His M.A. thesis, on medieval Ashkenazi leniencies

regarding non-kosher wine, and his Ph.D. dissertation on usury, focus specifically on the fact that this Orthodoxy waived canonical restrictions in order to earn a livelihood.

[xxxvi] Maimonides, Introduction to the *Yad*.

[xxxvii] Ironically, there is no *Halakhic* obligation to speak in Yiddish. But there most assuredly is a legal obligation to converse in Hebrew. See *Sifre* to Deuteronomy 46. Most Eastern European Orthodox rabbis viewed Yiddish as a Jewish vernacular, and did not insist upon Hebrew language instruction. A Legal Positivist, if duly competent, would provide Torah instruction in Hebrew, the “holiness” language.

[xxxviii] Maimonides, *Mamrim* 2:4.

[xxxix] **See** my *Hora’at Sha’ah*: The Emergency Principle in Jewish Law and a Contemporary Application, “*Jewish Political Studies Review* 13:3-4 (Fall 2001), pp. 3-39.

[xl] Deuteronomy 23:15.

[xli] See Baruch Litwin, *The Sanctity of the Synagogue* (New York, Jerusalem, Cleveland: Spero Foundation, 1959), pp. 139-141.

[xlii] *bBava Metsi’a* 86a.

[xliii] Deuteronomy 30:11-12.

[xliv] See R. Mordecai Eliahu, <https://harav.org/books/darcitaara-25/>. "Nakedness" in this context refers to female body parts, that are covered by clothing, either. If t

[xlv] *Shulhan 'Aruch Yoreh De'ah* 1:10.

[xlv] Arnold Lustiger, summarizer and annotator, *Before Hashem You Shall be Purified: Rabbi Joseph B. Soloveitchik on the Days of Awe* (Edison, N.J.: Ohr Publishing 1998), p. 21.

[xlvii] "lo ra'inu eino ra'ayah," *mEduyyot* 2:2. See also also Maran Karo's discussion at *Bet Yosef, Yoreh De'ah* 1:1, who makes this positivist argument most forcibly, convincingly, and eloquently.

[xlviii] *Tosafot* to *bShabbat* 125b, s.v. *ha-kol modim*, indicates, at least according to *Tosafot*, the *mechitsah* apparently is not a formal, legal obligation.

[xlix] A custom accepted by all Israel is binding, like the Babylonian Talmud, became because it was accepted by all Israel. Maimonides, *Introduction to the Yad compendium*. Other examples of this phenomenon are the fasts of Esther and the Firstborn and the male head covering for prayer.

[i] The Hebrew *Havdalah* prayer, which marks the passage decent from sacred to more mundane time, may be rendered into English, "[Praised] are You, Lord our God, King of the universe, who makes a distinction between sacred and profane, between light and darkness, between Israel and the nations, between the Seventh Day and the six work days. Blessed are You Lord, who makes a distinction between sacred and profane."  
[https://www.chabad.org/library/article\\_cdo/aid/258908/jewish/Havdallah.htm](https://www.chabad.org/library/article_cdo/aid/258908/jewish/Havdallah.htm). As with Genesis 1's creation narrative, distinctions make meaning, writing [letters require dark marks on light surfaces] and sanctity, possible.

[ii] *mAvot* 1:1 advises that human rabbinic legal norms be enacted to remove the possibility of transgressing *Torah* law. Protective fences are not applied to rabbinic norms. *bShavu'ot* 46a.

[iii] *Leviticus* 10:1-2.

[liii] Deuteronomy. 13:1-6.

[liv] <https://etzion.org.il/en/halakha/studies-halakha/philosophy-halakha/mechitza>. For sources relevant to this topic, see <https://joshyuter.com/wp-content/uploads/2011/08/Preserving-Gender-Roles-1-Mechitzah11.pdf>.

[lv] Genesis 1:27.

[lvi] This is the position of John Dewey, *The Quest for Certainty* (New York: Perigree, 1980).

[lvii] Comment to Leviticus 19:2.

[lviii] *Iggerot Moshe Orah Hayyim* 4:22. *bBerachot* 12a reports that is not permitted to perform gestures that would suggest that the Torah is not uniformly sacred, but since [a] standing for the Ten Commandments is an accepted practice among the community faithful, and [b] the *reason* attached to the norm, to avoid sectarian criticism, does not apply in our time. The Legal Positivist would contend that norm remains in force until revoked by a Supreme Court e greater in wisdom and number than the Talmudic court [*bBetsa* 5a]. While one would think that the human mimetic Tradition would defer to the revealed Judaism encoded in the Oral Torah library, this is not the case. The theological apologia for this anomaly will be discussed below.

[lix] See *bBetsa* 36b and *Iggerot Moshe, Supra*. 2:4. Siding with the Ashkenazi Legal Realists, R. Feinstein suggests “that it is the practice to be lenient [and to permit holy day clapping and dancing] because fully righteous dance on Shabbat and holidays.”

[lx] *Iggerot Moshe Yoreh De’ah* 2:49,

[lxi] See Numbers 15:26 and Lamentations 5:7.

[lxii] See above, “*Shenei Sugei Masoret*” (two types of tradition), in *Shiurim le-Zeicher Abba Mori*, (Jerusalem, 1993).

[lxiii] *Ibid.*

[lxiv] *Ibid.* and Haym Soloveitchik, “Rupture and *Reconstruction*: The Transformation of Contemporary Orthodoxy,” in *Tradition* 28:4 (1994), pp. 64–130.

[lxv] *Guide* 1:59 and *Responsum* n. 254. *Piyyutim* contain gnostic doctrines and interrupt the canonized liturgy.

[lxvi] Joseph B. Soloveitchik, *Halakhic Man*, ed., Lawrence Kaplan (Philadelphia: JPS, 1983), p. 83.

[lxvii] *Eichah Rabbah* 2:13 and <https://www.kipa.co.il/%D7%A9%D7%90%D7%9C-%D7%90%D7%AA-%D7%94%D7%A8%D7%91/%D7%94%D7%9E%D7%A7%D7%95%D7%A8-%D7%9C%D7%91%D7%99%D7%98%D7%95%D7%99-%D7%97%D7%9B%D7%9E%D7%94-%D7%91%D7%92%D7%95%D7%99%D7%9D-%D7%AA%D7%90%D7%9E%D7%99%D7%9F/>. This policy is consistent with Legal Positivism but contrasts sharply with *Hazon Ish*’s Legal Realism.

[lxviii] This idea may find precedent in the fact that Biblical judges are on occasion called “*elohim*,” which can mean “God,” “god,” or “judge.” See Exodus 21:6, 22:7-8 and Psalms 82:1.

[lxix] *Hazon Ish* proclaimed that the latter day Great Rabbis possess the authority of the Sanhedrin [*Iggarot* 1:41], it is not permitted to question established *Halakhot* [*Iggarot* 1:25], and at *Iggarot* 1:32, *Hazon Ish* declared that the early authorities possessed the “Holy Spirit” while our generation does not. Contemporary Orthodoxy ought to defer to the Great Sages without hesitation. Failure to defer



indicates a failure of faith. He claims to recoil from disagreeing with the Oral Torah Sages [*Iggarot* 1:15] but does not demonstrate why rabbinic descriptions carry normative valence. No contemporary serious rabbi requires the implementation of Rabbinic medical practice.

[lxx] For example, see *Shulhan 'Aruch, Hoshen Mishpat* 34:4,11, and 24.

[lxxi] *mAvot* 1:6 and 6. *bShabbat* 97a and *bYoma* 19b teach that people who wrongly suspect upright Jews deserve to be whipped, and *bGittin* 2b-3a reminds us that in ritual matters even one witness is sufficient to determine whether an act or an object may be permitted or forbidden.

[lxxii] See <https://www.hotpmo.com/management-models/webers-tripartite-classification-of-authority/>.

[lxxiii] Introduction to the *Yad*, the Hebrew idiom being *da'at notah*, referring to the most convincing position.

[lxxiv] In my first essay on the topic, "Mechitza, Midrash, and Modernity," *Judaism* 28:2 (1979), p.159, I concluded: "While the non-orthodox trends have been successful in scholarly examination of the Jewish tradition, they have not yet mustered the passionate commitment of their followers. The rigor of their search for truth is often negated by a concomitant loss of passion. Orthodoxy demands faith, especially in the oracular quality of the *gadol*, even at the expense of historical reality or the existential quest for truth. Ultimately, history will be the legitimating referee." By applying jurisprudential theory to *Halakhah*, motivations are uncovered, political positions may be clarified, and ideological consistency might assessed.

[lxxv] *bSotah* 44b. See also Maimonides, *Kings* 5:1.

[lxxvi]

Abraham Karelitz, Qovets, ed. S. Greinman (Jerusalem and B'nai B'raq, 1988), 1:111-113, and Alfred Cohen, "Drafting Women for the Army," *Journal Halachah and Contemporary Society* 16 (1988), p. 42, conveniently at <https://download.yutorah.org/1988/1053/735795.pdf>. For the Judaism of *Hazon Ish*, see Benjamin Brown, *The Hazon Ish: Halakhist, Believer, and Leader*, (Jerusalem: Magnes, 2011).

[lxxvii] Karelitz. 1:111. In order to contextualize this non-*Halakhic* argument, *Hazon Ish* reminds his readers that Jewry must have complete faith in every opinion of the Oral Torah Sages [*Ibid.* 1:115], the *Rishonim* are like holy angels [1:32], and have faith in the infallibility of contemporary Great Rabbis [1:182]. According to Maimonides, *Introduction to the Yad*, Rabbinic *legislation* obliges, Rabbinic *descriptions* do not, post-Rav Ashi sages possess equal authority as post-Amoraic regional jurisdiction, and *emunat hakhamim* [Avot 6:6] refers to "the faith/confidence of the Rabbis of the Oral Torah Canon, "and does require faith in the assumed inerrancy of any latter day saintly rabbinic synod. Since charisma trumps reason for Legal Realists, these issues would not be raised, much less addressed, by *Hazon Ish*.

[lxxviii] Cohen, *Ibid.*

The synagogue *mechitsah*, the partition separating women from men in the Orthodox shul, has evolved over time to become *the* defining distinction between what is accepted to be authentic Orthodox Judaism that the Torah law prescribes

and non-compliant, non-Orthodox communities. As with any culture, a person's actual opinions are inevitably conditioned by one's teachers and peers, rabbis and rebbes, congregations and communities, and peers and friends.[i] The polemic and hyperbole that has been applied to the synagogue *mechitsa* often leaves dissenters with the hard choice of remaining silent and compliant or as being marked as an outsider. The most efficient way to be accepted as an Orthodox Jew in good standing before God is by that person adopting an unquestioning and uncritical submission to the designated, rabbinic elite. Principled, idiosyncratic commitments are less valued than deferring to the Orthodox elite.

People often allow their personal piety to be worn on their sleeves for observers to notice. The easiest and socially inexpensive way to proclaim one's ideological orthodoxy is by denouncing those who may not conform to the culture Orthodoxy's benchmarks. Thus, lower *mechitsot*, or partitions segregating women from men in the Orthodox synagogue, may imply lower and possibly inadequate religious standards. If one is prepared to endorse a less than adequately sized partition segregating the genders in the synagogue prayer setting, one's "fear of Heaven" may also be suspect.

Authentically religious Jews look *into* their canonical books and not only to uninformed peers or people mistaken to carry canonical or statutory authority. The Orthodox Judaism that is encoded in the Oral Torah library only canonizes books; other religions often canonize people as well. Orthodoxy's currently enfranchised elite are said to possess the Holy Spirit,[ii] which bestows upon them the ability, expertise, and authority to parse the Canonical Oral Torah library, understand its message, and to articulate its normative implications, that God speaks to Jewry in their voice alone. Thus, the Great Rabbi is singularly entitled to read intuitively and knowingly between the Torah's lines but no one else has the right to read, understand, or apply the Torah Canon's actual, plain sense meaning.[iii]

There are two major approaches to Law in general and to the *Halakhah*, Jewish law, in particular. The *Legal Formalist*, or *Legal Positivist*, examines the legal systems[iv] the “ought to do” and ought *not* to do” legislated rules which are interpreted and applied but are not created by the judge. In contrast, *Legal Realism* maintains that the Law *is* made by the judges when rendering real life legal decisions.[v] While the Old Babylonian Codex Hammurabi records Hammurabi’s Legal vision, his *Letters* reveal that his personal behavior did not conform to his own Code’s normative benchmarks. In Old Babylonian culture, Legal Realism reigned.

A plain sense reading of the Torah seems to present a *Positive* legal order according to which God’s command, “obey the norms of the Torah contract,” is the Basic Norm of Jewish Law. The Hebrew idiom for Judaism’s “Basic Norm” is “*ol malchut shamayim*, the “yoke of Heaven’s Kingdom,” according to which God the Creator is accepted as Israel’s King and Commander, as well.

Genesis 1:3 reads “And God said/issued an imperative, ‘let there be light,’ and there was light.” The canonical Hebrew imperative, *vay-hi or*, literally “light, be[!],” is immediately followed by “*vay-hi or*, “light came into being.” While the Semitic root “*amr*” usually means “say” in Biblical Hebrew, in Arabic, Aramaic, and occasionally even in Biblical Hebrew,[vi] “command” is the preferred rendering. Note that the command’s fulfillment report employs the same diction as the command itself. This semantic device indicates that God the Creator is also God the Commander, and God expects exact compliance with the divine directives. When compliance takes place, God rewards the well-performing person with sanctification,[vii] or holiness,[viii] but the consequence for non-compliance with God’s command is death.[ix]

Hebrew Scripture's Law requires precise adherence to the Lawgiver's actual words, as evidenced by Scripture's consistent concern for exact compliance with God's word:

13 "Now all has been heard;  
here is the conclusion of the matter:  
Fear [=hold in a state of awe and

wonder/take seriously] God and keep

His commandments,  
for this is the duty of all mankind.  
14 For God will bring every deed into

judgment, including every hidden thing,  
whether it is good or evil."[x]

From these Hebrew Scriptural witnesses, we conclude that, for Biblical theology, God the Commander "stands" at the top of the Torah's hierarchical order of legal norms. Israel is held to account regarding its adherence to the exact, specific norms that are memorialized in the Torah's actual words. Scripture explicitly commands vigilance when anticipating unscrupulous pretenders to legitimate legislative authority who would dare to add to or to detract from Torah Law.[xi] However, Legal Realists' personal sense of what might be considered to be reasonable to the intellectual elite who may, on occasion cancel the legislated norm if they deem the norm to be unworthy. Legal Realists' tend to be cultural aristocrats who in antiquity might validate their power by means of miracles—or by exploiting the art of allusion—in order to present themselves in everyday life to be the Creator's duly ordained deputies, and in

modernity as those who are able to establish what " is proper and good" in God's eyes.[xii]

According to Positivist *Halakhah*, the statute/norm is unalterable, *unless* the given norm is revoked by a Bet Din [=rabbinical court] greater in wisdom and number than the court that issued the initial ruling[xiii] or provides for its own suspension.[xiv] Since a plain sense reading of the Written Torah document indicates that God's words are to be taken face value, we have adopted the Positivist/Formalist position in this study. [xv] Taking the Commander's diction as the Divine word, the *Halakhic* Positivist must pay close attention to the legal text's lexicon, syntax, and diction when defining the norm encoded in the canonical text. Below we will examine the *mechitsah* issue from both Legal Realist and Legal Positivist perspectives. In Talmudic literature, the idiom "*mechitsah*," or partition wall, is attested in the laws of plantings, in order to avoid mixing diverse seeds, the *sukkah* wall, and the *eruv*, the merging or enclosure of courtyards into one single residence, permitting carrying within its perimeter on Shabbat. According to Jewish law, a kosher *eruv* also requires a walled perimeter that is more enclosed than open, and the *eruv* arrangement enjoys the consent of every non-Jew and non-observant Jew residing within the *eruv*'s perimeter. There is no mention of a synagogue *mechitsah* requirement in the canonical Babylonian Talmud or related literature, the medieval Maimonidean *Yad*, or the early modern *Shulhan 'Aruch* legal compendium. There is no textual evidence of a positive Torah norm requiring a synagogue *mechitzah* in the Oral Torah canon. But we do know that men, women, and children heard the Torah being read in the women's section of the Temple on Yom Kippur[xvi] and on the Sukkot holiday during the *Haqhel* ritual.[xvii]

Rabbi Moshe Feinstein and others argue that the "great reform" [Hebrew, *tiqqun gadol*] made for the intermediate *Sukkot* festival day ritual of water drawing in the Temple is the "source" for the synagogue partition being viewed as a Biblical prohibition.[xviii] A formal separation of women and men was made in the Temple based on an obscure passage preserved by the Biblical Chronicler.[xix] There are three Formalist difficulties with this rendering. According to the formal



principles of Jewish law, Torah law does not derive from any Biblical post-Pentateuch book,[xx] and I-II Chronicles were among the last books of Hebrew Scripture to have been composed, by all accounts.[xxi] Second, the idiom *tiqqun*, or “enactment,” is not a divinely *authorized*, but necessarily *human*, positive rabbinic law that semantically cannot be a Biblical obligation.[xxii] This difficulty was also addressed by the ultra-Orthodox R. Yom Tov Schwartz, who answered [*me’anneh*] the letters, *Iggarot*, or responsa, of R. Feinstein.[xxiii] Third, Jewish Law does not require basins, animal or grain sacrifices, or necessarily raised women sections in contemporary Orthodox synagogues. Oral Law norms alone provide the instances in which the synagogue functions as a miniature Temple. And men *were* welcome in the Temple’s women’s section on occasion, as noted above.

R. Feinstein was scandalized with mixed gender seating during synagogue based prayer, and he claimed that this gender mixing and contact, even if unintentional, violates a *presumed* Torah norm prohibiting levity or *qallut rosh*. [xxiv] According to the Talmud, one may not engage in *qallut rosh* in a synagogue, indicating that the entire category is conventional but not covenantal.[xxv] I do not recall that avoiding *qallut rosh* was ever viewed as a Pentateuchal obligation. Nevertheless, R. Feinstein is unwavering regarding the synagogue *mechitsah* in spite of the fact that it goes unmentioned in the Oral Torah canon, but he does not object to eating in *shteibels*, or small chapels of Hassidic prayer. By defining these small *synagogues* as *batei midrash*, dedicated study rooms, the leniency of allowing eating in a *bet midrash* is somehow transferred to the small chapel. While the Talmud does not mention, much less forbid, mixed gender settings per se to be *qallut rosh*, eating in the synagogue is most assuredly forbidden as an instance of *qallut rosh*. [xxvi] R. Feinstein’s vehemence has carried the day in Orthodox culture, and the *mechitsah* has become a defining feature of institutional Orthodoxy.

A close reading of R. Feinstein's Introduction to *Iggarot Moshe* reveals the mindset of a Legal Realist, and *not* of a Legal Positivist. While affirming a perfect Torah law *de jure* to be a Positive legal order, R. Feinstein observes that a perfect Torah cannot be responsibly applied literally, perfectly, or at face value in an imperfect, human, social reality. R. Feinstein hereby adopts the Legal Realist perspective whereby the judge who is a Great Torah sage is authorized, obliged, and able to fill Orthodoxy's leadership vacuum, rule on pressing matters of law, and to determine appropriate policy for the Orthodox community in its immediate current culture context. His concern for the dire dangers challenging Orthodoxy suggest that in emergency situations and when called for, the Law itself may be suspended.[xxvii] Realizing the danger of invoking the Torah's emergency clause by suspending the Law in a fashion that may appear to be compulsive, cavalier, and capricious, the Positivist Maimonides immediately cautions the legal decisor regarding danger of the slippery slope should this norm be invoked often or irresponsibly.[xxviii]

As a Great Sage to whom dicey questions were so often directed, R. Feinstein not only had to rule correctly, as the religious authority of his community, he was obliged to lead responsibly as well. He could not and did not consider the positive statute alone; he took into account the social contexts, tradeoffs, consequences, and implications of his decisions as they are applied in the real world. He also had to rule wisely and convincingly,[xxix]which sometimes requires compromise and trade-offs. After all, he did not have a police force to enforce his rulings. His moral authority was all that he had in his possession, and that he needed to do his job.

Legal Positivists might not be sufficiently sensitive to challenges to Orthodox social culture, communal expectations or policy, because they focus upon *Halakhah's* explicit, recorded norms. Mixed-gender synagogue prayer was *the* issue that identified R. Feinstein as the outstanding Orthodox Legal Realist of his time. On one hand, mixed gender synagogue seating profoundly offended the

community's sensibilities, but to date there has been no success at all in identifying a Canonical, Oral Torah document that reports this assumed, positive legal norm.

R. Avrohom Gordimer, who is both a lawyer and an Orthodox activist, explains how Orthodoxy's living culture, or "Tradition," also known as "*Masorah*," really works. His words read like a Legal Realist manifesto:

*"Mesorah reflects enduring and traditional practices that are based on solid halachic and/or hashkafic (ideological and attitudinal) considerations, when such considerations are not formally codified or patently evident. In the case of synagogue ornamentation, the synagogue is classified as a Mikdash Me'at, a 'Miniature Beis Ha-Mikdash' (Holy Temple), and, as such, must reflect the highest degree of holiness and dignity. Anything that hints at Kalus Rosh (secular levity or amusement) is disallowed. This tradition and sentiment, which is based on halachic and hashkafic concepts yet is not codified specifically in terms of the actual adornment of the synagogue, forms the Mesorah as to the appropriate physical decor of a shul (and precludes introducing superhero or sports themes, as appealing and "Jewish" as they may seem)."*[xxx]

Orthodox Legal Realism elevates and reifies habit, appropriateness, expectations, and mimetic usage into actual law, and significantly, it also affords its own rabbinic elite immunity from review when their decisions differ from the "official religion," what is taken to be a divinely inspired Oral Torah mandate. According to this approach, rational discussion assumes that the question is in fact subject to rational discourse and public review. But Gordimer's "Tradition" is a social or taste culture, not the true legal order prescribed by the Written and Oral Torah library.[xxx] This Judaism maintains that the "customs of Israel are Torah," [xxxii] but Torah is "the word of the Lord,"[xxxiii] and social customs are clearly not divine mandates. Since social customs are not the word of the Lord, but are accepted as distinctly human, social constructs, customs cannot generate the sanctity of a divine order appropriately fulfilled.[xxxiv] Keenly aware not only of the Hartian "rules of obligation," i.e. the *Halakhah*'s prescriptive norms, the Legal Positivist is also mindful of the "rules of recognition," the rules that confirm

a given norm's validity. As opposed to Rabbis Feinstein and Gordimer, the Maimonidean Positivist understands "Tradition" to be the Oral Torah transmission from Moses to R. Ashi, with whom *hora'ah*, the authority to legislate apodictic legislation, comes to an end.[xxxv] According to this school of Orthodox thought, "Tradition" is the publicly vetted Oral Torah legal order transmitted from one generation's *Bet Din ha-Gadol* to the next.[xxxvi] It is what Israel ought to do according to the Torah covenant; it is not necessarily what Israel happens to do in everyday life.

Mixed gender synagogue seating violates [a] the traditional, historical practice of Jewry until the 19<sup>th</sup> Century, [b] traditional expectations of living continuity, and [c] its implementation often leads to future communal turbulence. Since family seating presented a mortal threat to Orthodox synagogue expectations, membership, theology, and leadership models, R. Feinstein the community leader formulated his substantive political/theological agenda, the goal of which is the preservation of *Yiddishkeit*, the living Eastern European, traditional culture guided by Great Rabbis whose Torah learning and principled piety provided the source of their authority and power. In Eastern Europe, Yiddish was that Jewish language by which they proclaimed that the local Jewish population was neither Russian nor Polish by nationality.[xxxvii] R. Feinstein strived to minimize the social dislocation caused by the migrations, with *Yiddishkeit* culture providing the social glue that sustains "traditional" Jewish life. This agenda may be gleaned from his many responsa:

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R. Feinstein strives to preserve Orthodox social culture as it was preserved by Jewry's ancestors. Compliance with contemporary rabbinic directives is a much more valued disposition than the creative individualism of

independent minds.

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Changes in Jewish culture are usually socially disruptive because they foster assimilation and undermine current religious standards and commitments. The Orthodox Legal Realist “Tradition of Israel” is the real life culture—as well as Law—of the *Haredi* Orthodox elite.

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No change in usage or policy may be implemented without the approval of the Great Sages.

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Orthodox Judaism must resist any, all, and every deviation that threatens the integrity of Orthodoxy’s *Halakhah*, ethos, and ideological narrative. Pretenders and competitors to Orthodoxy are so religiously illegitimate that it is even forbidden to officially communicate with them.

Mixed gender prayer may choreograph the unorthodox notion that God “must” agree to the radical egalitarianism of the secular, intellectual elite. For the unorthodox rabbinic elite, “God” is usually a concept, but is neither the Creator nor Commander of the cosmos. Given the emergency principle cited above, [xxxviii] R. Feinstein’s Legal Realism might actually be compatible with Legal Formalism because the emergency principle allows rabbinic discretion, and even law suspension, during emergencies.[xxxix] Extreme threats on occasion may require extreme responses. Liberal Jewish ideologies do not, with few exceptions, affirm a God Who commands, makes distinctions between individuals, and Who

holds humankind to account for what it does. Mixed gender “prayer” violates the *Yiddishkeit* religious ethos and must be regarded and resisted as a counterfeit cult.

Rabbi Joseph B. Soloveitchik argues that the synagogue gender separation is a Biblical requirement and the absence of this separation violates the rule of “thou shalt not see a matter of nakedness.” [xl] He also declares that the *mechitsah* must be “attributed” to an uncited, unidentified rabbinic enactment. In order to convincingly stress the “Biblical” nature of the separate seating in the synagogue requirement, R. Soloveitchik appropriately cites a Torah verse to justify his claim. [xli] But there are two problems with this assertion. Rabbis functioning after the Talmud came to closure simply do not possess the *Halakhic* authority, jurisdiction, or standing to derive apodictic laws from Biblical texts.[xlii] Such claims also require the approval of the Supreme Court of Israel, the *Bet Din ha-Gadol*. As noted above, the juridic power to create or legislate apodictic rabbinic norms has sadly lapsed in our day. And the Torah does not provide for oracular legal promulgation,[xliii] at least for the Legal Positivist. Since the Talmud does not explicitly claim that mixed seating violates Biblical law, the claim that it does is problematic, at best. A learned colleague suggested that R. Soloveitchik “must” be referring to Maimonides, Laws of *Shema* 15:3, which disallows praying in the presence of “nakedness,” the external sex organs, or excrement. Jewish law only requires that women cover those body parts that by social convention are covered.[xliv] Simply put, a woman may not dress provocatively. But *if* women are properly clad, why would mixed synagogue seating be forbidden according to Torah law? R. Soloveitchik actually allowed mixed gender classes at his Maimonides Day School for Torah study, which like prayer, may not be performed in the immediate presence of either nakedness or excrement. And since classroom furniture is more exposing than synagogue pews, there is greater risk of visual impropriety in the day school classroom than in the synagogue sanctuary. The assertion that one may not fulfill the *shofar* requirement in a mixed seating synagogue setting is anomalous because a ritual slaughterer who slaughters while stark naked has acted improperly, his act of slaughtering is not disqualified either by the absence of the slaughtering benediction or by his lack of clothes.[xlv]

Perhaps R. Soloveitchik attaches the protocols of prayer to the *shofar* blast. If the *shofar* is a prayer without words,[xlvi] then the *shofar* rite should be performed with the same solemnity, and protocol, as prayer.

R. Soloveitchik's imputation of the *mechitsah* requirement to a Rabbinic decree is a similarly challenging claim. If a proposed norm is not memorialized by and recorded in the Oral Torah canon for citation, it is simply is not a valid norm. The claim that a restriction exists by conception or imputation but without citation conflicts with Oral Torah principle that the absence of evidence may not be construed to be evidence of absence.[xlvii] On one hand, the synagogue partition "requirement" does not appear in any extant Talmudic text and it is also unattested in the classical legal compendia. On the other hand, the Tosafist report [xlviii] that the partition may be erected on the Shabbat for "conventional modesty" is evidence [a] that *mechitsot* were part medieval Jewry's religious inventory, [b] the *mechitsah* institution is neither Biblical, as argued by R. Feinstein, nor Rabbinic, as proposed by R. Soloveitchik. While the classical Rabbinic canon seems to be silent regarding mandatory gender separation during communal prayer, the [c] historical development of gender separation for formal communal events yields a very proper, appropriate policy **the function of which** is to preemptively avoid 'erva, or sexual improprieties. After all, a practice that is adopted by all of Torah compliant Jewry does become binding Jewish law, [xlix] and on this ground the *mechitzah* is mandatory.

Rabbis Soloveitchik and Feinstein may have thought that the *mechitsah* message defines a distinct Orthodox identity in opposition to the egalitarian radicalism of the non-Orthodox streams, which reject the God Who commands and makes distinctions.[l] Since homosexuality has been accepted to be "normative" for every non-*Halakhic* stream in Jewish life, the Orthodox Rabbinic fears were actually prophetic and their emergency-driven *Halakhic* hyperbole aimed—in retrospect successfully—in protecting their laity's thick Orthodox culture.



The *mechitsah* issue has had a life of its own within Orthodoxy. In a taped lecture, R. Isochor Frand, a teacher at Baltimore's Ner Israel Yeshiva, contrasts R. Feinstein's relatively "liberal" position to the more rigorously strict Hungarian position. But Frand neither addresses nor cites R. Soloveitchik's consistent position, that the statutory *mechitsah* height is 10 handbreadths, or 40," which is also the required height of the *Sukkah* and *eruv* wall, as well. In other words, once a wall is required, the Oral Torah definition of a wall being 40" long of necessity applies. Protective rabbinic extensions of, or fences around, Torah law are designed to prevent the community from sinning,[li] unwittingly or accidentally. When Nadav and Avihu invented an invalid, unauthorized cultic rite—they raised a "foreign" fire on the Tabernacle altar, which God did not command them to present, and lost their lives because they dared to intuit how to approach the Lord's sacred Presence.[lii] The Torah insists that one may neither add to nor subtract from the Law, even if one does possess oracular powers.[liii] According to Jewish Law, the 40" partition rises to the sky, following the rabbinic rule of *gud asiq*. By claiming that the synagogue partition serves to implement the gender segregation that prevents levity and inappropriate license [R. Feinstein], or to avoid visual impropriety [R. Soloveitchik], Great Rabbis' instincts, intuitions, and Torah informed internalized sense of propriety have assumed *post facto* *Halakhic* validity, and are part of the Legal Realist's toolbox.

*bQiddushin* 81a does report that *ad hoc* partitions were occasionally erected to prevent intergender immodesties. But the claim that the synagogue gender partition *originates* as a duly legislated Oral Torah norm cannot be made on the basis of the currently available textual evidence. R. Chaim Navon echoes our finding:

"What about a *mechitza* in the synagogue itself? Here the solid, unequivocal and consistent custom in all Jewish communities is that there should be a *mechitza* in the synagogue during prayer times. Jewish prayer is conducted in

the framework of total separation between men and women. No halakhic authority challenges the obligation to have a *mechitza*. Nevertheless, it is not at all clear that this practice has an unequivocal halakhic foundation.[liv]

In my view, the gender separation for communal Jewish prayer is an evolved, after-the-fact normative obligation. When asked at my pre-employment Baltimore B'nai Israel interview why I insisted on maintaining the *mechitsah* in the sanctuary, I responded that

“my personal work product requires gender segregation for shul based prayer. I am unable to do my job, that is serve a *Halakhic community*, without it. Without the *mechitsah* in place, I am unable to be a believable advocate for Torah because I would have forfeited my own membership in the community of the committed. I am unable to sell a congregational community to prospective members as a social and spiritual home that did not segregate the genders, because the *mechitsah* reminds that segment of Jewry that would consider my work product and mission appropriate, that men and women *are* different, distinctions individuate every person into a unique carrier of God's image, and protocols are always in place to remind Jewry that sexual activity is proper only with one's spouse, in a state of ritual purity and sanctity.”

Just because there is no clear canonical source of obligation for the *mechitsa* does not necessarily mean that the *mechitsa* should be removed. The synagogue *mechitsa* reminds Jewry what is unique to the Torah's religious narrative:

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God created both animal and vegetable life in male and female types.  
There is both order and meaning in Creation.

- 

God created the human animal in the Divine image, “male and female [He] created them.”[lv] While the genders are distinct, the Divine image inheres equally in both.

-

Scripture commends and commands that the genders relate to each other in sanctity and with restraint. In a secular age in which many assume that there is neither Judge nor judgment, people crave pleasure now and they do not want to wait, where Naturalism proclaims that transcendence is a myth, free will—and personal accountability—an allusion,[lvi] the *mechitsa* choreographs a robust, contrarian narrative to modernity's naturalistic secularism. The God Who created the cosmos by distinguishing between light and dark, heaven and earth, solid land and liquid seas, is also the same God Who commands humankind to holy.

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Rashi sees sexual restraint as the instrument by which holiness is generated.[lvii] Maimonides' Book of Holiness deals with the laws regarding sex and food, that is how Jews ought to respond to their basic human drives. By reminding Jewry that there is a Judge and judgment, there are objects and behaviors that are forbidden by God, and others that are permitted. In my view, a tasteful *mechitsa* choreographs these overarching values.

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This summary only represents my view, apologetic, and Jewish construction of reality, as a Legal Positivist. Most Orthodox rabbis are Legal Realists. R. Feinstein's *mechitsa* responsa, when read from a Legal Positivist perspective, are problematic. But in his Introduction to *Iggerot Moshe*, R. Feinstein concedes that it is impossible to apply the pure Torah law in real life. When popular Orthodox practice conflicts with Oral Torah norms, R. Feinstein will defend popular practice against what appears to be an unambiguous Oral Torah directive. For example, He permits standing for the Ten Commandments[lviii] and clapping and dancing on holy days,[lix] but will not forbid smoking cigarettes because otherwise pious Jews and Great Rabbis smoke.[lx] I am unaware of a rule of recognition that claims that if everyone does a forbidden act, the act somehow becomes permitted.[lxi] The sacred community and its rabbinic elite are *de facto* sources of law in Orthodox Legal Realism. Clarifying R. Soloveitchik's "two traditions,"[lxii] R. Avrohom Gordimer[lxiii] affirms that in addition to the recorded, Positive Oral law norms, Orthodox *Yiddishkeit* culture is a second, also unwritten Oral Torah, compliance with which is mandatory and is not

subject to review or challenge. This popular culture is R. Soloveitchik's "second type of Tradition." [lxiv] His "first type of Tradition" is Maimonides' Legal Positivism. For Maimonides and the Legal Positivists, this is the *only normative* Jewish Tradition. "Two tradition Orthodoxy" affirms that the "customs of Israel are [also] Torah" understands Torah to be revealed in the life of the sacred community as well as in the sacred library. According to this Orthodoxy, the *mechitsa* reflects the unwritten Oral Torah according to which Great Rabbis are able to intuit as they promulgate law as Legal Realists, creating law for a living community. Because Maimonides disapproved of adding *piyyutim* [liturgical poetry] to the prescribed, formal prayers, [lxv] R. Soloveitchik does *not* regard Maimonides to be a *Halakhic* man, [lxvi] precisely because Maimonides does not accept this second type of Tradition to be normative.

1.

*Halakhic* Legal Positivism observes

a.

that lacking an explicit norm in the Oral Torah that establishes the synagogue *mechitsa* is a requirement, with some evidence that the original modesty *mechitsa* was an *ad hoc* response to situational intergender impropriety, it must nevertheless be maintained because it was a practice accepted by all Israel.

b.

Modern Orthodox circles prefer the "letter of the law" Legal Positivist position because this point of view focuses upon legislated norms but not the habits, folkways, and conventions. As long as the Law is fulfilled, non-Jewish cultures, ideas, and interests may be explored, and if found to be compatible with Torah, they may even be adopted. [lxvii] Modern Orthodoxy maintains that whatever is not forbidden by formal Jewish law is permitted, carving out a social space for legitimate

Orthodox autonomy.

c.

For this version of Orthodoxy, Torah is an accessible, readable, object/*heftsa* documentary trove which contains norms that command, forbid, and when silent permit and authorize autonomous behavior, nurturing, fostering, and cultivating a citizen who is able to assess the communal elite fairly, generously, and honestly.

1.

*Halakhic* Legal Realism transfers the power of norm creation from the *object/heftsa* of the canonical *text* to the *person/gavra* of the rabbinical *judge*.

a.

Jewish Legal Realism from the time of the Tosafists has proclaimed that the “customs of Israel [are considered to be] Torah” which, like Oral Torah legislation, must be accepted as if they too were the “word of the Lord.”

b.

Jewish Legal Realists are less bound by the canonized statute than they are by their own intuitive sense of *Halakhic* and social propriety. Conflicts between the canonized Oral Torah norm and the accepted community practice are often resolved by deferring to the community’s present sense of propriety.

c.

Religious Legal Realists’ rulings are not usually subject to review, because [a] their spokespeople often speak in a prophetic or divine voice,[lxviii] [b] with dissent derided as improper. [lxix]

Jewish Law assumes that *Halakhic* mistakes are not heresies but errors,[lxx] because people are supposed to be judged generously, with the benefit of doubt.[lxxi] Great Rabbis rarely invoke legal theory, because their authority derives more from Max Weber's traditional and charismatic leadership models than from reason. Appeals to reason may be assessed and challenged,[lxxii] which is not the case for traditional and charismatic leadership. While Raabad follows the opinion of the individual he deems to be the greater rabbi, Maimonides, anticipating Weber, accepts the most compelling, rational claim, based on the facts and the logic of the case.[lxxiii] When first dealing with the *mechitsa* issue over 40 years ago,[lxxiv] and reading the data as a Legal Positivist, I discovered that non-Orthodox thinkers are informed but not obliged by the Oral Torah Law. I also realized that institutional Orthodoxy is not as *Halakhically* consistent as one would expect. Torah cannot be both *minhag Yisrael*, what Jews happen to do, and "the word of the Lord," or what Jews ought to do. A Legal Realist who is guided by intuition, who believes that Israel received a virtually inerrant mimetic culture that is the contemporary expression of God's will, would regard the synagogue *mechitsa* to be an embodiment of a Torah ethos. But a Legal Positivist defines Torah inductively by exposing the Torah polity's ethos that is created by the *Halakhic* norms.

If one adopts Legal Realism, the Law is always able to be responsive, because proceeds from the judge rather than from the legislature it; and if one adopts Legal Positivism, one is able to guide one's actions based on public information and expectations. The Positivist judge is an umpire, applying but not daring to create law. Orthodox Legal Realists have no patience the Positivist's relentless focus on the statute, norm, and rule. They have determined that Orthodoxy requires the synagogue *mechitsa* and they assign an appropriate valence to that requirement. The Positivist might argue that while there is no clear norm requiring the synagogue *mechitzah* and there is even some *reasonable* evidence, cited above, that there never was such a rule requiring the *mechitsa*. Culture aristocrat that he/she is, the Legal Realist will not allow the naked letter of the law to subvert the practice that elite presumes to be right and good. Note well that in most political arenas, the Positivist is the reactionary/conservative and the Realist is the radical/liberal. This is *not* the case for contemporary Orthodoxy. Orthodox modernists *are* bound by the Positive Jewish law, but not by nostalgia, habits, or folkways. The Oral Law does not forbid all assimilation; it only forbids what it

explicitly forbids by formal norm. And since neither Maimonides nor the Talmud speak of a second, undocumented “tradition” that conflates what Orthodox Jewry happens to do with what it is obliged by its Torah Law to do, Orthodox Legal Positivists will not necessarily be bound by this undocumented, and unvetted, “tradition.”

The canonical Tradition rules that for a *Milhemet mitsvah*, a war fought for the security of the Jewish land, people, or state, everyone, even the bride and groom, are conscripted.[lxxv] The *Hazon Ish* disagreed vehemently with this Oral Torah norm,[lxxvi] objecting to women’s military service on moral, or cultural grounds. But he does not offer a legal argument. Instead, he appeals to the immortality of coercion and the sexual license associated with military life.[lxxvii] Acutely aware of the tension between Orthodox Jewish law and current Orthodox cultural sensibilities and norms, R. Alfred Cohen observes:

“At all times, authentic Jewish leadership is not constricted by the niceties of academic precedent but acts from a broader and deeper appreciation of halachic norms, which may take precedence over considerations. We also have to realize that rabbis employ a variety of methods in arriving at a Halachic conclusion, so that at times there is a certain anomaly in their conclusions.”[lxxviii]

Cohen concedes that God’s word, as it appears in the Canon, does not always reflect w

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[i] Maimonides, *De’ot* 6:1.

[iii] See Bernard Weinberger, "The Role of the Gedolim," *The Jewish Observer* (October 1963), p. 6. This author suggests that only truly holy people are capable of appreciating—and understanding—Torah's holy texts. In other words, unless one is vetted to be a "Great Rabbi," or *gadol*, one is not entitled even to suggest an opinion, because

such a person is probably not guided by the "Holy Spirit."

[iv] I prefer Hans Kelsen, *Pure Theory of Law*, trld. M. Knight (Berkeley, Los Angeles, and Landon: University of California Press, 1967).

[v] [https://archive.org/details/bramblebushonour0000llew\\_k3l9/page/n1/mode/1up](https://archive.org/details/bramblebushonour0000llew_k3l9/page/n1/mode/1up) and <https://la.utexas.edu/users/jmciver/357L/BrambleBush.PDF>.

[vi] As witnessed by Psalms 33:9. When Scripture reads: "*Va-yomer Adonai el Moshe leymor* [as per Exodus 4:4, 21, and elsewhere, the root *amr* should be understood as "command." In most instances *leymor*, usually rendered "as follows" or "saying," will precede an imperative verb.

[vii] Numbers 15:40.

[viii] "Holiness" seems to be divine energy. See the parallelism of Psalms 150:1 [*qodsho* parallels and defined by '*uzzo*].

[ix] Especially Genesis 2:17 and Deuteronomy 30:17.

[x] Ecclesiastes 12:13-14.

Deuteronomy 13:1-5.



[xii] See Deuteronomy 6:18. In his commentary to this verse, Nahmanides first explains that people ought to orient themselves to God's point of view, which is the Legal Positivist perspective. But for Nahmanides, being "proper and good" carries a meta-*Halakhic* valence, because the Biblical instances of being "proper and good" are not exhaustive, making the Legal Realist judge the Legal Realist judge the arbitrator of propriety. In his introduction to Genesis, Nahmanides claims that the Torah's letter may be organized differently. While this claim is compatible with Legal Realism, because it renders its meaning indeterminate, it clashes sharply with Maimonides, *Eight Chapters* "this Torah will never undergo change."

[xiii] *bMegillah 2a*, *bMo'ed Qatan 3b*, *bGittin 36b*, *b'Avodah Zara 7a* and *36a*.

[xiv] Like *bBerachot 19b*, the laws regarding preserving human dignity.

[xv] *bBetsa 36b* unambiguously disallows handclapping, thigh slapping, and dancing on Jewish holy days. At *Shulhan 'Aruch OH 339:3*, Maran Karo duly records the Oral Torah's restrictive norm, as befits a Legal Positivist. However, R. Isserles the Legal Realist first argues that today, i.e. in his own contemporary times, "we allow people to do these acts and to sin unintentionally." In other words, these acts are tolerated but are not approved. His second opinion, that the law need not be nullified by a *Bet Din ha-Gadol*, because the reason that motivated the legislation, had lapsed. R. Isserles apparently believes that the post-Talmudic Great Rabbi, as evidenced here, may override Oral Torah norms. The Legal Positivist Maran Joseph Karo simply records the norm as it is legislated, while Rabbi Isserles, the Legal Realist [a] justified the integrity of his community regarding its non-compliance with the higher grade Oral Torah norm, [b] rejects or ignores Talmudic law when that law appears to be arcane or incompatible with the community's sense of propriety. Maran Karo merely memorializes the norm encoded in the canon; R. Isserles on occasion creates the Law. At his Introduction to *Darkei Moshe*, R. Isserles concedes that he takes the Oral Torah norm into account as strives to justify popular culture, even against the Canonical library's actual norms. Also note that for R. Isserles, charisma is attached to the great rabbinic personality, who is authorized, as with holy day clapping and dancing, to allow for dispensation,

[xvi] *bYoma 69a-b*.

[xvii] *bSotah 41a*.

[xviii] *bSukkah 51b*. See also R. Moshe Feinstein, *Iggerot Moshe*, *Orah Hayyim 1:39*.

[xix] I Chronicles 28:19.

[xx].bHagiga 19b.

[xxi] H.L.A. Hart's "rules of recognition" determine whether a norm or legal claim is valid. At *The Concept of Law* (Oxford, 1961), p. 99, Hart explains that the "rules of recognition" determine what rules of obligation, or norms, are indeed part of the given legal order. For Judaism's legal order, one must demonstrate that a rule is "recognized" as a norm within the order if one wishes to assign a legal valence to that norm.

[xxii] See Deuteronomy 17:8-13 for the Written Torah's authorizing of the Oral Torah's rabbinic power to legislate for all Israel, which is localized in the *Bet Din ha-Gadol*, the *Halakhic* supreme court. "Enactments" [*taqanot*] are positive, i.e. "to do" rabbinic norms. Maimonides, Introduction to the *Yad* compendium.

[xxiii] Yom Tov Schwartz, *Me'anneh la-Iggerot* (New York, 1964), pp.31-42. This Haredi voice objected to many of R. Feinstein opinions, which he believed was too accommodating to secular American culture. The word "*me'anneh*," literally an "answer," assumes a polemical tone because its use of the intensive *pi'el* conjugation signifies a thematic disapproval and should be best rendered "retort."

[xxiv] bMegillah 28a.

[xxv] When levity took place, then the *mechitsah* was installed. bSukkah 51b.

[xxvi] bMegillah 28a.

[xxvii] Maimonides, *Mamrim* 2:4.

[xxviii] *Ibid.* 2:5.

[xxix] Introduction to *Iggerot Moshe*, *Orah Hayyim*, vol.1

[xxx] Avrohom Godimer, <https://cross-currents.com/2015/11/16/what-is-mesorah-tradition-%D7%9E%D7%90%D7%99-%D7%9E%D7%A1%D7%95%D7%A8%D7%94/>.

[xxxi][xxxi][xxxi][xxxi][xxxi] Hebrew Scripture maintains that there is no individual who is exempt from the law [Ecclesiastes 12:13-4], and there is no one who does not sin [Ecclesiastes 7:20].

The Torah puts the Head Priest [Leviticus 4:3-12], at head of the Israelite polity [Leviticus 4:22], or the Israelite polity itself [Leviticus 4:13] on notice that they do not possess sovereign immunity. Abraham questioned God's decision to destroy Sodom and 'Amorah [Genesis 18:23], and Moses challenged God's apparent lack of proportion in meting out punishment, "one man [=Qorah] sins and You are in frothy rage regarding the people [Numbers 16:22]?" The monarchs of ancient Israel were regularly held to account for their murderous abuse of power. II Samuel 12:7 describes the Prophet Nathan holding David to account for the death Uriah and I Kings 21:18 reports Elijah's sarcastic rebuff of Ahab, "have not committed murder and also taken possession as the heir to deceased's estate?" My expanded translation reflects an exegetic unpacking of this very thick text.

[xxxi] Prof. Israel Moshe Ta Shma discovered this idiom's first occurrence to be at the end of the 12<sup>th</sup> Century, *Minhag Ashkenaz Qadmon* (Jerusalem: Magnes, 1994), p. 27, and boldly calls the reader's attention to the fact that medieval Ashkenazi Judaism's approach to communal custom is inconsistent with Oral Torah jurisprudence. But the medieval Ashkenazi evolved popular communal practice into binding rabbinic Law, which is echoed in Gordimer's sense of "Tradition."

[xxxi] Isaiah 2:3.

[xxxi] see <https://www.etzion.org.il/he/philosophy/great-thinkers/rambam/%D7%91%D7%A8%D7%9B%D7%94-%D7%A2%D7%9C-%D7%9E%D7%A0%D7%94%D7%92> and <https://www.etzion.org.il/he/philosophy/great-thinkers/rambam/%D7%91%D7%A8%D7%9B%D7%94-%D7%A2%D7%9C-%D7%9E%D7%A0%D7%94%D7%92>.

[xxxi] R. Soloveitchik believes that *Halakhic* authority is charismatic. See my "The Nuanced Ambiguities of R. Joseph B. Soloveitchik's Thought," A Review Essay of Dov Schwartz, Religion or Halakha: the Philosophy of Rabbi Joseph B. Soloveitchik, trans. Batya Stein (Leiden and Boston: Brill, 2007) *Review of Rabbinic Judaism* 12.2 (2009), pp. 232-233, notes

13 and 14. At “*Shenei Sugei Masoret* [two types of tradition], in *Shiurim le-Zeicher Abba Mori* (Jerusalem, 1993), reveal the two very distinct versions of Orthodox culture outlined above, the “tradition” of inherited culture” and the Great Tradition that is encoded in the canon, outlined in Maimonides introduction to the *Yad*.. The preference of both R. Soloveitchik and his son, Prof. Haym Soloveitchik, “Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy,” in *Tradition* 28:4 (Summer, 1994), is for the primacy of the second sense of Tradition, which is mimetic usage, the “Tradition” endorsed by Gordimer, cited above. Once unpacked, these essays reveal two very distinct versions of Orthodox culture, the “tradition” of inherited culture” and the Great Tradition encoded in the canon. I suspect that Prof Haym Soloveitchik’s use of the “reconstruction” idiom was both boldly chosen and deliciously subversive. He regularly calls attention to the disparities between that “orthodox” religion, the “Tradition” of the Oral Torah library and the *Yiddishkeit* mimetic street culture, which may now be understood as a civilization. While the Legal Realist looks to how the Law’s is put into the practice by the community of the committed, the Legal Positivist will judge the community based upon the canonical benchmarks, the legislated norms of the legal order. His M.A. thesis, on medieval Ashkenazi leniencies regarding non-kosher wine, and his Ph.D. dissertation on usury, focus specifically on the fact that this Orthodoxy waived canonical restrictions in order to earn a livelihood.

[xxxvi] Maimonides, Introduction to the *Yad*.

[xxxvii] Ironically, there is no *Halakhic* obligation to speak in Yiddish. But there most assuredly is a legal obligation to converse in Hebrew. See *Sifre* to Deuteronomy 46. Most Eastern European Orthodox rabbis viewed Yiddish as a Jewish vernacular, and did not insist upon Hebrew language instruction. A Legal Positivist, if duly competent, would provide Torah instruction in Hebrew, the “holiness” language.

[xxxviii] Maimonides, *Mamrim* 2:4.

[xxxix] See my *Hora’at Sha’ah: The Emergency Principle in Jewish Law and a Contemporary Application*, “*Jewish Political Studies Review* 13:3-4 (Fall 2001), pp. 3-39.

[xl] Deuteronomy 23:15.

[xli] See Baruch Litwin, *The Sanctity of the Synagogue* (New York, Jerusalem, Cleveland: Spero Foundation, 1959), pp. 139-141.

[xlii] *bBava Metsi'a* 86a.

[xliii] Deuteronomy 30:11-12.

[xliv] See R. Mordecai Eliahu, <https://harav.org/books/darcitaara-25/>. "Nakedness" in this context refers to female body parts, that are covered by clothing, either. If t

[xlv] *Shulhan 'Aruch Yoreh De'ah* 1:10.

[xlvii] Arnold Lustiger, summarizer and annotator, *Before Hashem You Shall be Purified: Rabbi Joseph B. Soloveitchik on the Days of Awe* (Edison, N.J.: Ohr Publishing 1998), p. 21.

[xlviii] "*lo ra'inu eino ra'ayah*," *mEduyyot* 2:2. See also also Maran Karo's discussion at *Bet Yosef, Yoreh De'ah* 1:1, who makes this positivist argument most forcibly, convincingly, and eloquently.

[xlix] *Tosafot* to *bShabbat* 125b, s.v. *ha-kol modim*], indicates, at least according to *Tosafot*, the *mechitsah* apparently is not a formal, legal obligation.

[l] A custom accepted by all Israel is binding, like the Babylonian Talmud, became because it was accepted by all Israel. Maimonides, *Introduction to the Yad compendium*. Other examples of this phenomenon are the fasts of Esther and the Firstborn and the male head covering for prayer.

[1] The Hebrew *Havdalah* prayer, which marks the passage decent from sacred to more mundane time, may be rendered into English, "[Praised] are You, Lord our God, King of the universe, who makes a distinction between sacred and profane, between light and darkness, between Israel and the nations, between the Seventh Day and the six work days. Blessed are You Lord, who makes a distinction between sacred and profane."

[https://www.chabad.org/library/article\\_cdo/aid/258908/jewish/Havdallah.htm](https://www.chabad.org/library/article_cdo/aid/258908/jewish/Havdallah.htm). As with Genesis 1's

creation narrative, distinctions make meaning, writing [letters require dark marks on light surfaces] and sanctity, possible.

[ii] *mAvot* 1:1 advises that human rabbinic legal norms be enacted to remove the possibility of transgressing *Torah* law. Protective fences are not applied to rabbinic norms. *bShavu'ot* 46a.

[iii] Leviticus 10:1-2.

[iiii] Deuteronomy. 13:1-6.

[iv] <https://etzion.org.il/en/halakha/studies-halakha/philosophy-halakha/machitza>. For sources relevant to this topic, see <https://etzion.org.il/en/halakha/studies-halakha/philosophy-halakha/machitza>. For sources relevant to this topic, see <https://etzion.org.il/en/halakha/studies-halakha/philosophy-halakha/machitza>.

[v] Genesis 1:27.

[vi] This is the position of John Dewey, *The Quest for Certainty* (New York: Perigree, 1980).

[vii] Comment to Leviticus 19:2.

[viii] *Iggerot Moshe Orach Hayyim* 4:22. *bBerachot* 12a reports that is not permitted to perform gestures that would suggest that the Torah is not uniformly sacred, but since [a] standing for the Ten Commandments is an accepted practice among the community faithful, and [b] the *reason* attached to the norm, to avoid sectarian criticism, does not apply in our time. The Legal Positivist would contend that norm remains in force until revoked by a Supreme Court e greater in wisdom and number than the Talmudic court [b*Betsa* 5a]. While one would think that the human mimetic Tradition would defer to the revealed Judaism encoded in the Oral Torah library, this is not the case. The theological apologia for this anomaly will be discussed below.

[ix] See *bBetsa* 36b and *Iggerot Moshe, Supra*. 2:4. Siding with the Ashkenazi Legal Realists, R. Feinstein suggests “that it is the practice to be lenient [and to permit holy day clapping and dancing] because fully righteous dance on Shabbat and holidays.”

[Ix] Iggerot Moshe Yoreh De'ah 2:49,

[Ixi] See Numbers 15:26 and Lamentations 5:7.

[Ixii] See above, “*Shenei Sugei Masoret*” (two types of tradition), in *Shiurim le-Zeicher Abba Mori*, (Jerusalem, 1993).

[Ixiii] *Ibid.*

[Ixiv] *Ibid.* and Haym Soloveitchik, “Rupture and *Reconstruction*: The Transformation of

Contemporary Orthodoxy,” in *Tradition* 28:4 (1994), pp. 64–130.

[Ixv] *Guide* 1:59 and *Responsum* n. 254. *Piyyutim* contain gnostic doctrines and interrupt the canonized liturgy.

[Ixvi] Joseph B. Soloveitchik, *Halakhic Man*, ed., Lawrence Kaplan (Philadelphia: JPS, 1983), p. 83.

[Ixvii] *Eichah Rabbah* 2:13 and <https://www.kipa.co.il/%D7%A9%D7%90%D7%9C-%D7%90%D7%AA-%D7%94%D7%A8%D7%91/%D7%94%D7%9E%D7%A7%D7%95%D7%A8-%D7%9C%D7%91%D7%99%D7%98%D7%95%D7%99-%D7%97%D7%9B%D7%9E%D7%94-%D7%91%D7%92%D7%95%D7%99%D7%9D-%D7%AA%D7%90%D7%9E%D7%99%D7%9F/>. This policy is consistent with Legal Positivism but contrasts sharply with *Hazon Ish*’s Legal Realism.

[Ixviii] This idea may find precedent in the fact that Biblical judges are on occasion called “*elohim*,” which can mean “God,” “god,” or “judge.” See Exodus 21:6, 22:7-8 and Psalms 82:1.

[lix] *Hazon Ish* proclaimed that the latter day Great Rabbis possess the authority of the Sanhedrin [*Iggarot* 1:41], it is not permitted to question established *Halakhot* [*Iggarot* 1:25], and at *Iggarot* 1:32, *Hazon Ish* declared that the early authorities possessed the “Holy Spirit” while our generation does not. Contemporary Orthodoxy ought to defer to the Great Sages without hesitation. Failure to defer indicates a failure of faith. He claims to recoil from disagreeing with the Oral Torah Sages [*Iggarot* 1:15] but does not demonstrate why rabbinic descriptions carry normative valence. No contemporary serious rabbi requires the implementation of Rabbinic medical practice.

[lxx] For example, see *Shulhan ‘Aruch*, *Hoshen Mishpat* 34:4,11, and 24.

[lxxi] *mAvot* 1:6 and 6. *bShabbat* 97a and *bYoma* 19b teach that people who wrongly suspect upright Jews deserve to be whipped, and *bGittin* 2b-3a reminds us that in ritual matters even one witness is sufficient to determine whether an act or an object may be permitted or forbidden.

[lxxii] See <https://www.hotpmo.com/management-models/webers-tripartite-classification-of-authority/>.

[lxxiii] Introduction to the *Yad*, the Hebrew idiom being *da’at notah*, referring to the most convincing position.

[lxxiv] In my first essay on the topic, "Mechitza, Midrash, and Modernity," *Judaism* 28:2 (1979), p.159, I concluded: “While the non-orthodox trends have been successful in scholarly examination of the Jewish tradition, they have not yet mustered the passionate commitment of their followers. The rigor of their search for truth is often negated by a concomitant loss of passion. Orthodoxy demands faith, especially in the oracular quality of the *gadol*, even at the expense of historical reality or the existential quest for truth. Ultimately, history will be the legitimating referee.” By applying jurisprudential theory to *Halakhah*, motivations are uncovered, political positions may be clarified, and ideological consistency might assessed.

[lxxv] *bSotah* 44b. See also Maimonides, *Kings* 5:1.

[lxxvi]



Abraham Karelitz, Qovets, ed. S. Greinman (Jerusalem and B'nai B'raq, 1988), 1:111-113, and Alfred Cohen, "Drafting Women for the Army," *Journal Halachah and Contemporary Society* 16 (1988), p. 42, conveniently at <https://download.yutorah.org/1988/1053/735795.pdf>. For the Judaism of *Hazon Ish*, see Benjamin Brown, *The Hazon Ish: Halakhist, Believer, and Leader*, (Jerusalem: Magnes, 2011).

[lxxvii] Karelitz. 1:111. In order to contextualize this non-*Halakhic* argument, *Hazon Ish* reminds his readers that Jewry must have complete faith in every opinion of the Oral Torah Sages [*Ibid.* 1:115], the *Rishonim* are like holy angels [1:32], and have faith in the infallibility of contemporary Great Rabbis [1:182]. According to Maimonides, *Introduction to the Yad*, Rabbinic *legislation* obliges, Rabbinic *descriptions* do not, post-Rav Ashi sages possess equal authority as post-Amoraic regional jurisdiction, and *emunat hakhamim* [Avot 6:6] refers to "the faith/confidence of the Rabbis of the Oral Torah Canon, "and does require faith in the assumed inerrancy of any latter day saintly rabbinic synod. Since charisma trumps reason for Legal Realists, these issues would not be raised, much less addressed, by *Hazon Ish*.

[lxxviii] Cohen, *Ibid.*