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The Cultural Analysis Paradigm: Women and Synagogue Ritual as a Case Study

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THE CULTURAL ANALYSIS PARADIGM: WOMEN AND SYNAGOGUE RITUAL AS A CASE STUDY

Roberta Rosenthal Kwall†

This Article develops an original cultural analysis paradigm with significant implications for understanding the relationship between law and culture. It also illustrates how this relationship should inform the normative application of areas of law in which tensions exist between modern sensibilities and traditional practices steeped in cultural perspectives from other times. Indeed, the negotiation between preservation and change confronts all ancient cultural traditions in modernity. The specific application invoked in this Article concerns the issue of women being called to read publicly from the Torah, a subject of serious academic debate among observant Jews. The analysis demonstrates that the virtually unanimous practice of excluding women from participation in public Torah reading exists despite long-standing ambiguity in the strictly legal realm of the tradition. This reality reveals that the prevailing practices and legal justifications have been markedly influenced by cultural considerations. Thus, the story of women and public Torah reading provides the ideal subject for exploring the synergies between law, culture, and tradition. This story also serves as a model for how cultural analysis can inform discourse on a broad range of issues in which settled law confronts cultural shifts.

† © Roberta Rosenthal Kwall, Raymond P. Niro Professor; Co-Director, DePaul University College of Law Center for Jewish Law & Judaic Studies; Founding Director, DePaul College of Law Center for Intellectual Property Law and Information Technology. I wish to thank Paul Berman, Michael Broyde, Zev Farber, David Flatto, Elizabeth Townsend Gard, Shubha Ghosh, Beth Grey, Michael Helfand, Vernon Kurtz, Jeffrey Kwall, Ellen LeVee, Greg Mark, David Nimmer, Steven Resnicoff, Jennifer Rothman, Tamar Ross, Chaim Saiman, Joshua Sarnoff, Keith Sharfman, Alexander Tsesis, Deborah Tuerkeheimer, Paul Vishney, and Tal Zarsky for their helpful comments and suggestions. I also extend thanks and appreciation to the faculty at University of Pennsylvania Law School, Tulane Law School, and the University of West Virginia, who attended faculty workshops on prior versions of this Article, and to my students Michael Brower, Aaron Fox, Mary E. Kane, and Rebecca Stang for excellent research assistance. This Article is part of a larger book project entitled: AUTHENTICITY OF THE CHOSEN: AN EXPLORATION OF JEWISH LAW THROUGH CULTURAL ANALYSIS (forthcoming). I am dedicating this Article to my Rabbi, teacher, and friend, Rabbi Dr. Vernon Kurtz, whose support and encouragement have been invaluable. Comments about this Article are welcome: rkwall@depaul.edu.
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INTRODUCTION

Two distinct legal philosophies are evident in contemporary thought. The traditional perspective sees law as an objective, neutral system that does not explicitly admit factors or influences from outside of its own systematic development. A more recent approach steeped in the discipline of cultural analysis understands law as a system that both reflects, and composes, human culture on a broader level. This approach to law is relational and contextual. In other words, law is the product of cultural influences and their historic context. The difference between these two perspectives concerns not only a philosophy of law, but also the nature of the legal process.

Cultural analysis, originally the product of study in disciplines other than law, is now rapidly gaining momentum in legal discourse in the United States and elsewhere. Traditionally associated with legal scholarship in areas such as feminist jurisprudence and critical legal studies, other areas, such as law and economics, are now beginning to employ a more culturally nuanced approach to the law. Law and culture scholars focus on how law “simultaneously embodies the interests of particular groups and shapes those interests—and even shapes the identities of those who understand themselves as members of

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1 See discussion infra Part I.
Beginning in the 1980s, protection of cultural rights was increasingly understood as including not only tangibles, but also intangibles such as modes of life, human rights, and beliefs. According to this perspective, cultural heritage provides groups of people “with a sense of identity and continuity.” Moreover, cultural property rights are increasingly seen within the framework of international human rights. In the human rights arena, rights emerging in cultural terms have particular relevance for traditions whose historic or present survival is in jeopardy. As human rights continue to evolve and expand, there has been a growing trend to augment human rights protections to include groups rather than just individuals. This expansionist tendency parallels the concern of cultural analysis with how the law reaffirms the composition of groups and individual identities and values. Under this framework, preservation of cultural tradition is seen as a positive value because it is a vital source of basic human identity and “[t]he
preservation of that identity can be of crucial importance to well-being and self-respect.”

Yet, this reality necessitates grappling with the ultimate questions of whether, and how, preservation of cultural tradition aligns with modern sensibilities. Specifically, cultural dissent and evolution of the cultural tradition in pockets of the community, particularly absent a link to the tradition, can compromise traditional values and result in the loss of something perceived as valuable by other segments of the community. Thus, cultural traditions continually negotiate between preservation and modernity and between evolution and authenticity. This concern with loss of value and dilution of the tradition’s authenticity justifies a cultural analysis perspective that embraces a degree of selectivity with respect to implementing changes in the tradition.

The cultural norms that influence law come from both secular and religious sources. Jewish law is thousands of years old and now more than ever, people from many different backgrounds desire to know what it has to say, particularly in areas that impact society at large such as family law, biomedical ethics, and business practices. Cultural analysis suggests that Jewish law and Jewish culture cannot be understood as distinct entities. Instead, culture inevitably influences the formation and interpretation of Jewish law, and Jewish law inevitably influences the culture from which it has been produced. These struggles are clearly evidenced in the formation and application of the entire chain of the Jewish tradition that incorporates the strictly legal precepts formulated by the rabbis as well as the practices that have developed among the people. Jewish law thus embodies a humanly developed tradition of interpretation that has been evolving over centuries.

Of course, in every generation, there were always boundaries of practice that the rabbis would not cross, no matter how much their discourse revealed significant differences of opinion and contestation. These boundaries fixed the parameters of the tradition in each generation. Although in certain instances, the boundaries of the

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10 Eide, supra note 9, at 289, 291.

11 For a discussion of cultural dissent, see infra text accompanying notes 67–68. A cultural product or tradition is authentic only if it “maintains a legitimate link to the community.” SUSAN SCAFIDI, WHO OWNS CULTURE? APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 54 (2005) (discussing cultural products).


13 This chain of tradition is known as the masorah. It consists of both rabbinical rulings that are the product of legal interpretation by the rabbis as well as the norms of practice by the people. See ELLIOT N. DORFF, THE UNFOLDING TRADITION: JEWISH LAW AFTER SINAI 59 (2005) (discussing the views of Solomon Schechter); see also infra text accompanying notes 71–75, 249–254.
tradition were regarded as fixed and certain, more often than not, they emerged through contested discourse and in historically specific contexts. This has been true throughout Jewish law’s history and is no less true today. Thus, although the Jewish tradition is sometimes understood in strictly formalistic legal terms, this perception is far from the truth. In short, the Jewish tradition is designed so that discontinuous, or new, elements can be embraced so long as there is a historic basis for these elements within the body of the system.14

The particular application of the cultural analysis paradigm developed in this Article concerns female participation in public Torah reading—the first area in the realm of gender and synagogue ritual to be subjected to a serious academic discourse among observant Jews.15 According to the Jewish tradition, a young man of thirteen is eligible to become a Bar Mitzvah. American culture is—in general terms—familiar with the concept of a Bar Mitzvah. Many non-Jewish Americans, even those who have never attended such an event, are aware of what the celebration entails as a result of the ceremony’s depiction in various television and movie programs.16 Typically, the Bar Mitzvah rite involves an adolescent being called to read from the Torah, also known as the Five Books of Moses, which is read publicly from a scroll during certain Jewish services. This rite traditionally marks the transition from childhood to adulthood and therefore is a sign of dignity and personhood. According to the tradition, the Torah can only be read in the presence of at least ten Jewish males above the age of thirteen (this service is known in Hebrew as a “minyan”). Upon being called to read from the Torah, the Bar Mitzvah recites, often for the first time in his life, a specific blessing before and after sections of the Torah are read. The tradition of reciting these blessings is known as receiving an “aliya” (aliyyot in the plural).17

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14 See, e.g., Isaiah M. Gafni, The Historical Background, in The Literature of the Sages 15 (Shmuel Safrai & Peter J. Tomson eds., 1987) (noting how the rabbis’ activities following the destruction of the Second Temple stressed “continuity with Jerusalem and the past, while simultaneously setting up an authority structure and religious framework that clearly evolved out of a radically new situation”).

15 CHAIM TRACHTMAN, Editor's Preface to RABBI DANIEL SPERBER ET AL., WOMEN AND MEN IN COMMUNAL PRAYER: HALAKHIC PERSPECTIVES (Chaim Trachtman ed., 2010) [hereinafter COMMUNAL PRAYER].

16 The Bar Mitzvah ceremony has been featured prominently in popular television shows and movies such as Seinfeld: The Serenity Now (NBC television broadcast Oct. 9, 1997); The Wonder Years: Birthday Boy (ABC television broadcast Apr. 11, 1989); and KEEPING UP WITH THE STEINS (Miramax Films 2006). Of course, the accuracy of these depictions is another matter.

17 Although the Bar Mitzvah ceremony, which typically takes place on the morning of the Jewish Sabbath (Saturday), often marks the first time a Jewish male receives an aliya and reads publicly from the Torah, the cycle of Jewish observance affords opportunities for public Torah readings multiple times a week. Thus, the Torah is read publicly every Monday and Thursday morning and every Saturday afternoon, see Bava Qamma 82a (Babylonian Talmud), as well as on numerous festivals and holidays throughout the year. Absent a Bar Mitzvah celebration, the Torah is read by knowledgeable congregants or a trained professional. Moreover, various male
In short, the ability to receive an *aliya* and read from the Torah represents a vital aspect of traditional synagogue observance. The act of reading from the Torah can be extremely spiritually satisfying because it enables the reader to connect with the narratives and history of his people in a visceral, compelling manner as the ancient text comes alive through the Hebrew words and the traditional accompanying musical tropes.

Significantly, however, according to the normative Jewish religious law, known as “*halakhah*,” women are not eligible to receive an *aliya* or to read publicly from the Torah during a *minyan*. This is the practice in nearly every Orthodox synagogue today throughout the world. In contrast, non-Orthodox synagogues do not adhere to the traditional practice and allow greater female participation in the service to varying degrees.18

On the ground level, there exists a “crying need” for greater gender inclusivity in segments of the Orthodox community19 as well as among traditional Conservative Jews who are affiliated with Orthodox members of the congregation are customarily granted the honor of saying the *aliya* blessings accompanying the readings. The number of *aliyyot* varies according to the particular type of service and ranges from three to seven *aliyyot*. These numbers are defined by the tradition. See *Megillah* 4:1–2 (Mishnah).


19 See Daniel Sperber, *Congregational Dignity and Human Dignity: Women and Public Torah Reading, in Communal Prayer*, supra note 15, at 27, 38; see also infra text accompanying notes 280–282. Some self-denominating Orthodox individuals have developed “partnership *minyans*” where women enjoy greater ability to participate in ritual, including public Torah readings. These groups typically are independent, meaning that they are not affiliated officially with any particular denomination of Judaism. See *infra* notes 276–291 and accompanying text; see also infra notes 207–208 and accompanying text.

Interestingly, some Orthodox synagogues do permit girls to celebrate their coming of age in Jewish terms with a Bat Mitzvah service, but in these instances the service typically is structured to accommodate the young woman giving a speech following the conclusion of the *minyan*. In situations where Orthodox communities permit girls to have a Bat Mitzvah, they are usually done when the girl turns twelve years old because Jewish law defines female maturity as twelve years and one day old. See *Niddah* 5:6 (Mishnah) (discussing the age of maturity for girls regarding vows). For a brief discussion of differing views on the Bat Mitzvah concept among Orthodox authorities, see Sperber, supra, at 180 (Appendix IX: *Bat Mitzvah: Pro and Con Views*). When Orthodox synagogues do allow the Bat Mitzvah ceremony, there is variability in its implementation but this Article describes the normative practice.
synagogues. This need is the result of a strong desire on the part of Jewish women who feel a powerful spiritual yearning to participate at some level in a minyan and who otherwise seek a more traditional level of ritualistic synagogue observance. For these women, the experience of praying in a minyan, where such participation is possible, completely changes the prayer experience and facilitates a stronger connection to God and to the Jewish people. Equally significant, the ability to read publicly from the Torah scroll, or to receive an aliya, provides women with the opportunity for close, physical access to the most sacred treasure of the Jewish people.

More generally, the story of women and public Torah reading provides the ideal subject for exploring the synergies between law, culture, and tradition and how the cultural analysis paradigm developed in this Article can illuminate these synergies. This Article argues that Orthodoxy’s exclusion of women in this regard is more the result of cultural sensibilities than unalterable law, a point that is not widely acknowledged in most Orthodox circles. The analysis demonstrates that the unanimity within Orthodoxy concerning women’s inability to participate in public Torah reading exists despite significant ambiguity in the strictly legal realm of the tradition on this issue up until the middle ages. Given this ambiguity, and the process of how change comes about within Jewish law, the current legal reality is best understood as a response to cultural influences. Thus, the introduction of greater female participation in synagogue ritual should be seen as a natural development in Jewish law based on current understandings of the role and character of women in today’s cultural milieu rather than as a “major reform” necessitating a substantial departure from the tradition. In short, from a strictly halakhic (relating to the halakhah, or Jewish religious law) standpoint, there is a basis in the tradition to enable women to receive aliyyot and to read publicly from the Torah.

Notwithstanding the resistance to greater female participation in synagogue ritual, the academic literature in certain Orthodox circles is manifesting an increasing awareness of, and interest in, allowing more ritualistic participation for women in public Torah reading. In recent years, much literature has been generated that examines both sides of this issue. The emergence of this discourse within Orthodoxy is

20 See infra note 277.

significant not only because of its substance and growing impact in academic and certain lay circles, but also because of the identity of those who are arguing in favor of a more inclusive, culturally based halakhic position. These proponents of change are not marginally committed to the halakhic system but are, instead, serious Orthodox Jews whose Orthodox self-identity and pedigree are not in question.22 One proponent, Rabbi Professor Daniel Sperber, is an internationally renowned Jewish law scholar whose reputation and erudite learning is readily acknowledged in the Orthodox world.23 Equally significant, some who oppose such changes in the system are highly respected Orthodox scholars who are taking the arguments of the other side seriously and engaging in respectful, honest discourse.24

In yeshivahs (traditional schools of Jewish learning), halakhah historically is studied as a closed legal system, admitting of no other sources or considerations beyond the traditional Jewish sources.25 This “objectified” approach to Jewish law constitutes “the prevailing mode of Orthodox theological/halakhic discourse, which posits an independent halakhic universe of rules and concepts quite similar to the immutable laws of physics and mathematics.”26 In contrast, Orthodox scholars who advocate for increased participation by women in public Torah reading interpret the traditional Jewish sources in light of historical and sociological sensibilities.27 Thus, the proponents of increased

http://www.traditiononline.org/news/_pdfs/Communications%20401%20.pdf. In 2010, an entire book was devoted to the topic, with essays also advocating diverse perspectives. See generally COMMUNAL PRAYER, supra note 15.

22 See Tamar Ross, Balancing Tradition and Modernity: The Case for Women’s Participation in Synagogue Ritual, in COMMUNAL PRAYER, supra note 15, at 1, 2 (noting that “finding a . . . legal basis for such an innovation” is the “prime concern” among a group of these proponents).

23 Daniel Sperber is a chaired Professor Emeritus in the Talmud Department at Bar Ilan University and currently serves as president of its Higher Institute of Torah Study. He also serves as the rabbi of Congregation Menachem Zion in the Old City of Jerusalem.

24 See Shlomo Riskin, Torah Aliyyot for Women, in COMMUNAL PRAYER, supra note 15, at 359; Eliav Shochetman, Aliyyot for Women, in COMMUNAL PRAYER, supra note 15, at 291; see also Sperber, supra note 19, at 37 n.7 (acknowledging the thorough, detailed commentary of Professor Eliav Shochetman, who he calls a good friend, appearing in the same volume).

25 See Sperber, supra note 19, at 89 n.70 (quoting noted authority Rabbi J.D. Bleich for the proposition that halakhah “does not permit policy considerations to adjudicate between competing theories or precedents” although it can provide a basis for public guidance by rabbinic authorities); see also id. at 123 (Appendix I: On Halakhic Methodology). As this Article illustrates, cultural analysis critiques this closed approach to legal development.

26 Ross, supra note 22, at 12–13 (quoting Mendel Shapiro).

27 See Sperber, supra note 19, at 123. Interestingly, Mendel Shapiro, who authored the seminal article on this issue, took a much more traditional, textual approach to the subject. Mendel Shapiro, Qeri‘at ha-Torah by Women: A Halakhic Analysis, in COMMUNAL PRAYER, supra note 15, at 207, 209 [hereinafter Shapiro, Qeri‘at ha-Torah by Women] (with new afterword) (originally published in 1 EDAH J., no. 2, 2002). Subsequently, Shapiro explained this original approach as the “editorial means that was called for to drive a wedge into accepted and received halakhic interpretation and to make room for innovative halakhic possibility.” Mendel Shapiro, Afterword to Qeri‘at ha-Torah by Women: A Halakhic Analysis, in COMMUNAL PRAYER, supra note 15, at 289 [hereinafter Shapiro, Afterword].
participation for women in public Torah reading are invoking a cultural analysis approach to Jewish law, although this approach is not explicitly acknowledged in halakhic discourse. Equally significant, even some scholars who disagree with the conclusion that women should be allowed greater opportunities for participation are now couching their arguments, at least to some extent, in culturally based reasons, presumably in response to a mode of discourse that is beginning to take cultural considerations into account.

At base, the debate is about legal process. Specifically, should halakhah, which according to the tradition is binding upon Jews, be understood as a closed, objectively neutral system or one that admits of social issues and circumstances? This debate is an extraordinarily important and complex one with far-reaching ramifications concerning not only the application of Jewish law but also other legal systems that are the product of cultural traditions. This Article demonstrates that an analytical model based on cultural analysis can be an invaluable resource in addressing the fundamental issue of how cultural traditions can maintain authenticity while being applied in a more inclusive framework. Although the specific focus here concerns women and public Torah reading, the analysis has significant implications for understanding the general relationship between law and culture and how this relationship should inform the normative application of areas of the law in which tensions exist between modern sensibilities and traditional practices steeped in cultural perspectives from other times.

28 Cf. Ross, supra note 22, at 8–9 (comparing halakhic discourse and feminist jurisprudence).
29 See Shapiro, Afterword, supra note 27, at 290 (commending the counter-arguments by Rabbi Henkin and Professor Shochetman as “compelling” for their sociological focus). On the dust cover of COMMUNAL PRAYER, Samuel C. Heilman, a noted professor of sociology, wrote that the issue examined in this Article “serves as the key to discovering how Jewish law and changing social and cultural norms interact in important ways . . .” Samuel C. Heilman, Comment on Book Cover of COMMUNAL PRAYER, supra note 15 (emphasis added).
30 Ross, supra note 22, at 12–13; Mendel Shapiro, A Response to Shlomo Riskin, in COMMUNAL PRAYER, supra note 15, at 389, 405.
31 As early as 1984, Rachel Biale observed in her comprehensive treatment of women and Jewish law that “the secondary role of women in the synagogue” has become “the major arena for debate” in the United States. RACHEL BIALE, WOMEN AND JEWISH LAW: THE ESSENTIAL TEXTS, THEIR HISTORY, AND THEIR RELEVANCE FOR TODAY 258 (1984). This statement is more true now than it was nearly thirty years ago in light of the emergence of this debate within certain Orthodox circles in the United States and in Israel. See, e.g., Benjamin Lau, The Challenge of Halakhic Innovation, 8 MEOROT 1, 9–10 (2010) (noting how, during the past twenty years, the status of women, including matters relating to prayer and public Torah reading, has emerged as “a central, substantive issue . . . requiring comprehensive rethinking”).
32 The issue of the appropriate boundaries of female ritualistic participation is currently the subject of a parallel debate within sectors of Christianity and Islam. See, e.g., Ahmed Elewa & Laury Silvers, I Am One of the People: A Survey and Analysis of Legal Arguments on Women-Led Prayer in Islam, 26 HAMLINE J.L. & RELIGION 141, 141 (2011) (“[O]nly men have the unrestricted right to lead the prayer, give the sermon, or even ask the community to serve God through the call to prayer.”); Cheryl Y. Haskins, Gender Bias in the Roman Catholic Church: Why Can’t Women Be Priests, 3 MD. MARGINS L.J. 99, 110 (2003) (explaining that modern
Part I contains a general discussion of the emerging focus on law and cultural analysis and develops an original cultural analysis paradigm. This discussion highlights that scholars invoking cultural analysis see law and culture as embodiments of one another rather than as two distinct entities. When law and culture are understood in this manner, it is important to ask how law can be formulated and interpreted in cultural terms.\textsuperscript{33}

Part II provides an overview of some of the classical Jewish law sources governing public Torah reading and \textit{aliyyot} for women in a \textit{minyan} of ten males. This discussion focuses initially on the oldest sources addressing the issue, and then examines subsequent interpretations of these sources by ancient and modern commentators and by later Jewish law codes. These subsequent sources have shaped the \textit{halakhic} discourse in this area. An analysis of these sources reveals that despite the eventual development of a consensus on this issue, a basis exists in the tradition for a different practice from the norm followed today.

Part III applies the cultural analysis paradigm developed in this Article to the issue of female participation in public Torah reading. In addressing how cultural analysis can be applied to shape the discourse of Jewish law in this area, the discussion initially explores, from a theoretical standpoint, the cultural underpinnings of the tradition’s perspective on women and the historical resistance of Jewish law to feminism. It then examines the “cultural basis for change” in this area, drawing from both philosophical and sociological perspectives.

\section*{I. THE EMERGING FOCUS ON LAW AND CULTURAL ANALYSIS}

An increasing number and variety of academics are invoking culture as an analytical construct. Although originally cultural analysis was used as a tool in disciplines such as anthropology and literary studies, by the late-twentieth century the legal academy also began to embrace the paradigm.\textsuperscript{34} As a general matter, cultural analysis emphasizes “the analysis of beliefs and values.”\textsuperscript{35} The starting point of cultural analysis is that human beings are creative and continually seek to make and remake their world. The discipline thus emphasizes peoples’ participation in the processes of cultural production.\textsuperscript{36}
Although the classic view of culture understood culture as coherent and self-contained, cultural studies experts today understand culture as fluid and “deeply compromised.”\footnote{See James Clifford, The Predicament of Culture: Twentieth-Century Ethnography, Literature, and Art 10 (1988).} In other words, they see culture as dynamic and continually evolving as a result of a variety of internal and external influences.\footnote{See Mezey, supra note 33, at 43.}

A cultural analysis approach to law asks “how to talk about and interpret law in cultural terms.”\footnote{Id. at 36.} The law and cultural analysis literature is varied and no unified cultural analysis approach to the law exists; scholars working in this area incorporate several distinct approaches to the convergence of law and culture. For this reason, it can be difficult to apply the insights of cultural analysis to a particular legal issue. This Part develops a viable cultural analysis paradigm that can facilitate legal analysis on a broad range of issues. It identifies and analyzes several key concerns that permeate the relationship between law and culture in the writings of those scholars who rely upon a more culturally nuanced approach to the law. This paradigm includes a focus on 1) power relationships; 2) contextualization; 3) contestation; 4) multiplicity of values; and 5) the interrelationship between law and culture.

In general terms, cultural analysis pays attention to power and hierarchy and examines how the law sustains and reinforces relationships of power. This concern with power and hierarchy undoubtedly derives from the link that the discipline of cultural studies has made between culture and “questions of social stratification, power, and social conflict.”\footnote{Austin D. Sarat, Redirecting Legal Scholarship in Law Schools, 12 YALE J.L. & HUMAN. 129, 147 (2000) (reviewing Paul Kahn, The Cultural Study of Law: Reconstructing Legal Scholarship (1999)).} Thus, those who engage in the cultural study of law view legal claims as a form of power—“more precisely, that the truth of legal propositions rests not in some objective fact or principle accessible to rational inquiry, but in the relationships of power that such claims sustain.”\footnote{Kahn, supra note 3, at 149.} Power relationships are what sustain legal claims.

An important consequence of this paradigm is that the study of law is “historically specific and deeply contextualized.”\footnote{Id. at 150.} Rather than being determined by timeless, “universal values that are basic to the human condition,” culture is “grounded in particular conditions of
possibility.” Cultural theorist Richard Johnson has observed that “cultural studies is about the historical forms of consciousness or subjectivity, or the subjective forms we live by.” Therefore, according to cultural analysis, the objectivity, neutrality, and coherence of the law are a myth. Instead, cultural analysis understands law according to a contextualized framework. The increasing popularity of the postmodern perspective, which emphasizes a fluidity of meaning in a given text, requires that a cultural analysis of the law be attentive to “complex cultural borrowings, importations of new meanings, and new points of resistance.” This perspective also sees legal texts as “multivalent,” and thus possessing the capacity to speak to new generations in different contexts. Paul Kahn fittingly captured the concept of contextualization with the following observation: “Does one ask what the Framers said in 1789, or what they would have said 200 years later, or something in-between, such as what is the current meaning of what they said then?”

This contextualized, democratic approach to the study of law highlights the issue of contestation. Culture “creates meanings that allow for the possibility of dispute and contest.” This approach struggles with the idea of hegemony, which MIT anthropology professor Susan Silbey has described as “those circumstances where representations and social constructions are so embedded as to be almost invisible” or “taken for granted.” Viewing law as hegemonic tends to reify power dynamics to the exclusion of resistance. A hegemonic notion of law is particularly characteristic of the “top-down” approach, which understands the law’s development from the perspectives of society’s more dominant, or powerful, viewpoints. The narrative movement of legal scholarship, which gained much attention during the last part of the twentieth century, can be seen as a response by outside scholars, working in areas such as critical race, feminist, and

43 Miller, supra note 36, at 74.
44 Johnson, supra note 3, at 43.
45 Kahn, supra note 3, at 145–46. In this respect, the cultural study of law owes a debt to the school of legal realism. Although a discussion of the differences between legal realism and cultural analysis are beyond the scope of this Article, see Sarat & Simon, supra note 2, at 9–13, for a nuanced discussion of this point.
46 Sarat, supra note 40, at 148–49.
47 Cf. Kahn, supra note 3, at 146 (discussing the multivalent quality of the legal texts according to this perspective, and noting that “history is a wide-open field for interpretive disagreement”).
48 Id. at 146–47.
50 Susan S. Silbey, Ideology, Power, and Justice, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES 287 (Bryant G. Garth & Austin Sarat eds., 1998). Throughout this Article, the author shall follow the practice of noting in the text the backgrounds of only those scholars who are not primarily legal academics.
51 A hegemonic system reinforces a “structure of social control and a means by which entrenched power relations are constructed and legitimized.” Paul Schiff Berman, Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis, 13 YALE J.L. & HUMAN. 95, 110 (2001).
gay legal theory, to law’s hegemonic character.\(^{52}\) Interestingly, the late Robert Cover’s groundbreaking article, *Nomos and Narrative*,\(^{53}\) embodies a significant cultural analysis approach and is especially significant given his stature in the legal academy.\(^{54}\) In discussing the non-hierarchical, “radically uncontrolled” nature of narrative, Cover observed that narratives “create and reveal the patterns of commitment, resistance, and understanding.”\(^{55}\) Narrative scholars focus on the need to introduce stories from a variety of perspectives so that legal discourse will be shaped in response to a broader array of interests rather than the interests of just the entrenched perspective.\(^{56}\)

Cultural analysis thus sees meanings as contested rather than “hegemonic.” According to Wellesley College professor Sally Engle Merry, “culture is being redefined as a flexible repertoire of practices and discourses created through historical processes of contestation over signs and meanings.”\(^{57}\) When law is understood in a historical context, the result is “a dynamic process in which power is contested for the sake of ideas, values, and interests.”\(^{58}\) Thus, the contestation aspect of the cultural analysis paradigm also relates to its concern for relationships of power and hierarchy because contests over meaning “become occasions for observing the play of power.”\(^{59}\) Naomi Mezey agrees that “[t]o talk about the making and contestation of meaning is necessarily to talk about power.”\(^{60}\) Paul Kahn notes that these contests are “often fought within, and over, the terms of legal claims for recognition of identity as well as of particular interests.”\(^{61}\) Those who view law through a cultural analysis framework “tend to see law as . . . a set of sites of social conflict, and a set of resources . . . for those involved in these conflicts.”\(^{62}\) In this regard, Amherst professor Austin Sarat has observed that “because the construction of meaning through law is, in fact, typically contested, scholars show the many ways in which resistance occurs.”\(^{63}\)

When law is invoked to reaffirm, or enforce, certain cultural values, it is typically being used as a vehicle for advancing a particular side of an


\(^{54}\) Id. at 17. Robert Cover was a professor at Yale Law School whose expertise included legal history, constitutional law, and jurisprudence.

\(^{55}\) Id.

\(^{56}\) See infra notes 69–71 and accompanying text.


\(^{58}\) Kahn, supra note 3, at 150; see also Johnson, supra note 3, at 39 (“[C]ulture is neither an autonomous nor an externally determined field, but a site of social differences and struggles.”).

\(^{59}\) Sarat, supra note 40, at 140.

\(^{60}\) Mezey, supra note 33, at 47.

\(^{61}\) Kahn, supra note 3, at 150.

\(^{62}\) Id. at 149–50.

\(^{63}\) Sarat, supra note 40, at 140.
ongoing cultural contest.\textsuperscript{64} Significantly, the battle lines can exist either between groups or even between diverse factions within a particular cultural group.\textsuperscript{65} Mezey has observed: “That contradictions exist within and between cultures is a point that can be missed by using terms, like ‘structure,’ ‘system,’ or ‘shared meaning,’ which suggest an elegant coherence.”\textsuperscript{66} In a similar vein, Madhavi Sunder has examined the concept of “cultural dissent” within cultures and documented how today, an increasing number of individuals within particular cultures are seeking “to dissent from traditional cultural norms and to make new cultural meanings—that is, to reinterpret cultural norms in ways more favorable to them.”\textsuperscript{67} Cultural dissent, according to Sunder, is defined by “challenges by individuals within a culture to modernize, or broaden, the traditional terms of cultural membership.”\textsuperscript{68}

A cultural analysis framework also entails embracing a multiplicity of values rather than a unitary, or even purportedly objective, set of ideals. From a scholarly perspective, this methodology characteristic of cultural analysis comports with the underlying premise of narrative scholarship, which emphasizes that the lawmaking process is best served when stories representing a broad range of societal perspectives are explicitly considered in the decisional calculus.\textsuperscript{69} Allowing multiple perspectives into the legal discourse facilitates the introduction of historically marginalized perspectives such as feminist theory. Indeed, Paul Kahn notes that many who study the culture of law focus on the perspective of such marginalized group interests “that might provide a ground for resistance to, and thus for evaluation of, legal

\textsuperscript{64} Post, supra note 49, at 492.
\textsuperscript{65} See Mezey, supra note 33, at 43–44.
\textsuperscript{66} Id. at 43.
\textsuperscript{67} Madhavi Sunder, Cultural Dissent, 54 STAN. L. REV. 495, 498 (2001).
\textsuperscript{68} Id. at 516; see also Yaacov Ben-Shemesh, Law and Internal Cultural Conflicts, 1 LAW & ETHICS HUM. RTS. 271, 288 (2007) (“Cultural dissenters remind us that cultures are not immutable ‘givens,’ and that individuals have the capacity to shape, resist, and change cultural norms, values and practices.”).

By attempting to focus attention on the stories of those whose perspectives have been excluded from the discourse, narrative scholars urge the need for law to incorporate as large an information base as possible. Their arguments are supported by evidence showing that compliance with law is enhanced on an overall basis to the extent the laws are perceived as reflecting public morality or public perception regarding the fairness and legitimacy of the decision-making process. See Tom R. Tyler, Compliance with IP Laws: A Psychological Perspective, 29 N.Y.U. J. INT’L L. & POL. 219, 225–26 (1996) (focusing on criminal justice research). Tyler’s work demonstrates that “[p]eople are more likely to regard as fair, and to accept, decisions in which they participated.” Id. at 232. This reality reinforces the emphasis cultural analysis places upon the importance of people’s participation in the creation of law as a form of cultural production. See supra note 10 and accompanying text.
understandings."\(^70\)

Kahn also notes that "[m]uch of the cultural studies of law movement has been an effort to shift the location at which we study law from the opinions of the appellate courts to the expressions of ordinary people carrying out the tasks of everyday life."\(^71\) One notable example of this phenomenon is the reality that, despite the enactment of formal laws, speed limits are enforced by police and traffic courts based on the conventions of drivers that vary according to geographic and other variables.\(^72\) Another illustration, in the context of Jewish law, is furnished by the importance of the role of "minhag" or "custom" in shaping the fabric of Jewish law from the "bottom up." For example, although rabbinic law does not explicitly support the obligatory nature of Jewish males wearing a head covering, or yarmulke, at all times,\(^73\) in certain segments of the Jewish community, Jewish males are now obligated to wear the head-covering.\(^74\) This development illustrates how customs, typified by a "bottom-up" approach, can indeed acquire the force of law. Nevertheless, this incorporation of the bottom-up approach to law's development does not negate the relevance of the top-down approach.\(^75\) The global point here is that a cultural analysis methodology blends the importance of both "top-down" and "bottom-up" inquiries as it opens the door to a multiplicity of values.

The interaction between law and culture is the most all-encompassing characteristic of the cultural analysis paradigm.\(^76\) This perspective understands law as reflecting culture as well as creating culture.\(^77\) Robert Cover recognized this relationship between law and culture when he observed that "the creation of legal meaning . . . takes place always through an essentially cultural medium."\(^78\) According to a cultural analysis perspective, the law is "constitutive," meaning that law both constitutes culture and is constituted by cultural norms.\(^79\) Thus,
when law is seen through a cultural analysis framework, law is understood as both a product of, and catalyst for, cultural production rather than as a neutral, objective system. Significantly, under this perspective, the law lacks an autonomous quality.80

Mezey illustrates this interdependent characteristic with a fascinating discussion of the litigation concerning the now familiar warnings routinely given to a suspect of custodial interrogations that “he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him.”81 The rule of law requiring these warnings was developed by the Supreme Court in *Miranda v. Arizona*,82 and quickly became part not only of police practice, but also of our popular culture. Thirty-four years later, the Court reconsidered the *Miranda* warnings in *Dickerson v. United States*, in which the Court held that the constitutional rule announced in *Miranda* could not be superseded legislatively.83 Mezey explains the *Dickerson* decision as an example of the interdependence of law and culture. She notes that even though several members of the majority in *Dickerson* had previously sought to call the constitutional rationale of the *Miranda* decision into question,84 “the Court found that the warnings were constitutionally required not because the Constitution demanded them but because they had been popularized to the point that they were culturally understood as being constitutionally required.”85 In short, post-*Miranda*, law transformed culture; “in *Dickerson*, culture transformed law.”86

As Mezey’s discussion of the *Miranda* and *Dickerson* decisions illuminates, it is possible to understand more fully the interrelationship between law and culture by exploring the relationship between law and cultural or social norms.87 Indeed, social norms, which are the collective

80 Id. at 47.
82 Id.
84 See Mezey, supra note 33, at 56 (noting the views of Justice Kennedy, Justice O’Connor, and Justice Rehnquist); see also Dickerson, 530 U.S. at 444–45 (Scalia, J., dissenting).
85 Mezey, supra note 33, at 57.
86 Id. The Court’s recent decision in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), does not impact this analysis. In *Berghuis*, the Court merely examined application of the “right to remain silent” from a practical and procedural standpoint. Id. at 2266; cf. Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 Va. L. Rev. 1899, 1946 (2007) (noting that as courts incorporate more customary law into actual decisions, “a feedback loop is created in which custom influences the law, the law reinforces the custom, and the custom then becomes further entrenched”).
87 This Article refers to the terms “social norms” and “cultural norms” interchangeably and without differentiation in order to conform with other legal scholars’ use of these terms in the context of a cultural analysis discussion. See generally Kerry Rittich, *Engendering Development/Marketing Equality*, 67 Alb. L. Rev. 575 (2003).
embodiment of informal rules and implicit understandings can be viewed as culturally driven. Dickerson shows how the development of the law can be impacted by prevalent social norms, and in this way, law reflects culture. According to this model, law is used to enforce social norms and thus is “figured as the arm of a coherent antecedent culture that is the ultimate source of society’s identity and authority.”

Many cultural analysis scholars believe that not only does law reflect “antecedent culture” but also “is instead itself a medium that both instantiates and establishes culture.” This “constitutive” view of law’s relationship to culture emphasizes that “law [is] a lens for constructing reality” and that “law is sometimes used to revise and reshape culture.” Mezey’s discussion of Miranda reveals how the development of social norms can be influenced by the creation and enforcement of law. Scholars describe this as law’s “expressive function,” indicating to people what is right or socially acceptable. Austin Sarat has remarked how “social practices are not logically separable from the laws that shape them and that social practices are unintelligible apart from the legal norms that give rise to them.” He elaborates on the constitutive view by observing that it “suggests that law shapes society from the inside out by providing the principal categories in terms of which social life is made to seem largely natural, normal, cohesive, and coherent.”

Social norms can also discourage compliance with the law because they can be so pervasive and influential that people may choose to comply with a norm rather than a rule of law. In this way, cultural norms have the potential not only to supplement, but even to replace, formal rules of law in certain circumstances by creating a more popular version of the legal rules. For example, changes in formal speed limits have been shown to bear little connection to the actual speed at which motorists drive. Another prominent illustration of this phenomenon is

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88 The sociological and legal literature examining the development of customary practices and norms suggests that customs are most common in situations involving ongoing relationships with repetitive transactions. See Rothman, supra note 86, at 195–60. Similarly, research has shown that welfare-maximizing norms are most likely to develop in close-knit communities. See Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 161, 187, 228, 267, 283 (1991).


90 Id. at 489; see also Berman, supra note 51, at 109 (“[F]or at least the past fifteen years, sociolegal scholars have largely pursued a constitutive vision of law. . . .”).

91 Berman, supra note 51, at 118.

92 Post, supra note 49, at 488.

93 Mark F. Schultz, Copynorms: Copyright Law and Social Norms, in 1 Intellectual Property and Information Wealth 201, 206 (Peter K. Yu ed., 2007) (citing literature on this point).

94 Sarat, supra note 40, at 137; see also Sarat & Simon, supra note 2, at 19 (“Law is . . . constitutive of culture . . . .”).

95 Sarat, supra note 40, at 134; see also id. (noting Paul Kahn’s “deep investment in a constitutive theory of law”).

96 See Robert E. King & Cass R. Sunstein, Doing Without Speed Limits, 79 B.U. L. REV. 155,
illegal file sharing. Thus, law and cultural norms work in tandem in influencing human behavior.

The foregoing discussion underscores that the formation and implementation of the law is “a process that always takes place in culturally specific contexts” and produces the circulation of the law’s “intended and unintended meanings.” As a result, “[t]hose whom the law seeks to govern may redefine the law, the law may redefine them, or both.” The process, overall, is a “messy” one, as candidly acknowledged by legal scholars. Part II illustrates this phenomenon in the context of the Jewish law concerning female participation in public Torah reading.

II. THE CLASSICAL JEWISH LAW SOURCES GOVERNING TORAH READING AND ALIYYOT FOR WOMEN

As the time for Torah reading approaches, someone takes the Torah around the boys’ side. I must jump if I wish to reach over the mechitza [partition separating the men and women] and kiss the Torah. The [Torah reading] is a bitter point for me. The boys assist, compliment and teach each other—laughing, joking and living the rituals. They literally own the room. I am a nothing.

According to the Jewish tradition, Revelation of God’s word included not just the written word of the Torah but also the accompanying Oral Law that explained and elaborated upon the Torah. Specifically, the tradition assumes that part of the Oral Law was revealed directly by God to Moses and part of the Oral Law was “committed to the halakhic authorities” in every generation “to fashion and

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97 At a 2009 conference at Howard Law School, intellectual property attorney John Hornick said that “illegal file sharing is not just a question of money . . . . It’s also a question of convenience and it’s also becoming a way of life.” Anandashankar Mazumdar, Speaker at Howard Law School IP Conference Proposes that Copyright Might Be “Dead,” 77 PAT. TRADEMARK & COPYRIGHT J. (BNA) 562, 562 (2009) (reproducing portions of Hornick’s speech); see also DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 105 (2009) (“[E]vidence of a potential cultural shift occasioned by digital technologies and the Internet . . . . make the underlying questions of exclusivity and appropriation a phenomenon deserving of more measured attention . . . .”); Schultz, supra note 93, at 217 (noting that numerous studies show that people are more likely to comply with the law for normative reasons rather than because of fear of legal consequences).

98 Mezey, supra note 33, at 60.

99 Id.

100 DORFF, supra note 13, at 335 (admitting that his view of Jewish law is “messy,” and generally manifesting a cultural analysis perspective without explicitly invoking this mode of analysis); Mezey, supra note 33, at 66–67.

This latter aspect of the Oral Law reflects a clear tradition of human interpretation and can be traced back to a verse in Deuteronomy, which provides that people must abide by the judicial verdicts that are announced by the Levitical priests or the judges in charge. The tradition understands this language as applying to more than judicial verdicts so that it also invests halakhic authorities in subsequent generations with the authority to solve new problems. Menachem Elon, the former Deputy President of the Supreme Court of Israel, fittingly captured the human component of Jewish law in his authoritative treatise:

Thus, when we examine the views of many halakhic authorities, we will find that as clearly and unequivocally as they emphasized the suprahuman and divine quality of the Source of the entire Halakhah, in the very same way and with the same emphasis they also stressed the human factor—the exclusive prerogative of the halakhic authorities in regard to the ongoing development and creation of the Halakhah.... The source of the Halakhah is Heaven, but the place of the Halakhah, and its life and development, are not in heaven but in human society.

In the early centuries of the Common Era, the rabbis began to write the Oral Law down because they were concerned that it would otherwise be forgotten. The major product of this codification according to Jewish law and life is the Babylonian Talmud, which was redacted around 500 C.E. Once the Talmud was redacted, Jewish law authorities regarded themselves as lacking the ability to reinterpret the meaning of the Written Torah itself in ways that would contradict that which the Babylonian Talmud had established as normative Jewish law. Still, legal development continued to be possible through innovative interpretation of the Talmud, as well as creative conceptualization and application of the Talmudic principles. Although the halakhic system historically gave greater weight to the earlier authorities, the post-Talmudic authorities beginning in the late sixth and early seventh centuries developed the rule that differences of opinion arising from the time of the middle of the fourth century onward should be resolved according to the later authorities. By resorting to such rules of lawmakers, the rabbis of

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103 Deuteronomy 17:8–11.
104 ELON, supra note 102, at 217 n.34.
105 Id. at 241–42 (citing passages from the Babylonian and Jerusalem Talmuds that discuss Deuteronomy 30:12).
106 See Steven H. Resnicoff, Autonomy in Jewish Law—In Theory and in Practice, 24 J.L. & RELIGION 507, 528 n.112–13 (2009). An earlier Talmud, the Jerusalem Talmud, was redacted in Palestine but has never been viewed with the same reverence as the Babylonian Talmud. See Stephen G. Wald, Mishnah, in 14 THE ENCYCLOPEDIA JUDAICA 319, 319–31 (Michael Berenbaum & Fred Skolnik eds., 2d ed. 2007); see also infra notes 181–182 and accompanying text.
107 ELON, supra note 102, at 268.
each generation sought to further halakhic creativity and development. The discussion in this Part demonstrates how this rule favoring later interpretation has been especially problematic for the history of women’s participation in the synagogue rituals of reading Torah and receiving aliyyot.108

This Part provides an overview of some of the primary classical Jewish law sources and their interpretation by ancient and modern commentators regarding the issue of women publicly reading from the Torah and receiving aliyyot in a traditional minyan of ten men. The initial section of this Part discusses the two oldest sources dating back to the Talmudic period that address these issues because they serve as the foundation for all subsequent Jewish law discussions. Subsequent sections focus on numerous legal applications of these sources that, taken together, have shaped the Jewish law tradition on the issue of women and public Torah reading.

A. Talmudic Period Sources

Traditional Jewish law authorities maintain that in theory, whenever the Babylonian Talmud “reached a consensus as to a particular Torah or non-Torah law, that conclusion became normative law, not to be changed by later authorities.”109 Still, the Talmud “failed to constitute a clear written code of Jewish law.”110 Specifically, authorities acknowledge that it is extremely difficult to determine not only the circumstances in which the Talmud actually reached a consensus, but also the substantive content of any given consensus in certain situations.111 Further, the difficulties of Talmudic consensus

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108 See infra notes Part II.C, and notes 180–184 and accompanying text.
109 Resnicoff, supra note 106, at 532. Some Jewish law authorities take the position that even categorical prohibitions contained in the Babylonian Talmud should be subject to re-examination going forward. This perspective is characteristic of the Conservative Movement, which tends to interpret the law more leniently. See generally Kwall, Comparative Perspective, supra note 18. The Conservative Movement can be said to embrace the cultural analysis paradigm most explicitly because its proponents assert that Torah law has evolved, and should evolve, to accommodate social needs. Although the Conservative Movement claims to regard halakhah as binding upon Jews, adherents of this Movement are sometimes willing to revisit and reject legal precedents that the Orthodox approach regards as conclusive, including rules believed to have been settled by the Talmud. In other words, according to this perspective, the rabbis of the Talmud may not be the final arbiters of Jewish law because the law, as a human system, must be seen to develop in response to changing human conditions. See Louis Jacobs, A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law 222 (2d ed. 2000). The Conservative Movement also opposes the claim that the codifications of Jewish law are binding and authoritative, but sees them instead as furnishing guidance. See Resnicoff, supra note 106, at 535; infra Part II.E; see also Byron Sherwin, In Partnership with God: Contemporary Jewish Law and Ethics 45 & n.115 (1990). These points are major sources of contestation between the Orthodox and Conservative legal perspectives.
110 Resnicoff, supra note 106, at 529.
111 Id. at 532.
were complicated by the development of distinct customs by the dispersed Jewish communities—pertaining to both ritual and nonritual matters—that impacted the contours of the governing law. Moreover, throughout history, foreign cultural influences also permeated Jewish thinking and law as a result of these geographical differences. These factors have resulted in numerous gray areas that have provided fertile grounds for contestation over the centuries of the development of Jewish law.

Thus, although the tradition, at least in Orthodox circles, purports to draw a line between the prohibited changing of the law to accommodate new circumstances and the permissible application of the law to new situations, the practical applications and parameters of this distinction are not always clear. Even Orthodox authorities readily admit that in rendering legal decisions, the fact-sensitive nature of legal decision-making sometimes requires that new situations be considered differently from those presented in the Talmud. As a result, throughout history rabbis attempting to apply many Jewish laws have done so only by resort to the examination and consideration of diverse circumstances “involving cultural, economic, medical, political, and psychological factors.” Additionally, in issuing rulings, rabbis inevitably have been influenced by some of their personal approaches and perspectives on Jewish law’s priorities.

Significantly, with respect to the issue of women and public Torah reading, the Babylonian Talmud lacks clarity. The relevant Talmudic text derives from an even earlier rabbinic source called a baraita. It states:

Our Rabbis taught: All may be included among the seven [called to the Torah on Shabbat], even a minor and a woman, but the Sages

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112 Id. at 535.
113 Steven Resnicoff writes that “[t]he continuous stream of significant economic, geographical, political, sociological and technological changes and scientific discoveries has . . . rendered the applicability of Talmudic rulings increasingly ambiguous and uncertain.” Id. at 532.
114 Id. at 533–34. Although the Conservative Movement explicitly considers the role of socio-economic factors in its applications of halakha, see, for example, JACOBS, supra note 109, even Orthodox scholars have acknowledged that these factors do creep into the law’s application. See, e.g., Lichtenstein, supra note 21, at 14 (“[W]e can recognize the position of the human and social factor within halakhic decision as firmly secure.”); Daniel Sperber, Paralysis in Contemporary Halakha?, 36 TRADITION, Fall 2002, at 1, 7 (writing from an Orthodox perspective).
115 Resnicoff, supra note 106, at 534. This reality was present as early as the first century C.E., when the two major schools of thought concerning Jewish law first emerged with the schools of Rabbis Hillel and Shammai. Louis Ginzberg has documented how the social status of Hillel and Shammai, respectively, influenced their rulings, and thus, demonstrated how halakhah, from its very inception, was “an expression of life itself.” Louis Ginzberg, The Significance of the Halakhah for Jewish History, in ON JEWISH LAW AND LORE 77, 79 (Athenaum 1981) (1955). Ginzberg provides an in-depth documentation of how the diverse positions of these two Talmudic schools were influenced by socio-economic factors. Id. at 77–124.
said that a woman should not read in the Torah because of the
dignity of the congregation [kevod ha-tsisbur].116

Even a cursory reading of this language shows that it furnishes
rather conflicting messages. The first clause indicates that women may
be called to the Torah on Shabbat (the Sabbath), but the second clause
cautions against women reading from the Torah based on the more
vague concept of the “dignity of the congregation” (in Hebrew, kevod
ha-tsisbur). According to one commentator, the Talmud contains
“almost no further discussion of this point” and he therefore asks
whether the Talmud’s position concerning women is “a rabbinic decree,
good advice, or something else?”117

Some might argue that the language of the Talmudic text overall
exhibits ambiguity given the conflicting clauses concerning women’s
participation. Others might conclude that the Talmud’s language that
women should not read publicly from the Torah is unambiguous, but
that the text still leaves open the question whether the Sages’ statement
that women cannot read in the Torah is an immutable ruling, or
whether its prescription is changeable if the underlying reason for its
position changes. In other words, is the “dignity of the community” a
relevant concept based on local minhag (custom) or “a durable, timeless
perception that withstands shifting cultural sensibilities”?118 Had the
Talmud conclusively decided that females are not categorically eligible
to be called to the Torah for an aliya or to read publicly from the Torah
during a minyan, it would be more difficult to challenge this conclusion
under a traditional Jewish law perspective. According to Sperber,
however, as the language in the Talmud stands, it displays “an
uncertainty regarding a matter of Rabbinic law.”119 In contrast, Israeli
Professor of Law Eliav Shochetman writes that even if the beginning of
the baraita represents a minority opinion, the Talmud did not codify
the halakha according to this view, and therefore, “post-Talmudic
rabbis lack the authority to rule according to the logically sound
minority opinion.”120

There is a parallel, but separate, early rabbinic text addressing this
same matter in a distinct compilation called the Tosefta. This text
provides:

All may be included among the seven [called to the Torah on
Shabbat], even a woman, even a minor. We do not bring a woman to

116 Megillah 23a (Babylonian Talmud), as translated in Shapiro, Qeri’at ha-Torah by
Women, supra note 27, at 211.
117 Michael Broyde, Women Receiving Aliyyot: A Short Halakhic Analysis, in “Wisdom and
118 Shapiro, supra note 27, at 241. For a further discussion of “dignity of the congregation”
see infra Part II.C.
119 Sperber, supra note 19, at 53.
120 Shochetman, supra note 24, at 329.
read to the public.\textsuperscript{121}

The text in the \textit{Tosefta} dates from the same period as the text in the Talmud,\textsuperscript{122} and it also exhibits an internal contradiction. Mendel Shapiro, a committed Orthodox Jew, rabbi, and lawyer who wrote the first extensive legal analysis advocating increased participation for women in public Torah reading, noted that the \textit{Tosefta}’s language leaves “open the possibility that there may be circumstances where a woman might read.”\textsuperscript{123} Riskin, in contrast, believes the second sentence is a direct continuation of the first one, rather than a dissent.\textsuperscript{124}

Having laid out the relevant foundational materials, this Part now turns to the various arguments and positions embraced in the Jewish tradition as they pertain to the issues of women publicly reading from the Torah and receiving \textit{aliyyot}. The following discussion reveals that the question whether women may engage in these activities was never addressed directly until very recently. Therefore, this is one of those historically gray areas lacking specific prohibitions or instructions delineating a clear-cut mandatory legal position.

The classic legal discourse on the issues of women publicly reading from the Torah and receiving \textit{aliyyot} centers around two basic questions: 1) are women obligated to hear the Torah being read, and 2) can the “dignity of the congregation” be waived and, if so, under what circumstances? Following an exploration of these issues, this Part examines the position adopted in the Jewish law codes that were compiled subsequent to the sources discussed in the earlier subparts. It concludes with an analysis of consensus and re-examination of this issue under \textit{halakhah}.

B. \textit{The Obligation Issue}

The notion of being “obligated” to perform the commandments (\textit{mitzvoth}) is a fundamental concept in Jewish law. The Jewish legal system is structured in terms of “obligations” rather than voluntary compliance. These obligations entail human obligations to other humans, as well as human obligations to the Divine.\textsuperscript{125} Some of the commandments apply especially to women,\textsuperscript{126} others to men.\textsuperscript{127} There is

\begin{footnotes}
\item[121] Megillah 3:5 (Tosefta).
\item[122] Sperber, supra note 19, at 49.
\item[123] Shapiro, supra note 27, at 234.
\item[124] Riskin, supra note 24, at 362.
\item[126] See Shabbos 20a (Jerusalem Talmud) (discussing the commandments of ritual immersion prior to resuming sexual relations after menstruation, separating challah, and lighting candles for the Sabbath).
\item[127] The commandments of marrying and procreating apply to men rather than women. See
\end{footnotes}
also a rule announced in the early rabbinic literature stating that “one who is not himself under obligation to perform a religious duty cannot perform it on behalf of a congregation.”\footnote{Rosh Hashanah 3:8 (Mishnah), as translated in Shapiro, Qeri'at ha-Torah by Women, supra note 27, at 212.} Based on this rule, the argument has been advanced that because women are excluded from the requisite minyan of ten males needed for a public Torah reading,\footnote{Riskin, supra note 24, at 366; Shochetman, supra note 24, at 300.} and also because women are not obligated to study Torah,\footnote{Kiddushin 29a–b (Babylonian Talmud). For a more detailed discussion of the issue of women and Torah study, see Saul Berman, The Status of Women in Halakhic Judaism, in THE JEWISH WOMAN: NEW PERSPECTIVES 114, 119–21 (Elizabeth Koltun ed., 1987).} they cannot discharge the obligations for men in connection with a public Torah reading.\footnote{The Mishnah states that women are exempted from affirmative precepts that are time-bound. Kiddushin 1:7 (Mishnah). Yet, many commentators have noted that the Talmud’s discussion of this point is considerably more nuanced. Saul Berman has noted that it is “impossible to explain women’s exemptions exclusively in terms of the absence of need for time conditional commandments.” Berman, supra note 130, at 119; see also Biale, supra note 31, at 10–17 (discussing this point); JUDITH HAUPMANN, REREADING THE RABBIS 233 (1998) (“In the ancient world women were on a lower social rung than men and for that reason could not assist them in discharging their ritual obligations.”).} This reasoning, although adopted by the majority of Orthodox authorities,\footnote{See supra pg. 614; infra notes 153, 170 and accompanying text.} does seem to contradict the explicit language of both the baraita\footnote{See supra text accompanying note 116.} and the Tosefta\footnote{See supra text accompanying note 121.} quoted above allowing women to be called to the Torah.

With respect to the issues of publicly reading from the Torah and receiving an aliya, the determinative question is whether these are areas that fall under the general realm of Torah study (from which women are exempt), or something else. As discussed, according to the Babylonian Talmud, women are not prohibited from being called to the Torah, but they are seemingly barred from reading the Torah publicly based on “the dignity of the congregation” rationale rather than one concerned with the nature of the obligation.\footnote{See supra text accompanying note 119.} Given that the Sages could have barred women from publicly reading the Torah on the basis that this act involves Torah study, from which women are exempt,\footnote{The Sages also could have relied on the rationale that reading the Torah is a time-bound obligation. See Shapiro, supra note 27, at 212; supra note 131.} but instead they chose to support their decision with the dignity rationale, Shapiro has concluded that “no primary objection to women’s reading can be adduced.”\footnote{Shapiro, supra note 27, at 212.} Moreover, Shapiro argues that the model for public Torah reading is not the commandment of Torah study, but rather the commandment of gathering the community to hear the Law, in which
women and men participated together. 138 According to this perspective, the public Torah reading is a community obligation “revolving around the religious life of the synagogue” 139 rather than an individual responsibility pertaining only to men. The logical conclusion under this perspective is that women should be allowed to read the Torah on behalf of men because they are not discharging an obligation applicable only to men. 140 Once the obligation issue is placed in its proper perspective, the issue of women publicly reading from the Torah must be addressed from the standpoint of the “dignity of the congregation” concern specifically articulated in the text of the Talmud.

Before moving to the “dignity” discussion, however, it is worth addressing briefly the issue of aliyyot apart from that of reading from the Torah. At the time that the text of the baraita originated, those who were called to the Torah for an aliya also read the corresponding Torah portion itself. 141 Moreover, according to the earliest tradition, only the first and last Torah readers recited the aliya blessing. 142 Sometime before the year 1000 C.E., however, the rabbis switched to a practice in which one person read the entire Torah portion for the week, and those receiving an aliya read along silently or just listened. 143 Because not every person who received aliyyot before this time recited the introductory and concluding blessings (although they did read a portion from the Torah), the weight of authority understands these aliya prayers as blessings of thanksgiving to God for giving us the Torah, rather than as part of the commandment of studying Torah. 144 Significantly, if the aliya prayers were viewed as part of the command to study Torah, every person called to the Torah would have been required to say these blessings from the outset. As a result of this logic, Shapiro argues that women who are not commanded to study Torah can say these blessings of thanksgiving without being seen as discharging a male’s obligation to

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138 See id. at 213–14. This command is known as haqhel, and it derives from Deuteronomy. See Deuteronomy 31:12 (directing that all the Israelite people be gathered to hear and learn to revere God).

139 Shapiro, supra note 27, at 215.

140 Id. at 217.

141 These two areas of ritual were, at one time, unified because those who received the aliyyot also read the corresponding portion from the Torah. Today, however, the people receiving aliyyot generally are not the same individuals as the actual Torah readers. Id. at 230; see supra note 17. Shapiro notes that the current practice that each person who receives an aliya recites the introductory and concluding blessings was instituted during the Talmudic period to protect the honor of the Torah. Specifically, the rabbis believed that the honor of the Torah would be damaged under the earlier practice because those who left the service early—or arrived late—and were not present to hear the requisite blessings might falsely assume that the Torah reading did not require an introductory or concluding blessing. Shapiro, supra note 27, at 220.

142 Megillah 4:1 (Mishnah).

143 See Shapiro, supra note 27, at 230.

144 See id. at 218–29 for a discussion of the rabbinic authority on this point.
study Torah. 145 Under this view, the concern that women should be barred because they cannot recite these blessings on behalf of the men in the community is not relevant. 146 In contrast, some authorities understand the *aliya* blessings to involve “matters of sanctity” requiring a *minyan* of men, and therefore women cannot fulfill men’s obligations in this regard. 147

C. Dignity of the Congregation and Waiver

The pivotal issue concerning whether women are permitted under the *halakah* to publicly read from the Torah and receive *aliyyot* centers on the concept of the “dignity of the congregation” (*kevod ha-tsibbur*) as mentioned in the *baraita* in the Talmud. Specifically, if “dignity of the congregation” is a fixed *halakhic* concept that does not change with place and time, then it might be appropriate to conclude that the *halakhic* system bars women from these ritual activities for all time. On the other hand, if “dignity of the congregation” is understood to reflect social sensitivity of the times, then the rationale provided in the *baraita* may not seem to be applicable in modern times, at least for all Orthodox communities. The significance of this distinction is critical: those who oppose allowing women to participate in public Torah reading tend toward the view that “dignity of the congregation” is an objective, independent, and “scientific” *halakhic* category divorced from place and time, whereas those favoring such participation understand the concept as “a context-related principle indicating a recommendation of policy to the community under certain circumstances.” 148

Shapiro takes issue with those who treat “dignity of the congregation” as a “restatement of the rule that ‘one who is not himself under obligation to perform a religious duty cannot perform it on behalf of the congregation’” because this view “leads naturally to the conclusion that [dignity of the congregation], at least in the case of women’s *aliyyot*, is an objective, nonwaivable standard.” 149 Based on the

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145 Id. at 221–22. Another *halakhic* argument that is often asserted in support of the view that women should not publicly read from the Torah or recite the *aliya* blessings has a basis in the laws of modesty. See Shochetman, supra note 24, at 306–10 (discussing the view that the presence of women among men in synagogue can disrupt the men’s concentration). Moreover, a woman’s singing voice is regarded as “nakedness,” which presumably can cause sexual arousal in men. See *Berakhot* 24a (Babylonian Talmud). Shapiro notes that he is not aware of a direct opinion on whether a woman chanting the words of the Torah or the accompanying blessings in accordance with the prescribed musical tropes violates the laws of modesty on this ground. Shapiro, supra note 27, at 269–70. He notes, however, that the issue of women publicly chanting other religious texts has been raised and the majority of decisors conclude that no violation exists. Id. at 270.

146 Shapiro, supra note 27, at 221–22.

147 See Riskin, supra note 24, at 387.

148 Ross, supra note 22, at 6; see also id. at 11–12.

149 Shapiro, supra note 30, at 403. Shapiro critiques Riskin’s definition of this concept as
other examples of “dignity of the congregation" enumerated in the Talmud, Shapiro concludes that “it appears that kevod ha-tsibbur generally covers a range of related but distinct concepts, whose common purpose is to prohibit conduct that imposes unnecessary bother on the congregation . . . or that disturbs the seriousness and propriety of the synagogue service." Indeed, the general approach to illuminating the meaning of the congregation’s dignity appears to depend on situational relativity. For example, “dignity of the congregation” requires “that the Torah not be read publicly from a printed book, yet if there is no [Torah] scroll available, the book may—indeed, must—be used.”

If women’s participation in public Torah reading is considered as an absolute prohibition, it would be very difficult to make an argument that the tradition allows a congregation to relinquish its dignity so as to permit women to participate. This is the view of many authorities in the Orthodox world today. On the other hand, if the congregation’s dignity is not considered as a fixed halakhic category applicable for all time, the question arises as to whether the congregation may waive its dignity or may consider its dignity unimpaired. In the context of the issue of women’s participation in public Torah reading, this issue actually generated significant discussion in the middle ages. Not surprisingly, however, when the issue surfaced at this time, it was in the context of a discussion that did not focus directly on the question of whether women could receive an aliya. The precise question that occupied the rabbinical scholars of this period concerned whether, in a hypothetical city in which all the men were descendants of the kohanim (the Biblical High Priests), a woman could be called to the Torah in lieu of a man. According to the Talmud, the first aliya of a Torah reading is given to such a priestly descendant (known as a kohen), but it is not permitted to give one kohen an aliya after another in succession. The reason for this prohibition is to avoid generating doubt as to whether any of the kohanim receiving an aliya in these circumstances are truly valid kohanim. This possibility of doubt as to the validity of a kohen’s pedigree is known as the stigma of the kohen. Thus, the hypothetical problem that generated the critical discussion in medieval times regarding the propriety of women receiving aliyyot concerned how to have a successful Torah reading in a city in which all the men are

being “so specific to the case of women’s aliyyot that it bears no similarity to the meaning of kevod ha-tsibbur as it is generally used.” Id.

150 Shapiro, supra note 27, at 242.
151 Id. at 242–43 (discussing examples in both the Talmudic literature and the later commentaries).
152 Sperber, supra note 19, at 59–60.
153 See, e.g., Shochetman, supra note 24, at 351–52.
154 Gitten 59b (Babylonian Talmud).
155 Broyde, supra note 117, at 4 (explaining that in Hebrew the stigma is known as pegam kohen).
In the thirteenth century, Rabbi Meir ben Baruch of Rutenberg, commonly known by the acronym Maharam, proposed the following solution: the same kohen receives the first two aliyyot and women receive the remaining five. The Maharam’s reasoning in this regard was that because the Talmud does permit women to count toward the obligation of Torah reading, the Sages concern with violating the dignity of the congregation if women were allowed to read should be discarded in situations in which there is no other choice. In other words, “[a]ccording to Maharam, there is no objective rabbinic decree flatly prohibiting women from receiving aliyyot in all circumstances.”

In evaluating the significance of the Maharam’s ruling, it is important to understand that overall, the Maharam was not liberal concerning women and synagogue ritual. On the contrary, in some instances, his decisions can be read as trying to exclude women from the synagogue. Yet, the Maharam clearly interpreted the law to be sufficiently flexible to allow women to receive aliyyot where necessary. Law professor Michael Broyde, who is also an Orthodox rabbi and well-known authority on Jewish law, has observed that “[t]he intellectual predicate of Maharam’s view is that women may receive aliyyot in certain cases.”

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156 The use of Hebrew acronyms, especially for renowned rabbinic scholars, became popular in medieval times and has continued to grow in modernity. See SOL STEINMETZ, DICTIONARY OF JEWISH USAGE: A GUIDE TO THE USE OF JEWISH TERMS 128 (2005).

157 According to the Talmud, the first aliyah goes to a kohen, the second goes to a descendant of the Levite tribe, and the remaining five aliyyot to descendants of the general population (yisraelim). Gittin 59a–b (Babylonian Talmud). Significantly, these lines of descent are relevant only for males under traditional Jewish law given that women had no part in the rituals to which they pertained. In some Conservative synagogues today, however, female descendants of the kohanim and the Levite tribe are allowed to have the first and second aliyyot during a Torah reading. See Joel Roth, The Status of Daughters of Kohanim and Leviyim for Aliyot, in PROCEEDINGS OF THE COMMITTEE ON JEWISH LAW AND STANDARDS, 1986–1990, at 419 (2001), www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19861990/roth_daughtersaliyot.pdf.

158 See supra text accompanying note 116.

159 See Broyde, supra note 117, at 3 (quoting the original position of the Maharam in English).

160 Id.; see also Sperber, supra note 19, at 58 n.24 (observing that if the Maharam had understood women receiving aliyyot as absolutely prohibited, he “would not have been able to permit it, even in a place where one might consider it to constitute an offense to the kohanim present”). For a further discussion of Broyde’s views, see infra text accompanying notes 162–163, 166–169.

161 Sperber, supra note 19, at 55–58 (citing authority on this point).

162 Broyde teaches at Emory Law School and is also a dayan (judge) of the Beth Din of America.

163 Broyde, supra note 117, at 5. Significantly, however, Broyde is not a proponent of increased participation by women in public Torah reading, as will be discussed infra at the text accompanying notes 166–169. For a contrary opinion on this particular point in the text, see Shochetman, supra note 24, at 331–34. “Since there is no explicit statement made by the Sages that women’s offense at not being called to the Torah is a consideration in this matter, it seems far-fetched to assume that the Maharam would consider this” an appropriate criteria for permitting women’s aliyyot. Id. at 332.
Although a number of rabbis at the time agreed with the Maharam on this issue, a different position was articulated by Shlomo ben Aderet, known as the Rashba, who lived in Spain during the thirteenth and early fourteenth centuries. The Rashba’s solution to the situation presented by the hypothetical city containing only kohanim was to allow successive kohanim to read from the Torah because everyone knows that only kohanim are present, and therefore no doubt exists in the community as to the validity of any given kohen. According to Broyde, the Rashba does not believe that women are eligible to receive aliyyot and so their presence does not create the stigma for the kohanim. In other words, no stigma exists because the women could not be relied upon to save them from the stigma. Further, the Rashba seems to suggest that the issue of a particular kohen’s perceived pedigree is a socially subjective matter because he acknowledges that in a community in which everyone knows that all the men are kohanim, no doubt or stigma is created by successive kohanim receiving an aliya.

Broyde notes that many of the rabbis of this time also adopted the Rashba’s view and the matter remained in dispute during this period of Jewish law’s development. Further, Broyde emphasizes the completely contradictory nature of these two views. On the one hand, the Maharam maintains that women may receive aliyyot in certain situations. Broyde argues that in contrast, the Rashba’s view is based on the concept that women receiving aliyyot is prohibited by the halakhah by virtue of a rabbinic decree.

Based on these two distinct positions, Broyde has observed:

[O]ne can say with some halachic confidence that seven hundred years ago, a person living in Northern France or Southern Germany (those areas where the intellectual school of thought of the Maharam dominated) would not be considered a sinner if he or she lived in a village where all the adult men were kohanim and women received aliyyot after them, as this school of thought was certainly a reasonable one for a [religious leader] to choose at that time.

Even if the Maharam is correct as a matter of halakhah with respect to the specific issue involving a town containing all kohanim, one might argue that it is still a leap to conclude that women may generally receive

164 See Broyde, supra note 117, at 4 (quoting the original position of the Rashba, in English translation).
165 Id. at 14. Broyde’s interpretation of the Rashba’s position is not accurate given that he does not specifically say that women may not receive aliyyot. Thus, Zev Farber has argued that it is more likely that the Rashba did not believe that calling successive kohanim to the Torah is an absolute prohibition and therefore, he did not need to reach for a different solution to the problem of a city in which all of the men are kohanim. Email from Zev Farber to author (Sept. 7, 2012, 1:30 PM) (on file with author).
166 Broyde, supra note 117, at 5.
167 See id. at 6 and n.15.
168 Id. at 8.
Nevertheless, as Broyde observes, “it must be conceded—it is a leap that is within the range of possibility.” As time passed, however, despite the initial existence of the dispute between the Maharam and the Rashba, a consensus eventually developed in favor of the Rashba’s position. The fact that such a consensus exists in the mainstream Orthodox discourse is clear. As Section E develops more fully, however, the nature of the legal process that gave rise to this consensus leaves ample room for a different legal conclusion, at least for some Orthodox communities.

D. The Jewish Law Codes

On a strictly legal level, following the sealing of the Babylonian Talmud around 500 C.E., the development of Jewish law was impacted substantially by the creation of certain Jewish legal codes. Among the most important codes of Jewish law are the sixteenth century works by Yosef Caro, who prepared the *Shulhan Arukh* (the title of which means “The Set Table”) and the subsequent commentary called the *Mappah* (“The Tablecloth”) by Moses Isserles (known as the Rema). Caro’s code reflected the customs and traditions of the Jews of Spanish descent (the *Sephardic* community), whereas the Rema’s commentary drew from the Eastern European (or *Ashkenazic*) tradition. Over time, the works of Caro and Rema began to be published together (the Code) and newer printings of the Code also incorporated other commentaries. The Code eventually gained acceptance as binding law in both the *Sephardic* and *Ashkenazic* traditions, and even today it continues to govern the religious practices for the majority of mainstream Orthodox Jews.

169 *Id.* at 3 (emphasis added).

170 *Id.* at 15–17. But see Sperber, *supra* note 19, at 59, for an interesting story of a prominent and learned woman in Baghdad reading from the Torah in 1901, presumably with the knowledge of the rabbinic authority there.

171 In addition, throughout the centuries, rabbis also issued “responsa,” or legal decisions, in response to questions presented by correspondents, and these responsa constitute another important component of Jewish law. Robert Goldenberg has analogized responsa to appellate court decisions, noting that they do “not necessarily uncover great new amounts of precedent” but instead “provide . . . authoritative interpretation[s] of texts that the inquirer has already cited.” Robert Goldenberg, *Talmud, in BACK TO THE SOURCES 129*, 160 (Barry W. Holtz ed., 1984).

172 An earlier important code was the twelfth-century work by Maimonides, the *Mishneh Torah*.


174 Historically, though, there was opposition to codifying Jewish law but the Code was eventually accepted due to its many supplemental commentaries, the perceived need for a codification of the law due to persecutions, and the role of the printing press in establishing its authoritative stance. See, e.g., 3 ELON, *supra* note 102, at 1407–20 (1994) (documenting the struggles over the Code’s acceptance and the role of the commentaries and persecutions); JACOBS, *supra* note 109; SHERWIN, *supra* note 109, at 32 (discussing the opposition of the
On its face, the Code acknowledges the possibility of women receiving *aliyyot* with the following text:

All are included in the count of seven, even a woman and a minor who knows to Whom one recites blessings. But the Sages said: A woman ought not to read in public because of [the dignity of the congregation]. [Rema]: These may indeed be included among those called up, but not all those called up may be women or children . . . .175

Modern commentators disagree with one another regarding exactly what this language means. Sperber understands this language to mean that women and children may not receive all the *aliyyot*, and that “[t]his formulation is clear, lending itself to no alternative understanding.”176 Similarly, Shapiro, providing an extensive analysis, interprets this language as permitting women to receive *aliyyot* (as long as all who receive *aliyyot* are not women or minors) but prohibiting them from reading from the Torah publicly due to “communal dignity.”177 Rabbi Yehuda Herzl Henkin, a noted authority on Jewish law, questions Shapiro’s conclusions, writing that it lacks credibility to assert that the *Shulhan Arukh* would allow for “such an innovation in practical halachah without openly calling attention to it.”178 Broyde acknowledges that, from his perspective, the Rema’s “formulation is more troubling” but explains it away with the assertion that since the Rema does not quote the Maharam in this particular passage, he is indicating that he does not believe the halakhah follows the Maharam’s view on this point.179

E. Consensus and Ability to Revisit

Overall, then, the foregoing discussion illustrates that the classical Jewish sources concerning the issues of women reading from the Torah and receiving *aliyyot* contain contradictory strands and are capable of supporting different conclusions. Yet, in a recent article, Broyde observes that “the crucial underlying issue which . . . has not received
sufficient attention” is whether change in the Jewish legal system on this subject “is consistent with the minimal halakhah of Torah reading, independent of any other issues….”180 From a strictly halakhic perspective, Broyde’s argument can be summarized as follows: 1) respectable authorities differed on the issue of whether it is objectively prohibited for women to receive aliyyot in the thirteenth and early fourteenth centuries; 2) the dispute eventually closed, with the consensus being that women cannot ritually participate in this way;181 and (3) the consensus that developed earlier is still the norm to be followed today.182 Broyde bolsters his position by adding that to the best of his knowledge, “no halakhic authority of the last five hundred years has disagreed with that consensus and thus halakhic practice is to generally prohibit women from receiving aliyyot in all situations.”183 In

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180 Id. at 1.

181 Id. at 13. Broyde justifies the consensus based on the Jerusalem Talmud’s position. Recall, however, that it is the Babylonian Talmud that occupies the central place in Jewish tradition. See supra text accompanying note 107. An initial problem with Broyde’s analysis is that he fails to justify the validity of his reliance on the Jerusalem Talmud as his ultimate proof-text for the inability to revisit the consensus that has developed. See infra notes 183–185 and accompanying text. Moreover, one can question Broyde’s basic premise that the Jerusalem Talmud compels the conclusion that women are categorically prohibited from receiving aliyyot. Broyde attributes the development of this consensus to an explicit statement in the Jerusalem Talmud that, according to Broyde, supports the Rashba’s view. The statement provides that, according to Rabbi Chaninah, in “a city which is all kohanim (except for one), the single yisrael reads torah first as such is the way of peace.” Gittin 5:9 (Jerusalem Talmud). Based on this language, which can be considered ambiguous at best with respect to the specific issue of whether women may receive aliyyot, Broyde concludes that the ruling of the Jerusalem Talmud “can be understood as indicating that the presence of women in the congregation does not count toward creating stigma [of the kohanim], as women can never receive aliyyot by rabbinic decree.” Broyde, supra note 117, at 8–9. Further, he asserts that “[i]f the proper solution was that women should receive aliyyot, the Jerusalem Talmud would have told us so.” Id. at 9. In Shapiro’s extensive halakhic treatment of this subject, nowhere does he discuss or even cite this passage from the Jerusalem Talmud, despite a detailed discussion of its relevance in other ways to his analysis. Shapiro, supra note 27, at 240–41 (concluding that the Jerusalem Talmud prohibits female participation “only where a woman would be the exclusive reader”).

182 Broyde, supra note 117, at 14; see also id. at 15 (“In the absence of an intellectually persuasive explanation for why the view of the Maharam is indeed correct, and the view of the Rashba wrong, it would be outside of the framework of normative halakhah today to rely on the view of the Maharam absent a persuasive explanation of why the view of the Rashba, which is adopted by nearly all subsequent halakhic authorities, is not persuasive and the view of the Maharam is plausible.”).

It is also worth noting that even Broyde’s discussion of the Rashba’s view suggests that no law is culturally neutral. Recall the Rashba’s view that women cannot receive aliyyot even if a city only contained all kohanim and that the Rashba appeared to believe the stigma of the kohanim is determined subjectively. See id. at 4; supra notes 164–165 and accompanying text. Interestingly, Broyde never addresses the halakhic disparity that results from viewing a rabbinic decree prohibiting women from reading Torah and receiving aliyyot as an “objectively neutral” and now fixed boundary, in contrast to the permitted culturally determined category concerning the stigma of the kohanim. In truth, the Rashba’s arguable view of female ritualistic participation manifests the same degree of subjectivity on this issue as his view of the stigma of the kohanim. In other words, both positions manifest a cultural bias—neither is “objectively neutral.”

183 Broyde, supra note 117, at 12.
short, Broyde’s entire analysis seems to be predicated on the view that a rabbinic decree can result from an after-the-fact interpretation of the Talmud by subsequent generations, and that once such a consensus has been reached regarding the existence of this rabbinic decree, it is nearly impossible to override.184

Recall that in instances where the Babylonian Talmud reaches a clear consensus, this consensus arguably controls, at least according to the strictest interpretations of the tradition. In the case of women reading from the Torah in a public forum and receiving aliyyot, the discussion in the foregoing Section has demonstrated that no clear Talmudic consensus exists. Therefore, a reasonable halakhic argument can be made that the issue is not beyond revisiting according to the halakhic process as it has been developed and applied throughout history. Even Broyde implicitly acknowledges this point in a footnote toward the end of his paper.185

The issue raised by the Talmud’s language, and its subsequent interpretation, centers on whether the Talmud provides a categorical prohibition concerning women reading Torah and receiving aliyyot. The discussion in the foregoing section illustrates that there is much room for concluding that the Talmud’s prohibition should not be understood as one that is fixed for all time. Even the language in the Shulhan Arukh may be interpreted as consistent with the view that no categorical prohibition exists.186 It is telling that in arguing against Shapiro’s conclusion that women should be afforded greater opportunities for participation in synagogue ritual surrounding Torah reading, Yehuda Henkin acknowledges that he agrees with “much of Rabbi Mendel Shapiro’s comprehensive and thoughtful article.”187 In Henkin’s view, however, the bottom-line issue is that permitting women

184 It is especially interesting to compare Broyde’s position on women reading publicly from the Torah and receiving aliyyot with his position on ordination for Orthodox women rabbis. In another article, Broyde outlines his thinking in this regard. Although he does not recommend that the Orthodox Movement begin ordaining female rabbis at this point in time because such a consensus has yet to develop, his entire discussion of this issue, unlike his work concerning the issue of public Torah reading, is steeped in a culturally nuanced paradigm. Significantly, in the only mention of aliyyot for women in his article on ordination, he groups this possibility with other reforms advocated by more liberal sectors of Orthodoxy that manifest “various degrees of radicalism and halakhic plausibility . . . and . . . have the potential to recklessly break the bounds of Orthodoxy.” Michael J. Broyde & Shlomo B. Brody, Orthodox Women Rabbis? Tentative Thoughts that Distinguish Between the Timely and the Timeless, 11 Hakirah 25, 52–53 (2011).

185 Broyde asserts two very “tentative” areas of exploration for re-opening the dispute between the Maharam and the Rashbah. One area concerns whether the Maharam may or may not have felt bound by the secondary Jerusalem Talmud. See Broyde, supra note 117, at 15 n.53; see also supra notes 107, 184 and accompanying text. The other area centers on the possibility that in the Maharam’s community, women attended synagogue unlike the women in the Rashba’s community. Broyde, supra note 117, at 15 n.53.

186 See supra text accompanying notes 177–179.

187 Henkin, supra note 178, at Henkin 1.
to receive aliyyot today is simply “outside the consensus.”188 Henkin claims this is the case now and for “the foreseeable future,” and thus sees “no point in arguing about it.”189

Significantly, Henkin, who would not permit women to receive aliyyot (or read from the Torah) bases his ultimate conclusion on a sociological or culturally based analysis. He writes that synagogues which permit women to receive aliyyot are “not Orthodox in name and will not long remain Orthodox in practice.”190 This approach is distinct from that of Michael Broyde, whose analysis of “minimal halakhah of Torah reading, independent of any other issues”191 seemingly rejects the essential insight of cultural analysis that law both reflects and is constituted by culture. Broyde even rejects the premise that the social status of women is different today than it was in medieval times.192 Henkin, on the other hand, manifests a more nuanced approach to the relationship between law and culture but nonetheless rejects the possibility that the law can move in a more inclusive direction based on his assessment of the current cultural realities.

For purposes of this discussion, it is not necessary to move beyond the theoretical parameters of halakhah as invoked in the most traditionally observant circles. As discussed, mainstream Orthodox scholars have argued that there is no fixed, categorical prohibition to women receiving aliyyot or reading from the Torah. Had the Babylonian Talmud clearly maintained a categorical prohibition on women participating in public Torah reading, there would be less room in the tradition to argue otherwise, despite the fact that a cultural analysis framework might question the neutral objectivity of even conclusive Talmudic rulings. On the other hand, cultural analysis also is concerned with maintaining authenticity and therefore justifies selectivity in

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188 Id. at 6. Sperber also makes this observation regarding Henkin’s position. See Sperber, supra note 19, at 61.

189 Henkin, supra note 178, at Henkin 6. Significantly, even Henkin’s analysis seems to suggest that no categorical prohibition exists with respect to women receiving aliyyot because he mentions the possibility that a woman might have an aliya on the Sabbath in a minyan of men located in a private home. Id. Surely if a categorical bar existed with respect to a woman receiving an aliya, it should not matter if the woman received an aliya in synagogue or in a minyan at home despite the fact that the laws concerning worship in a synagogue are more stringent than for an ad hoc minyan located elsewhere. See Shapiro, supra note 27, at 269. Moreover, even with respect to a synagogue setting, Henkin acknowledges the possibility of women receiving aliyyot on Simchat Torah (holiday marking the conclusion of the annual cycle of public Torah readings, translated as “rejoicing of the Torah”), a holiday known for the incorporation of leniencies. Henkin, supra note 178, at Henkin 6–7.

190 Henkin, supra note 178, at Henkin 6.

191 Broyde, supra note 117, at 1. As an example of his seemingly neutral and autonomous view of the halakhah, Broyde argues “[t]hose who permit women’s aliyyot can only do so by arguing that the dispute between Rashba and Maharam was wrongly decided in favor of Rashba.” Id. at 13–14. Moreover, Broyde relegates to “secondary questions” matters such as whether the dignity of the congregation specifically, or more generally minhag or custom, can change over time and therefore be dependent on social norms. Id. at 16.

192 Id. at 13 n.48.
changes to the tradition.

The subject of women’s participation in public Torah reading exemplifies the utility of the cultural analysis paradigm developed in this Article because no substantial *halakhic* barrier prevents a re-examination and change of the tradition as it developed in the middle ages and beyond. Indeed, based on the authority of the Maharam, and the language of the Rema in the *Shulhan Arukh*, a *halakhic* basis exists upon which to predicate the development of the law in this regard. In other words, the rabbinic prohibition advocated by the Rashba was not seen as a fixed reality at the time of the Talmud, given the fact that the tradition was conflicted on this point for centuries following the Talmud’s redaction. Instead, this rabbinic prohibition was the result of re-interpretation by later generations who were responding to their own cultural realities. This approach acknowledges that even if the Rashba’s view of what was forbidden in the thirteenth or fourteenth centuries was appropriate in its cultural context, the cultural context has changed substantially since then. Thus, a candid assessment of this area compels the conclusion that the tradition contains a basis for the adoption of a practice that would be more inclusive, at least for those Orthodox communities willing to adopt this approach. Sperber fittingly captured the state of the law in this regard:

> When we attempt to reconstruct the issue of women’s participation in the synagogue and in various rituals in retrospect, we find that the stream does not follow a uniform course; rather, it is multidirectional, moving in different directions, reflecting different aspects at different times and places.\(^{193}\)

In situations such as this, where the law itself is “multi-directional,” the cultural analysis paradigm developed in Part I provides an especially useful tool for facilitating a change in the stream’s directional course without compromising the authenticity of the tradition. As the next Part demonstrates, the multiple-perspective approach embraced by cultural analysis can be particularly useful with respect to changes that are steeped in feminist thought, an area that has not been especially warmly embraced by the Jewish tradition.

### III. Developing and Applying the Cultural Analysis Paradigm to Public Torah Reading by Women

Two reasons support the argument that the Jewish legal tradition presents a particularly relevant case for the application of cultural analysis. First, Jewish law is unique in that it governs every aspect of human behavior, regulating man’s relationship to God and to fellow

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193 Sperber, *supra* note 19, at 36.
human beings. The history and functioning of Jewish law is “as a living, religious, legal organism that is the product of [the Jews’] ongoing covenantal relationship with God.” 194 Moreover, throughout history Jewish law has functioned as the national legal system of the Jews—“as an integral and fundamental part of its cultural heritage as a nation” even during centuries of exile and dispersion. 195 As such, Jewish law prescribes the required conduct in matters concerning ritual, ethics, business, war, sex, and virtually every other dimension of human activity. For example, most people, even non-Jews, are aware that Jewish law dictates the foods which are permissible for Jews to consume, but far fewer realize that the law also specifies the order in which one’s shoes should be put on and tied. 196 Jewish law is intended to be an organic system that is all-encompassing. In short, Jewish law protects a set of practices that are integral to the survival of the Jewish tradition.

Second, the essence of Jewish law is similar to any type of cultural property in that it has been developed and adapted by humans throughout the ages. Although Jewish law differs from secular legal systems in that God is viewed as the ultimate Author of the laws, in practice the operation of Jewish lawmaking historically has embodied a pronounced human element, which necessarily entails both subjectivity and fluidity of interpretation. Significantly, Jewish law is a cultural expression of creative human activity that represents the product of human judgment about God’s will. The undeniable human component of Jewish law is of vital importance in applying the cultural analysis paradigm to Jewish law.

There are several consequences of situating Jewish law within the cultural analysis paradigm. Jewish law, as an expression of human creativity, makes a critical contribution to the identity of the Jewish people. Additionally, situating Jewish law within the cultural analysis paradigm facilitates a simultaneous concern with the preservation and development of the Jewish tradition that includes the legal precepts, practices, and customs. 197 This mode of analysis also emphasizes the interrelationship between Jewish law, which is perceived as concrete, and the more amorphous, but yet visceral, notion of Jewish culture. Cultural analysis sees law and culture as intertwined so that Jewish law produces Jewish culture, and Jewish culture produces Jewish law.

This Part augments the existing academic scholarship on the issues of women publicly reading from the Torah and receiving aliyyot by introducing an original, explicit cultural analysis paradigm into the

194 DORFF, supra note 13, at 330.
195 1 ELON, supra note 102, at 5.
196 See Shabbat 61a (Babylonian Talmud). Although this matter is subject to different views that are recorded in the Talmud, one position provides that the right shoe is put on first, followed by the left; but the left shoe is tied first, followed by the right.
197 See supra text accompanying notes 12–13.
discourse. It demonstrates that an examination of Jewish law through the lens of the cultural analysis paradigm developed in this Article facilitates the construction of an argument that would allow for a more inclusive approach to women’s ritualistic participation within willing Orthodox circles. Cultural analysis thus supports a basis for an alternative perspective on this topic that is sustainable within the bounds of traditional Jewish law. Although the specific focus of this discussion centers on Jewish law’s struggle with greater access for women pertaining to synagogue ritual, the cultural analysis methodology invoked here can inform the discourse on a broad range of issues in which settled law confronts cultural shifts.

This cultural analysis paradigm not only informs the questions of whether, and how, the law can be changed, but also why the law as it stands exists. Because the primary insight of cultural analysis is that the law cannot be understood without reference to the culture from which it emerges, the starting point of this cultural analysis paradigm is an examination of the influence culture has had upon the development of the law. Indeed, it is impossible to evaluate the considerations that militate for or against change without understanding the overall attitude of the traditional Jewish culture concerning matters involving claims perceived as feminist in nature. The first Section of this Part examines this alignment more fully by focusing on reasons for past and current resistance. It illustrates that the development of the halakhah concerning women and synagogue ritual has been influenced from the outset by a strong cultural bias concerning women and their place in religious society. This bias continues into the present, even in the more liberal sector of Orthodoxy known as Modern Orthodoxy. The second section of this Part analyzes the cultural arguments that favor a modification of the status quo, at least for some Modern Orthodox communities.

A. The Nature of Past and Present Resistance

A modern person easily can understand the Talmudic, and also the medieval, hesitancy to involve women in the business of ritual, which would explain the original “dignity of the congregation” rationale as to why women could not read from the Torah.198 Throughout history, the rabbis sought to establish their authority and power so that they could execute their role as lawmakers. The female voice is noticeably absent not only in the Biblical texts, but also in the texts produced in the Talmudic period and later. As a result, women did not have a voice in

198 Indeed, Shapiro has observed that “[i]n light of women’s cultural situation and status at the time, no explanation was required” concerning why reading by women violated the “dignity of the congregation.” Shapiro, supra note 27, at 247.
the development or outcome of Jewish ritualistic law (and that is essentially still the case in Orthodox circles). Their primary domain was that of the home and family.199

Although women had virtually no opportunity to directly influence the development of the law concerning synagogue ritual or any other matter, it is important to recognize that Jewish law in some areas concerning women was very pro-female. For example, the Talmudic Sages elaborated upon the Biblical requirement of conjugal rights, mandating that men were obligated to have sex regularly with their wives for the sole purpose of providing their wives with sexual gratification.200 This recognition of female personhood is quite remarkable not only for the early centuries of the Common Era, but even by today’s standards. The point, then, is that the Sages were not necessarily sexist or anti-female. On the contrary, many of the laws they instituted tried to ameliorate women’s overall social and economic status.201 Still, on the issue of synagogue and ritual, it is clear that their views were limited by their historic context, and undoubtedly the majority of women themselves may not even have been inclined to press for reforms given that they were also a product of this same cultural milieu.202

Although the Jewish tradition’s historic resistance to feminist religious claims can readily be explained by the greater social culture of bygone eras, the present day situation is more complex. The themes of contextualization and contestation prominent in this cultural analysis paradigm are very much intertwined with that of power relationships. Cultural analysis sees law as a product of the human condition, grounded in specific historical contexts, rather than as an objectively

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199 Interestingly, as late as 1916, a religious census in the United States showed that whereas 60.7 percent of synagogue members were male, women constituted only 39.3 percent of the members. In contrast, the survey showed that more women than men belonged to churches. Professor of Jewish History Jonathan Sarna explains these statistics as consistent with Eastern European practice in which the women focused on maintaining Judaism through the home, whereas the men focused their religious energies within the synagogue. JONATHAN D. SARNA, AMERICAN JUDAISM 164 (2004).

200 The Torah refers to the man’s obligation to provide his wife with regular sexual relations, see Exodus 21:10, but the Sages of the Talmudic period expanded upon this concept. The Sages required that men perform their conjugal duties with intimate bodily contact and even during pregnancy. They even specified how often a husband was required to satisfy his wife, which depended on the nature of the husband’s occupation (occupations that did not require the husbands to be away from home obligated the man to have a greater amount of sex with his wife). See Ketubot 61b (Babylonian Talmud); Ketubot 5:6 (Mishnah). The wife’s conjugal rights apply even during pregnancy when she is incapable of conceiving. See Nidah 31a (discussing times when sex is beneficial or injurious for the woman or fetus).

201 For example, rabbinic rules were developed during the early centuries of the Common Era attempting to ameliorate women’s social and economic vulnerability due to their husbands’ ability to secure a divorce without their consent. The ketubah, or marriage contract, a device developed by the rabbis during this time and still in use today, was instituted to delineate a man’s financial obligations to his wife in the event of divorce. See BIALE, supra note 31, at 80.

202 Cf. infra note 243 and accompanying text.
neutral system. Significantly, the inevitable exercise of human judgment in the application of Jewish law produces the need for contextualization and the reality of contestation. The increased degree of contestation reflects the range of issues that are capable of being debated in modernity. Prior to the Enlightenment, the Jewish community manifested a degree of insularity that minimized to some degree the nature and level of contested discourse. The experience of American Jews in particular has demonstrated that enhanced opportunities for participation in the broader culture also create a greater likelihood of assimilation. Moreover, Jews are not alone in being influenced by the more liberal, socially democratic discourse that characterizes the modern worldview. This worldview is markedly different from that of the classical Jewish tradition. It is no wonder, then, that the overall context of currently contested issues looks very different in modernity than in any previous era of Jewish history.

Further, in modern times the presence of cultural dissent has escalated as a result of shifting power dynamics. This reality is reflected in the Jewish law on several fronts and is particularly visible in the contested issues involving gender. In the twenty-first century an Orthodox rabbi ordained his female protégée and invested her with the title “Rabbah,” (the feminine derivative of “Rabbi”). Although this action was definitely controversial and represents a position atypical within the Orthodox community, it would have been unheard of in prior centuries. Still, after taking this action the rabbi negotiated with the Rabbinical Council of America and agreed he would no longer give women this title.

Indeed, the Modern Orthodox community in particular appears to maintain a dualistic stance on gender equality—one for secular areas in which different rules for the genders are simply unacceptable and one for the religious realm where separation and distinction are perpetuated. Israeli professor and social activist Tova Hartman has done groundbreaking work on this topic, particularly with respect to the Modern Orthodox community in Israel. After years of frustration and

203 See supra notes 106–107 and accompanying text.
206 TOVA HARTMAN, FEMINISM ENCOUNTERS TRADITIONAL JUDAISM 11 (2007) (“Any Modern Orthodox parents whose daughter was denied the right to pursue the career of her choosing, or was accorded second-class status in any way, would fight the case tirelessly, to the highest court in the land, and be lauded as heroes by their Modern Orthodox compatriots.”); see also Shochetman, supra note 24, at 357 (“The incorporation of women in professional and communal life has no halakhic relevance to the laws of conduct during public prayer, nor to the specific issue of women’s aliyot.”).
anguish, Hartman founded the first “semi-egalitarian” Orthodox synagogue, Shira Hadasha, in 2001. This congregation allows women to read publicly from the Torah, receive aliyyot, and even lead certain parts of the prayer service. Much discussion and thought went into the process of how to effectuate a more egalitarian model within the parameters of Orthodox Judaism. Since its inception, Shira Hadasha has become enormously popular among certain circles of Israelis and American visitors and has spawned several spin-off synagogues in both Israel and some cities in the United States.

Although Hartman lives and works in Israel, her experience and observations apply to Modern Orthodox communities worldwide. With respect to the issues about which she writes, little difference exists across the globe. For example, Modern Orthodox synagogues in the United States by and large exhibit no movement toward incorporating greater participation by women in public Torah readings, and the same is true for Jewish communities elsewhere. Equally significant, virtually all of the progressive scholarship on this issue is being published by Orthodox Israeli academics rather than by those affiliated with Yeshiva University, the premier Modern Orthodox institution in the United States.

Modern Orthodoxy sets itself apart from the more centrist and even right-wing versions of Orthodoxy by its explicit prescriptive adoption of modern sources of knowledge and values that are not derived directly from Jewish sources. The problem, according to Hartman, is that only some “foreign” values make the cut. For example, Modern Orthodoxy is extremely comfortable incorporating and compartmentalizing certain types of scientific knowledge into its overall framework. Feminism, on the other hand, has been relegated to the “back alley” as seemingly inconsistent with the values of the tradition.

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207 Women and men sit separately at Shira Hadasha, as is the norm in Orthodox synagogues. Still, the space is configured in such a way that women are able to be called to the bimah (the place where the prayers are led) and read publicly from the Torah. See Shapiro, supra note 27, at 271–72 (arguing that the presence of a small number of women in the men’s section is not halakhically invalid and therefore, cannot be used as a basis to prohibit women’s participation in public Torah readings).

208 The author visited Shira Hadasha, which is located in Jerusalem, one Friday evening for Sabbath services during the summer of 2005. More than a hundred people were in attendance. A spin-off synagogue was started several years ago in Skokie, Illinois, and others exist in New York.

209 Mendel Shapiro and Daniel Sperber, discussed throughout this Article, are the prime Israeli examples, although Benjamin Lau, another important Israeli scholar and practicing rabbi, also has briefly mentioned these issues as ones mandating thoughtful rethinking. See Lau, supra note 31, at 9–12.


211 This integration is epitomized by Modern Orthodoxy’s umbrella slogan, “Torah and Madda.” Madda is generally interpreted as secular, particularly scientific, knowledge. See HARTMAN, supra note 206, at 8. See generally NORMAN LAMM, TORAH UMADDA (1990).

212 HARTMAN, supra note 206, at 8.
Hartman argues that in order to move beyond the currently set boundaries the tradition maintains with respect to feminism, it is important to understand why Modern Orthodoxy is comfortable incorporating certain areas of knowledge or value systems, but not feminism.\footnote{Id. at 7.}

Of course, Modern Orthodoxy’s views on this score are shared with the more centrist and right-wing sectors of Orthodoxy. Thus, in the majority of the current Orthodox world, feminism is categorically dismissed as a dangerous, Westernizing influence, one that threatens the entire fabric of the tradition. Hartman acknowledges that the work of Third-World feminists have helped her to better understand the importance of the “Western label” in the overall process of delegitimizing feminism.\footnote{Id. at 6 (quoting Uma Narayan, Andrew W. Mellon Professor in the Humanities, Vassar College).} At base, however, the over-arching issue is one of power relationships, one of the critical factors of this cultural analysis paradigm.

Tamar Ross, a committed Orthodox Jew and Professor Emerita of Jewish Philosophy at Bar Ilan University, has observed that “the gender-based distribution of power has prevented women from active participation in the process of halakhic interpretation, by deliberately distancing them from the type of education that might have suited them to such activities, in the name of an ‘objective’ understanding of their role in Jewish life.”\footnote{Ross, supra note 22, at 18.} Hartman’s work also repeatedly emphasizes the power of religious authorities in framing feminism for the Modern Orthodox world, and “the extremely conscientious way” they exercise this power.\footnote{HARTMAN, supra note 206, at 6.} Moreover, the “framing” about which Hartman writes is performed not only by Modern Orthodox authorities, but also by their more centrist Orthodox colleagues, who teach in Modern Orthodox schools and serve as local rabbis for Modern Orthodox communities.\footnote{Id. at 139 n.1.}

This last point concerning the synergy between the Modern and more centrist Orthodox camps is extremely significant beyond the issue of framing. It goes to the heart of how the Orthodox world functions. It is no secret to observers of the “sociology” of the Orthodox Jewish community that there has been a visible “swing to the Right.”\footnote{Haym Soloveitchik, Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy, 28 TRADITION 64, 64 (1994), available at http://www.traditiononline.org/news/originals/Volume%2028/No.%204/Repture%20And.pdf.} Dr. Haym Soloveitchik expressed this powerfully when he observed, even in 1994, that “[w]hat had been a stringency peculiar to the ‘Right’ in 1960 . . . had become, in the 1990’s, a widespread practice in Modern Orthodox circles, and among its younger members, an axiomatic
one.” This trend has not abated in more recent years.

Moreover, the concept of consensus is seen as an essential value in the development of halakhah, despite the myriad of legal, ritual, and even ideological differences among the various sectors of Orthodoxy. Therefore, especially when an issue seen as a significant departure from the status quo is being considered, even more moderate Orthodox authorities resort to the consensus trope rather than advocate a perceived break with the tradition. Moreover, more open-minded Orthodox rabbis who might be inclined to institute a practice in their own synagogues in which women could participate in public Torah reading fail to do so because they require the approval of an official poseq, a Jewish law authority highly regarded by all segments of the Orthodox community. Such an authority has not yet emerged. Also, because it is fairly certain that the more centrist and right-wing segments of the Orthodox movement will never endorse a change in this area, more open-minded leaders may conclude that it is not prudent or useful to spend their political capital on this issue. As discussed, an Orthodox rabbi who recently ordained his female protégée subsequently agreed to refrain from investing women with this status going forward. Saul Berman’s essay, The Status of Women in Halakhic Judaism, furnishes yet another example that is directly on point. Berman, who is a prominent Modern Orthodox rabbi and scholar with a law degree, opens his essay with rhetoric that could easily appear in an article embracing this cultural analysis paradigm: “Our apologetics have relegated women to the service role; all forces of the male dominated society were brought to bear to make women see themselves in the way most advantageous to men.” Moreover, he forcefully argues that “Jewish women have been culturally and religiously colonized into acceptance of their identities as ‘enablers.’” The solution, according to

\(^{219}\) Id. at 64–65. For an in-depth discussion of this phenomenon, see SAMUEL C. HEILMAN, SLIDING TO THE RIGHT (2006).
\(^{220}\) See Broyde & Brody, supra note 184, at 25–27 (discussing the spectrum of Orthodox thought on some salient differences).
\(^{221}\) See Riskin, supra note 24, at 361–62 (expressing concern that changes in prayer and Torah reading "could lead to further divisions in the already fragmented Orthodox community"); see also Broyde & Brody, supra note 184, at 55 (noting that the requisite consensus for female ordination does not exist).
\(^{222}\) Ross, supra note 22, at 3 (recounting the story of a rabbi in Teaneck, New Jersey, who found Shapiro’s arguments convincing and would institute this practice if a reputable poseq would approve it).
\(^{223}\) Aside from the issue of strategy and conservation of resources, there is the reality that moderates hesitate to lobby for change because they fear losing influence among their more strict colleagues. The story of the ordination of the first female Orthodox rabbi may illustrate this very point. See Fertig, supra note 204.
\(^{224}\) Berman, supra note 130, at 116. For confirmation of this point, see Riskin, supra note 24, at 387 (discussing the "broader perspective" illustrating how the Sages "assigned to women the primary obligations related to purity and sanctity of the household" and that this "division of responsibility is grounded in historical, sociological, and biological factors").
\(^{225}\) Berman, supra note 130, at 116.
Berman, is that “we must encourage women to develop in a creative fashion whatever additional forms they find necessary for their religious growth.” Despite the promise of these words, his ultimate recommendations include designing synagogue space in a way that is more welcoming for women and encouraging rabbis to exhort women to come earlier to synagogue services and refrain from talking during the services. He makes no mention, however, of any possibility for increased participation for women in public Torah reading.

Thus, the “framing” and filtering processes that are responsible for rejecting many of the insights feminist theory can offer are very deeply engrained in all segments of the Orthodox community. Part of the reason for this deeply engrained perspective is explained by the yeshivah education system, which not only maintains gender separation, but also treats Jewish law as a closed legal system not admitting of social, cultural, or historical factors. This resistance to understanding the cultural context of Jewish law exists not just with respect to current issues but also regarding the laws as they developed over time, including the Talmudic era. This failure to incorporate the cultural dimension of law results in a tendency to freeze the law, especially in matters involving gender issues that are highly culturally sensitive. Thus, in responding to Sperber’s argument that denying women the ability to participate in public Torah reading violates their human dignity, Shochetman has queried: “Is it possible to say of a rabbinic law—which no doubt was based on careful deliberation, after all relevant factors were taken into account—that it is harmful to one’s esteem and therefore he may treat it with disregard?”

The engrained nature of the status quo concerning female participation in public Torah reading gives rise to the related issue of whether this practice should be considered minhag (custom) that has now been elevated to the status of halakhah. Sperber also addressed this argument when he observed that the current resistance to increased female participation in public Torah readings derives from the “underlying idea . . . [that] ‘Your ancestors didn’t do so; your parents didn’t do so; and therefore your children are forbidden to do so as well.’” Interestingly, in an email responding to whether his synagogue in the Old City in Jerusalem has adopted his suggested views in this

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226 Id. at 124.
227 Id. at 123–24.
228 See Sperber, supra note 19, at 123 (Halakhic Methodology); see also David C. Flatto, Tradition and Modernity in the House of Study: Reconsidering the Relationship Between Conceptual and Critical Methods of Studying Talmud, 43 TRADITION, Winter 2010, at 1, 1–20 (arguing that yeshivahs should consider exploring a degree of Talmudic study from a critical, academic perspective).
229 See infra text accompanying notes 263–268.
230 Shochetman, supra note 24, at 343.
231 Sperber, supra note 19, at 63; see also infra text accompanying notes 248–254.
regard, Sperber wrote, “[it] suffers my views but does not apply them.”

The perpetuation of the status quo in this area also can be explained by the role “negative identity” plays in the Orthodox world. Specifically, each of the Jewish movements has its respective identity, and greater participation for women in ritual matters is a hallmark of Reform and now even most Conservative synagogues. Orthodox leaders of all sectors fear that responding to feminist claims in ritual matters will result in a detrimental blurring with these more liberal movements, and ultimately, even a weakening of practice across the board among Orthodox Jews (“the slippery slope”). The heart of this concern is not just that it might lead to increased assimilation among those who are currently Orthodox, but also that Orthodoxy’s adoption of practices more supportive of female participation would be perceived by the more liberal movements as signs of their own merit, and Orthodoxy’s respective failings.

Further, although education on the part of a disenfranchised group is generally believed to lead to changes in the socio-legal structure, this result is not necessarily expected in the Orthodox culture with respect to this particular matter. In other words, the increased educational opportunities available today for Orthodox women probably will not have an immediate impact on increasing the role of women in synagogue ritual. Today, more Orthodox women are learning Talmud (once thought to be off-limits for women) than ever before. Also, programs exist to train women to become advocates before rabbinic courts in Israel, as well as Jewish law consultants. As Hartman’s saga illustrates, however, widespread resistance still exists to increasing the role of female participation in ritual matters. Hartman questions

232 E-mail from Professor Daniel Sperber to author (Feb. 13, 2011, 04:10 CST) (on file with author).

233 HARTMAN, supra note 206, at 15; see also Shapiro, supra note 27, at 259–60, 272–73; Shochetman, supra note 24, at 326 (quoting Ovadiah Yosef, the former Sephardic Rabbi of Israel). Interestingly, the slippery slope argument was made in connection with prohibiting women from saying the Mourner’s prayer (Kaddish) for a deceased parent, but in the end, it was not accepted in this context. Sperber, supra note 19, at 178 (Appendix VIII: Women and Kaddish).

234 See Shapiro, supra note 27, at 260 (noting the argument that “tampering with [the status quo] would encourage the ‘assimilationists,’ presumably the Conservative and Reform movements”). Interestingly, Brody dismisses this argument as a legitimate basis for decision with respect to the issue of female ordination. See Brody & Brody, supra note 184, at 51–52; see also Sperber, supra note 19, at 131 (“[T]he fear of seeming to emulate non-Orthodox movements is not realistic so long as there are normative halakhic sources upon which to rely.”).

235 See Brody & Brody, supra note 184, at 48; Riskin, supra note 24, at 361 n.2.

236 One area in which women serve as Jewish law consultants is the complex subject of the family purity laws governing sexual relations between spouses. HARTMAN, supra note 206, at 17; see also Brody & Brody, supra note 184, at 48 (noting that the consultant positions, existing in both Israel and the United States, have been created with the support of prominent halakhic authorities and are growing in their acceptance).
whether it is precisely the rabbis’ awareness of their powerful agency in shaping tradition that has generated their adamant rejection of feminism; not only because their awareness of their power is what makes them so reluctant to share it, but because their selective faculties caused them to question, very reasonably, the potential impact on their values and culture of feminism’s sweeping claims about the need to create the world anew.237

Significantly, some of the resistance also can be attributed to the women themselves who self-denominate as Orthodox. A process of acculturation exists in these communities that can result in women being reluctant to question or push the boundaries of the status quo for fear of being marginalized or isolated. This reality exists for women on both a social, and even a professional, level. Women who do have ambitions of being spiritual leaders may refrain from activism in this area for fear of being seen in a negative light by the male authority figures. Additionally, many women also buy into the existing system, either consciously or unconsciously. With respect to the former explanation, the norms of the Orthodox community—and especially the realities of the “matchmaking” marriage system under which women in general have increasingly fewer opportunities—cannot be underestimated.238 Women, fearing negative consequences for either themselves or their daughters, may simply find it easier to stay silent. As for the latter explanation, it also stands to reason that many women who grow up not knowing of any other ritual possibility do not necessarily miss something to which they have never been exposed. Tamar Ross, whose specialty is gender studies, writes about her own experience as originally somewhat indifferent to the issue of women participating in public Torah reading. Only after she had learned more about the arguments made by Shapiro and others advocating for a more inclusive approach did she come to realize that if she were nearing Bat Mitzvah age she “would be most eager to mark the event by reading the Torah” and that she would regard “any other form of celebration as a pale second best.”239 Still, even now Ross prefers a conventional synagogue in which women do not publicly read.240 Moreover, many women who are raised and educated in Orthodox environments actively agree with the parameters to which they have been exposed. Some who do not agree with the mainstream Orthodox ritual norms leave Orthodoxy and find spiritual homes in more inclusive movements (or even leave the world

237 HARTMAN, supra note 206, at 17.
238 Tamar Snyder, Houses of Worship: Single Jewish Female Seeks Stress Relief, WALL ST. J., July 11, 2008, at W11 (discussing the problems for young women presented by the “shidduch” (matchmaking) system).
239 Ross, supra note 22, at 3.
240 Id. at 3–4.
of organized Jewish religion completely). Tova Hartman is unique in that her father is a rabbinic leader and scholar who educated her himself; most women do not have the education, pedigree, or contacts to start their own synagogues.

B. **The Cultural Basis for Change**

This Article recognizes that not all Orthodox communities would be open to reconsidering calling women to the Torah to receive *aliyyot* and allowing females to read the Torah in public.\(^{241}\) Realistically speaking, some Orthodox communities will never make this leap. Nonetheless, the cultural analysis paradigm developed in this Article facilitates understanding how this particular leap can be made in willing Orthodox communities under the current *halakhic* framework. How any one community resolves this issue is, of course, the product of both the community’s rabbinic leadership and its lay members. But the importance of approaching the issue from a cultural analysis perspective is just as much about the process as it is about the ultimate conclusion. Orthodox communities can, and should, differ in certain respects because, as is true of both the Conservative and Reform Movements, Jews who self-denominate as Orthodox form a spectrum in terms of their levels of practice and even their ideology.\(^{242}\) Significantly, in his recent article on female ordination, Broyde writes that although certain practices such as refraining from eating pork are immutable, practices established by “tradition alone” are considered differently and can be re-evaluated when religious authorities feel that circumstances have changed, even if such practices have never been allowed “within the Orthodox community.”\(^{243}\)

Part I of this Article crafts a cultural analysis paradigm focusing on power relationships, contextualization, contestation, multiplicity of values, and the interrelationship between law and culture. For purposes of this discussion, it is important to emphasize that cultural analysis reminds us about the intersection between context, contest, and power in law’s development. If particular groups or individuals are absent from the decision-making calculus, the resulting law will look different than if

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\(^{241}\) Both Sperber and Shapiro have also articulated boundaries to the adoption of a more inclusive practice. See Shapiro, *supra* note 27, at 288; Shapiro, *supra* note 30, at 400–01 (recommending, in accordance with traditional authority, that at least some of the *aliyyot* during a service should be reserved for men); Sperber, *supra* note 19, at 106 (advocating more inclusivity for those Orthodox communities that believe “change within the normative halakhic framework ought to take place”).

\(^{242}\) See sources cited *supra* note 219 and accompanying text.

\(^{243}\) Broyde & Brody, *supra* note 184, at 46. As discussed, Broyde does not believe this logic extends to females publicly reading from the Torah or receiving *aliyyot*, presumably because in his view, this is an area that is not “permitted as a matter of technical Jewish law.” See id.; *supra* Part II.E.
they had participated. A cultural analysis discourse emphasizes that much of the existing power dynamics between humans are a product of cultural production. In other words, the power structure in place at any given time reflects the give and take of human dynamics and relationships.

Jewish law is similar to any legal system in that the law that results in any given historical context is shaped by the voices that are allowed into the dialogue at any given time. As discussed in the foregoing section, it is easy to understand the hesitation of the Talmudic rabbis, and of subsequent halakhic authorities, with respect to the issue of female participation in synagogue ritual. Even so, the Talmud did not categorically preclude such female participation, and a dispute subsequently developed. The fact that the dispute later closed, would not—under this cultural analysis paradigm—foreclose its reconsideration. Thus, this approach to Jewish law understands the norms of female ritualistic participation concerning being called to, and reading from, the Torah as a result of environment, conditioning, history, and context, rather than as an unalterable mandate. Law is understood in its historical context and as the product of power relationships.

Moreover, the development of Jewish law has, from its beginnings, embraced a multiplicity of values that is also characteristic of cultural analysis, and consistent with its parallel focus on contestation. Recall Paul Kahn’s observation that students of the culture of law focus on group interests that provide a basis for resistance to, and evaluation of, legal understandings. There are several ways in which Jewish law and culture manifest a multiplicity of values, but the most significant for this discussion is that cultural analysis focuses on law as a product of the people as well as the rabbinic hierarchy. Part I discussed how the minhag (custom) of Jewish men wearing yarmulkes took on an

244 See sources cited supra notes 3, 70 and accompanying text; see also Broyde & Brody, supra note 184, at 48.
245 The sacred texts of the tradition reveal a multiplicity of meanings on their face. With respect to the Torah, for example, Jewish law eschews the idea of textual fundamentalism, and thus, it rejects the position that the text has a fixed and determinate meaning. Indeed, the text of the Bible itself incorporates “a number of views of God, a number of conceptions of sin, retribution, love, justice, and so forth.” Gerson D. Cohen, The Talmudic Age, in GREAT AGES AND IDEAS OF THE JEWISH PEOPLE 143, 174 (Leo W. Schwarz ed., 1956). Moreover, because the Oral Torah depended on human agency to arrive at conclusions, see supra text accompanying notes 102–107, an expectation automatically exists that human agents will differ in their interpretations. Indeed, “[r]abbinic discussion . . . is replete with differences of opinion and records of divergent practice” and “difference of opinion and practice was a legacy” of the early rabbis and “recognized as a normal phenomenon.” Cohen, supra, at 165. In addition, Jewish culture and law always have borrowed from the cultures of the hosts of the Jewish people since the Jewish people have been living in foreign cultures in the Diaspora from the time of the destruction of the Second Temple in 70 C.E. See Kwall, Creativity and Cultural Influence, supra note 76, at 1940.
Historically, in practice, Jewish law always has represented a blend of what the rabbis taught and what the people practiced. Given the absence of a legislative body and a police force, *minhag* has a special significance in the development of Jewish law. Thus, from a historic standpoint, the Jewish people have maintained a very democratic ideology in that the practices they have adopted and which have become part of their lives have a special meaning and cannot be ignored by the rabbis. Jewish law embraces this cultural analysis paradigm’s focus on a multiplicity of values by incorporating both a top-down and a bottom-up approach. In other words, the bottom-up practices of the people can eventually acquire the force of law. As Shapiro notes, there are “aspects of halakhic practice that are shaped by social circumstances of time and place” and therefore “originate in entirely casual circumstances and only after time are invested with halakhic cachet.”

He posits that perhaps the *minhag* of excluding women from participation in public Torah readings began in this way because there are only so many synagogue honors to go around. Shapiro argues that if a *minhag* of denying women aliyyot does indeed exist, its origins must be examined and its authority carefully evaluated.

A culturally based approach to the issue of whether women ought to be permitted to read from the Torah and receive aliyyot in today’s times would consider the reasons for the current practice, and weigh them against arguments that militate in favor of a more inclusive practice. Resort to this type of balancing approach is, in and of itself, a cultural analysis mode of thought since it rejects the idea that the law is autonomous and non-responsive to cultural realities. Moreover, in applying a balancing approach, it is vital to determine the ultimate objective to be accomplished in the long run. In other words, whenever

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246 See *supra* text accompanying notes 73–75.
247 See *supra* note 13 and accompanying text.
249 DORFF, *supra* note 13, at 51.
250 See *supra* text accompanying notes 74–75.
251 Shapiro, *supra* note 27, at 277.
252 *Id.* at 278.
253 *Id.*
254 *Id.* Based on his analysis of the various types of *minhag*, Shapiro finds no real support for the position that female participation in public Torah reading should be universally prohibited based on *minhag*. *Id.* at 279–85. He asserts, however, that this *minhag* can be respected for communities that genuinely believe the synagogue experience is enhanced by this practice. *Id.* at 50. Of course, on a practical level, this position does beg the filtering and “framing” issues Hartman raises concerning whose voices are allowed into the discourse in any given community. See sources cited *supra* notes 216–217 and accompanying text.
any innovation or change is being sought under Jewish law, it is essential to address the issue of “for what purpose” the change is being sought. There are two ways to approach answering this question. One approach is to ground the answer in theology. This approach would attempt to frame the issue in terms of “what does God want of us” based on what we know of the tradition and its history. This model is not one that this cultural analysis paradigm would endorse because its underlying assumption is that objective certainty exists regarding the answer to the question of “what God wants.” Further, this approach tends to be backward looking in that it justifies the present in terms of what was done in the past. After all, if the tradition understood that God wanted women to refrain from reading Torah and receiving aliyyot, what could possibly cause a change in this understanding?

A second approach—one that is generally more consistent with the predicate of cultural analysis—is to ask what balance on this subject is best likely to preserve the particularity of the Jewish people. Given that Jewish law and Jewish culture are inextricably intertwined, the preservation of Jewish culture depends on the law and vice versa. In light of the current understanding that protection for cultural rights extends to intangibles such as traditional practices and beliefs, any position that would result in Jews abandoning their tradition, and concomitantly their particularity as a people, is undesirable under this cultural analysis paradigm. Additionally, cultural analysis encourages a degree of selectivity in change in order to preserve the integrity of the tradition.

This Part explores in greater detail the relevant cultural considerations that favor allowing women to read from the Torah in public and to receive aliyyot. The first two considerations are philosophically based; the second two are grounded in a sociological perspective. Significantly, however, all of these arguments assume the halakhic viability of allowing women to participate in public Torah reading and approach the issue from the standpoint of a cultural perspective. Thus, they offer a counterpoint to the arguments raised in the prior section discussing resistance to change.

The first consideration focuses on human dignity and posits that denying women the ability to participate in public Torah reading violates the human dignity of women who have a spiritual yearning to participate in synagogue ritual in this way and feel great distress by being excluded. Sperber has been a primary proponent of this position, and laments that the current discourse on this topic does not include a discussion of human dignity. To him, it is clear that “the

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255 See generally Aaron Kirshenbaum, Subjectivity in Rabbinic Decision-Making, in RABBINIC AUTHORITY, supra note 174, at 61, 63–66 (discussing different models of halakhic theology).
256 See supra note 4 and accompanying text.
257 See Sperber, supra note 19, at 85.
dignity of the congregation” is of doubtful validity in these times but even it if exists, “human dignity outweighs communal dignity.” 258 Sperber believes that calling women to the Torah to receive *aliyyot* is “within the normative halakhic framework,” and therefore, the absence of such a change “will constitute a source of pain and anguish to an important segment of the community.” 259 In essence, Sperber’s argument is based on the cultural analysis insight that the law should reflect a multiplicity of values and be applied in a manner that is as inclusive as possible. Therefore, denying women who very much want to participate in public Torah reading the ability to do so is cruel and degrading, especially because the tradition includes evidence of flexibility on this score.

Again, it bears repeating that this understanding does not necessarily violate the norms of the tradition. Shapiro has observed that the “dignity of the congregation” is “a social sensitivity, and the fact that it must be interpreted to us shows how far removed we are from the social culture of the Talmud.” 260 Given the lack of a clear consensus in the tradition early on, a cultural analysis approach leaves the door open for reform even under a traditional perspective. In speaking about the halakhic process, Sperber has focused on an insight that is completely consistent with a cultural analysis approach:

> Is the *halakhah* fixed at some given time? If so, is it to be determined by that historical moment . . . and hence it must remain in the same state as it was . . . ? Or may we say: No! The *halakhah* was never thus! It was always open to changing reality and circumstances. 261

From a cultural analysis perspective, Sperber’s position is extraordinary, not only because of the more inclusive position he endorses, but also because of the nature of his halakhic theory. As Ross has observed, although Sperber well understands the constraints presented by the traditional Jewish sources, his approach also suggest[s] that our understanding of the meaning of these texts is inevitably affected by the context in which they are read, so that greater attention to newfound moral sensibilities with regard to women need not be regarded with suspicion; to the contrary, it bears promise of enriching our understanding of Torah. 262

Significantly, Sperber sees the changes for which he advocates as reflective of the overall advancement in the ethical development of

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258 *Id.* at 84.
259 *Id.* at 106.
262 Ross, *supra* note 22, at 23–24; see also Sperber, *supra* note 19, at 124 (calling for a “renewed reading of the sources, taking into account the contemporary reality”).
Whereas many of those who lobby for retaining the status quo resort to an objectified, rational halakhic standard, Sperber’s mode of analysis boldly embraces a cultural analysis perspective. He asserts:

> If we superficially examine only the laws relating to women, we will apparently find a negative approach to them. If, however, we examine matters more deeply, we will discover a different principled position toward women and arrive at the realization that the laws that limit their status were dependent upon the socio-economic conditions of the time.

Such an approach to the issues concerning gender and Jewish law require an important shift in the discourse more generally. As Shapiro has observed, the “formal, categorical basis for opposing women’s ali’iyot” does not necessitate exposing “stressful aspects of Orthodox attitudes toward gender and contemporary culture.” Shapiro feels that these formalistic arguments are problematic because they not only “disregard broader issues” but also place an “unfair burden” on the classic Jewish sources. Ross agrees that “[s]hifting the weight of halakhic deliberation regarding women’s ali’iyot from the limited vocabulary of legal technicalities to a richer lexicon of principles and policies can contribute much to the honesty of the discussion, revealing the true stakes involved.”

Tova Hartman’s work emphasizes a second consideration that also is grounded in a philosophical framework. Hartman’s central insight in this regard is that the cultivation of a positive collective Jewish identity depends upon reclaiming aspects of the tradition that prioritize “the cultivation of relationships with various different ‘others’ as integral to one’s own sense of self.” Although the focus on relationship building clearly is drawn from feminist theory, her insight moves well beyond this discipline. In essence, Hartman is saying that Modern Orthodoxy in particular has done such a good job of incorporating the ideals of Kantian autonomy into its intellectual framework “that it has assimilated too deeply into an extremely Western vision of what modernity means.” The result of this assimilation, in her view, is that

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263 Sperber, supra note 19, at 126 (observing that halakhah must change in the face of this ethical advancement and “also must encourage such ethical sensitivity”).
264 See supra Part II.E; see also Shapiro, supra note 30, at 405–06; Shochetman, supra note 24, at 339, 341.
265 Sperber, supra note 19, at 125 (emphasis added).
266 Shapiro, supra note 30, at 406.
267 Id.
268 Ross, supra note 22, at 16.
269 HARTMAN, supra note 206, at 16.
271 HARTMAN, supra note 206, at 13.
the positive values of relationship building and connection have been lost. Hartman thus sees feminism as an important way to “reaccess the relational ethos of traditional Judaism” so that it can reintroduce “religious sensibilities that were lost, or superseded by modern Western notions and ways of being in the world.”272

The sensibilities about which Hartman writes are very much present in a cultural analysis paradigm that seeks to introduce a multiplicity of values into any discourse. Her argument is that traditional Judaism’s very essence would benefit from incorporating the relational ethos of feminism into its discourse, and that such an ethos was present at one point in time. In other words, this perspective is valuable for traditional Judaism’s very identity, beyond its application to any specific area of law or the halakhic process as a whole.273

The second set of considerations is grounded in the sociology of the modern Jewish community. The first of these considerations concerns the vitality of synagogue life. In today’s times, the synagogue has become the focal point of worship, education, activity, and socialization for the majority of religiously committed Jews. One commentator has observed that that “what goes on in the synagogue takes precedence in the minds of most Jews over what goes on in the home.”274 Although this observation perhaps is an overstatement, at least with respect to observant Jews, it does contain truth to the extent that synagogue life occupies a substantial amount of physical and emotional space for observant Jews.275 In short, synagogues represent community.

Furthermore, a new trend, the creation of independent minyanim276 unaffiliated with any particular denomination, is emerging.277 These independent minyanim typically are lay-led and follow the pattern of a very traditional service, although they usually are more egalitarian in nature than Orthodox protocol allows. Although they afford worshippers a small, intimate, and customized setting, they lack an institutional structure and officiating rabbi.278 For families who plan to send their children to public school, and therefore need more institutional religious educational support, these minyanim become impractical once pre-schoolers enter grade school.279 Still, the increasing

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272 Id. at 14.
273 Id. at 16.
274 BIALE, supra note 31, at 258.
275 See Ross, supra note 22, at 4.
276 Minyanim is the Hebrew plural for minyan.
277 This trend is especially popular among traditional Conservative Jews who find many Conservative synagogues lacking in sufficient ritual and observance. Based on a national survey undertaken in 2007, forty six percent of those who attend independent minyanim grew up in a Conservative synagogue. See ELIE KAUNFER, EMPOWERED JUDAISM 64 (2010).
278 See generally id.
279 The high cost of Jewish day school can be a significant obstacle for many families, even traditional families who might otherwise want to send their children to a private Jewish day
popularity of these independent minyanim are a reality that the Orthodox movement as a whole might well want to contemplate because they contain an important and potential source of congregants who are inclined toward a more traditional mode of observance than many more liberal synagogues afford.

Moreover, these minyanim also attract significant numbers of members who lean toward Orthodoxy. Based on a 2007 national survey, twenty-five percent of the independent minyanim maintain the Orthodox practice of separate seating for men and women, and twenty percent of those who attend such minyanim grew up in Orthodox synagogues. If the rabbis of certain Orthodox synagogues were inclined to allow increased female participation in public Torah reading it is conceivable that they would attract—and perhaps even retain—a greater number of congregants, both men and women. Such an increase in Orthodox affiliation would strengthen Orthodox institutions on a more global level. Indeed, Shapiro has written that his motivation in studying and writing about this topic was "to open up inclusive options that [he] believe[s] are embedded in halakhah and that would draw the halakhic circle a bit wider than it is today and welcome more into the Torah community." Although the independent minyanim are important to the extent they afford like-minded worshippers a community, the fact that they are largely divorced from the institutional structure of Orthodoxy still reinforces Orthodoxy’s lack of inclusivity with respect to women and synagogue ritual.

The second sociological consideration concerns the inevitable “slippery slope” that is often invoked as a reason to avoid innovation. Shapiro has observed:

The “slippery slope” arguments that warn of the dire consequences of change to the delicate fabric of communal religious life rarely give much consideration to the countervailing risk that attitudes that suppress the halakhic impulse to embrace and "give pleasure []" to as wide an audience as possible may lead to the estrangement and alienation of many religiously serious persons from the Orthodox community.

Unfortunately, many who oppose any changes to the status quo do not seem to understand this point. Indeed, in refuting Sperber’s human dignity argument, Shochetman claims that the concept of “human dignity” cannot be invoked to annul rabbinic prohibitions unless all

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280 See supra note 207 and accompanying text.
281 See KAUNFER, supra note 277, at 64.
282 Shapiro, supra note 30, at 406.
283 See supra notes 233–234 and accompanying text.
284 Shapiro, supra note 27, at 232–33.
women share this view.285 When framed in this manner, the argument for change is over before the conversation ever begins.286

In short, a more inclusive approach with more opportunities for women in certain Orthodox settings would likely increase observance overall among segments of the Jewish population.287 Rather than causing a slide down the slippery slope, such change could draw more people in and very well result in increased commitment to higher levels of observance with respect to key ritualistic practices concerning the Sabbath and the dietary laws. Significantly, this type of increased commitment to Jewish ritual ultimately will facilitate the preservation of the Jewish tradition. Those involved in Orthodox outreach, an area that also has been growing in recent years,288 might do well to contemplate these possibilities. The independent minyanim that are springing up in Israel, the United States, and elsewhere afford women increased participation in public Torah reading and other synagogue ritual289 and are a testament to the need among observant Jews for a more inclusive, yet traditional, synagogue venue. As Rabbi Yosef Kanefsky has observed, the outcome of the experiment these minyanim raise will be determined by sociology rather than halakhic debate. Specifically, if these communities succeed in producing committed Orthodox Jews going forward, the flavor of Orthodox Judaism will look very different in the years to come with respect to the issue of female participation in synagogue ritual.290 This reality is yet another testament to the cultural analysis paradigm developed in this Article that maintains that law is a product of culture, and is determined both by top-down leadership as well as the bottom-up grass roots. 291

CONCLUSION

The cultural analysis paradigm is as much about the process of legal development as it is about change itself. In the context of increased female participation for public Torah reading, cultural analysis can be used as the basis for re-examining the tradition as well as for modifying

285 Shochetman, supra note 24, at 341–42.
286 Shochetman’s argument is a good example of the “framing” problem that was discussed earlier. See supra text accompanying notes 216–217.
287 See sources cited supra note 282 and accompanying text.
288 Outreach in the Orthodox world has been emphasized in recent decades largely as a result of the global example set by the Chabad-Lubavitch community. See generally SUE FISHKOFF, THE REBBE’S ARMY (2003). In the same vein, Heilman has also observed that by the close of the twentieth century there was an increased focus on outreach among Orthodox Jews. See Heilman, supra note 219, at 26–27.
289 See supra notes 19, 208 and accompanying text.
290 Kanefsky, supra note 21, at 117.
291 Cf. Ross, supra note 22, at 22–23 (discussing “greater awareness of the role of community in determining the meaning of law”).
the current practice, at least with respect to some Orthodox communities. As this Article has discussed, we are now witnessing some movement in certain Orthodox circles concerning women’s involvement in aspects of the religion from which they were previously completely excluded. Women are becoming increasingly educated from a Jewish law standpoint and are even taking on leadership roles in certain areas of decision-making. One forward thinking leader has already ordained a female rabbi (despite his subsequent agreement not to do this in the future). More importantly, other respected Orthodox scholars are taking the issue of female ordination seriously by exploring the halakhic parameters of this possibility. Significantly, in 2009, a privately funded Modern Orthodox yeshivah opened its doors with the goal of training Orthodox women to be halakhic and spiritual leaders. If sectors of the Orthodox world could mobilize their efforts to increase the avenues for female participation in synagogue ritual, the door could be opened to tolerating, and even accepting, some much needed variability by the Orthodox world more globally in this area of Jewish law.

Going forward, the cultural analysis paradigm developed in this Article can prove to be a useful tool for facilitating a re-examination of many types of boundaries assumed to be unalterable not only by the Jewish tradition but also by a variety of other cultural traditions. Law and culture are part of the same dynamic of human enterprise. Creativity is a necessary element in both lawmaking and in the making of culture. The foregoing discussion illustrates that Jewish law, like all cultural traditions, is a cultural expression of creative human activity designed for transmission to future generations. Paul Berman has documented a particularly difficult issue concerning cultural analysis generally, which can be especially problematic in the context of a tradition such as Jewish law that is grounded in the conception of a Divine origin and is designed to achieve spiritual elevation. Berman observes that if one understands a given cultural practice as the product of human cultural production, it may be difficult to be fully inspired by this practice or to achieve self-transformation through the cultural system under discussion. In the context of Jewish law specifically, the

292 See sources cited supra notes 235–236 and accompanying text.
293 See Fertig, supra note 204.
294 See supra text accompanying notes 166–170.
296 In this regard, it is worth noting that Shlomo Riskin, who authored one of the two essays in COMMUNAL PRAYER disagreeing with Shapiro and Sperber, still leaves the door open to some degree with respect to increased ritual participation by women in an Orthodox minyan that far exceeds the current norm. Riskin, supra note 24, at 411.
297 Berman, supra note 51, at 124 (attributing this observation to philosopher Richard Rorty).
question is whether the inevitable application of human creativity can potentially destroy the system’s authenticity.

In addressing this problem in general terms, Berman has proposed an approach grounded in “a hermeneutics of meaning, faith and sympathetic interpretation.” He invokes Ronald Dworkin’s metaphor of a chain novel, in which “every writer but the first has the dual responsibilities of interpreting and creating because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is.” In an insightful explanation, Berman notes, “Dworkin’s model requires the interpreter to treat herself as a ‘partner’ in the endeavor being analyzed.” Under this framework, the interpreter must understand the essence of the prior endeavor so she can generate new interpretations that are within the boundaries of the enterprise. Such an interpretation differs from a “suspicious” reading of the tradition because it does not seek to undermine the tradition or ignore its meaning and relevance.

Interestingly, Sir Jonathan Sacks, Chief Rabbi of the mainstream Orthodox synagogues in Great Britain, has also invoked Dworkin’s model and has observed that it provides “an admirable way of describing the halakhic process.” This notion of a partnership between the tradition and the interpreter allows the interpreter to become a part of the interpretative enterprise but only after the interpreter has acquired a thorough understanding of the enterprise and its history.

In theory, this type of partnership explains how the evolution of Jewish law as well as other cultural traditions can be approached from a cultural analysis standpoint without compromising their authenticity. Cultural analysis explicitly acknowledges that the legal interpreter always is influenced by her context and environment. Although change must be rooted in the tradition’s previous chapters and therefore

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298 Id.
299 Id. at 125 (quoting RONALD DWORIN, How Law Is Like Literature, in A MATTER OF PRINCIPLE 146, 158 (1985)).
300 Id. at 126.
301 See id. at 127.
302 See Jonathan Sacks, Creativity and Innovation in Halakhah, in RABBINIC AUTHORITY, supra note 174, at 123, 147–49.
303 See Berman, supra note 51, at 126–27. Rabbi Sacks’s reliance on Dworkin’s model of legal interpretation is not surprising given that both models are “backward looking.” See Suzanne Last Stone, Formulating Responses in an Egalitarian Age, in FORMULATING RESPONSES IN AN EGALITARIAN AGE 53, 64 (Mark D. Stern ed., 2005) (discussing Dworkin’s model). In other words, both models of legal interpretation confine their analysis to authoritative texts “internal to the law” and do not legitimize the “conscious decision to depart from prior norms in order to meet present or future needs of society.” Id. at 64. These positions do not endorse legal creativity or reform for the sake of reform but they do acknowledge that the historical position of the interpreter may impact legal creativity in particular instances. Note that the cultural analysis paradigm would go even further than Dworkin’s model to the extent that it explicitly incorporates new understandings in the discourse.
mindful of the integrity and coherence of the entire enterprise, legal creativity will necessarily arise through the implicit differences that exist over time and space. Further, the very acknowledgement that the custodians of cultural traditions were indeed influenced by their historic and cultural situations will produce a way of reading their legal and other texts in ways that provide interpretative insight for different circumstances. In the context of the Jewish tradition specifically, the classical Talmudic sources facilitate this approach through their preservation of minority opinions. As Rabbi Aharon Lichtenstein has acknowledged, these minority opinions “are very much alive, held in reserve where they can be culled from the shelf in a crisis.” On the other hand, the fact that the Jewish legal tradition historically has embraced a multiplicity of perspectives sometimes makes it difficult to determine where, in practice, the boundaries of the tradition lie.

Daniel Sperber has observed that “[t]he questions raised by the issue of aliyyot for women go far beyond the immediate question at hand, to larger issues in the philosophy of halakhah, the nature and legitimacy of halakhic change, the proper methodology for halakhic decision-making, and the like.” Indeed, the questions he raises in the context of female participation in public Torah reading extend far beyond Jewish law “to larger issues in the philosophy of [law], the nature and legitimacy of [legal] change, [and] the proper methodology for [legal] decision-making.” The negotiation between preservation and change confronts virtually all cultural traditions in modernity. Thus, the issues addressed in this Article lie at the heart of any examination of legal theory, process and reform. This Article advocates a view of law and legal process that is dynamic, relational, and culturally driven. By developing a specific cultural analysis paradigm and applying it to the issue of increased participation for women in synagogue ritual, it illustrates the promise of the application of cultural analysis to law on a much broader level.

304 See Sacks, supra note 302, at 149 (describing the renewal of the "halakhic enterprise by adding a chapter to its continuing history but in such a way so as to preserve the integrity and coherence of the whole").
305 Lichtenstein, supra note 114, at 11.
306 Sperber, supra note 114, at 127.
307 Id.