The Halakhic Theory of Judaism of Rabbi Emanuel Rackman

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I. Rabbi Rackman's Major Writings

Rabbi Emanuel Rackman's [henceforth, ER] first book was a published version of his doctoral dissertation entitled **Israel's Emerging Constitution** [IEC] (1955) This monograph is the most cogently argued and least theological product of Rackman writing. Every sentence flows into the next, the line of argument is flawless, and it is written with a literary discipline that would not be replicated in future writing. While a lover and advocate for Israel, Rackman's political study of the emerging Israeli Constitution reflects a partisanship that draws upon a

uniquely American sense of right. For Rackman, Israel's elite controlled political power and did not take the concept of individual Rights, enshrined in the first ten amendments to the American Constitution, seriously. According to Rackman, a written constitution that enshrined individual rights would have enhanced the moral quality of the Israeli political system.

Israel's Labor Party's marginalization of the Communist Left and the Right Wing Herut is, for ER, a denial of human dignity that the Law is morally obliged ought to protect. In this volume, ER emerges as a probing, intellectual who happens to be an idiosyncratic Orthodox Jew with a fiercely liberal and philosophically urbane sensibility. Natural Law theory provides Rackman with a perspective and rhetoric with which the Orthodox Jewish tradition and secular modernity might be synthesized. While ER's Judaic thinking evolved throughout his career, his view of political theory, developed in the early 50's, remained constant throughout his writing and this sensibility informed his treatment of halakhic issues that re-emerge in his theological and halakhic writings.

ER's second volume, **One Man's Judaism,** [OMJ] presents a collection of writings which as a book was published in 1970 and works out the system that first appeared in an earlier work first published in 1966 in the **Commentary Symposium: The Condition of Jewish Belief.** In this brief theological response , ER provides the contours of his unique "One Man's Judaism." He believes in revelation, but is not a fundamentalist or like any other of the Orthodox respondents to the Symposium, he accepts the Laws of the Covenant, but as a copartner with God and not a blindly obedient and mindlessly dutiful slave.

ER asserts that Torah overlaps with Orthodoxy, but is not limited to Orthodoxy. In other words, Orthodoxy is the way the Torah that is usually applied in community, but the Torah is wider in scope than what is expected and accepted within Orthodoxy. In other words, the religious forms of Orthodoxy do not exhaust the range of Halakhically legitimate religious expressions. But ER is no secularist, either. Responding to the hyper-rationalist Naturalism of Mordecai Kaplan, Rackman insists that a real, personal God did choose the Jews to be the "chosen people." His audience in this volume, which includes his essay on Jewish belief, is the Jew who wants to remain Orthodox in observance while living in and

inhabiting the modern world, professionally intellectually, and theologically. For ER, "Reconstructionists and Reform denigrate God's role in applying God's covenant; some Orthodox denigrate the role of man." [OMJ 173] His middle position claims to be honest to God as well as to humanity that life's actual realities.

Rackman's final volume to date, **Modern Halakhah for our Time** [MHT] (1995), applies his vision of an expanding, flexible Jewish law, to issues currently convulsing within in the contemporary Orthodox community. The moral reading of the Law takes into account the actual statute recorded in the Oral Torah canon, which must be read with integrity, and the life situation to which the legal norm must be applied. Whereas in **One Man's Judaism** ER implicitly argues that Torah is larger than the Orthodox orbit, in **Modern Halakhah for our Time**, he explicitly includes those within the Conservative Movement who were, at the time of his writing, committed to Halakhic Judaism. Unlike most Orthodox thinkers, who apply the **method** of the analytic school, often referred to as "Brisk," and which often treats the inherited culture, called "Tradition" and considered to be normative, ER borrows an idiom from Conservative Judaism when applying the definitions of Prof. Menachem Elon of the Hebrew University, locates himself "Historical School." [1] However, ER refers not to the Historical School, which has become associated with Conservative Judaism, but with the Historical "approach." [OMJ 43-44] Well aware that history as an academic discipline describes what **is** and rabbis, who function as judges, deal with normative issues of **ought,** ER applies his sense of morality and decency that he finds in the fabric of the laws to be the mpre engine that translates descriptions of fact into prescriptive, value laden norms.

II. **The Contours of** ER's **Thought**

1. **Revelation**

ER's synthesis of a traditional Orthodox identity and liberal social politics translate into a religious sensibility that stresses a modern religious mindset according to

which humanity participates in Revelation. [2] He concedes that like Socrates, he is seen as a corruptor of the youth because he preaches that Judaism encourages doubt. [OMJ 17] [[3]] This sensibility is grounded in this one man's application of the Higher Biblical Criticism to his understanding and applications of Judaism's normative claims.

ER is also willing to consider a doctrine of continuous revelation, but only when "the modern age recaptures basic religious experience." [OMJ 353] He claims that God continues to reveal the divine will, but only to those for whom revelation is not an empty idiom. Thus, ER finds in Abraham Joshua Heschel's scholarship the claim that some rabbis believed that there were revelations that occurred in the Middle Ages. [OMJ 177] [[4]] But unlike Jewish liberals, who reject the doctrine that there is a real, commanding God Who akes demands, [[5]] ER sees God as the Author of Jewish law's basic norm, [MHT 15] [[6]] And, citing the late President Belkin of Yeshiva University, ER endorsed Josephus's view held that Israel's God is Israel's ultimate sovereign. [[7]] Judaism is a legal order [OMJ 4] with a personal God Who is the Commander. [OMJ 11] [[8]] For ER, the continuous revelation that empowers humanity to participate with God in defining the content of Revelation, has two sources. First, Abraham's covenant [OMJ 5-6was augmented at Sinai. [[9]] Second, a close reading of isolated ER statements indicates that he is that he has accepted the Documentary Hythothesis regarding the composition of the Pentateuch:

> The most definitive record of God's encounters with man is contained in the Pentateuch, Much of i**t may have written by people in different times**, but at one point in history God not only made the people aware of his immediacy but caused Moses to write the eternal evidence between Him and His people. Even the rabbis in the Talmud did not agree on the how. But all agreed that the record was divine." OMJ 180 [my emphasis]

While not affirming that the Higher Critical position is theologically or factually correct, ER here entertains it as a possibility, taking the Talmudic discussion regarding the authorship of the last lines of Deuteronomy to be precedent for reconsideration of the Mosaic authorship of other passages as well. Furthermore,

"Many theologians, **even among those who are committed to the belief in**

a historical Revelation at Sinai, maintain that it happened once and will

never happen again" OMJ 177 [emphasis mine]

From his word choice, ER does **not** necessarily accept a historical revelation at Sinai, but actually posits that God's covenantal Revelation is in fact revealed in subsequent prophecies as well . [[10]] ER's later formulation is ultimately his redefinition of what it means to be authentically Jewish, or Orthodox:

What then, unites all who are committed to the Halakhah, those presently

called "Orthodox?" It is simply the belief that from the Covenant between

God and Israel there emerged the obligation to obey His law, **which is**

subject to change and development only as the Law—Written and Oral—

made change and development possible. The dissenter, or the champion of a new rule, must base his dissent or his effort at legislation on these

fundamental norms and methodology they describe. [MHT 112]

[my emphasis]

In his comments regarding the application of science to Torah, "by any criterion the Pentateuch was written before the Common Era." MHT 136 In other words, none of the Higher Critics take the Pentateuch's basic text to have been completed or augmented before the rabbinic period. And ER here again treats

the Documentary Hypothesis regarding the Pentateuch's historical origins minimally as a theory that is plausibly

true. [[11]]

ER's Judaism affirms [a] a commitment to Halakhah, [b] a commitment to a binding covenant between God and Israel [c] which admits to change only as authorized by the halakhic system. [[12]] The Mosaic authorship of the Torah is, for most Orthodox thinkers, [[13]] as necessary a dogma for Judaism as is the belief in the Resurrection of Jesus for the the Roman Church. By adding his comment regarding dissent, ER affirms his own "one man's Judaism."

ER's three dogmas are the existence of a personal, omnipotent God, Revelation, and the chosen people. [[14]] It is precisely because ER takes God seriously that he is constrained to take humankind, created in God's image, seriously. Consequently, suicide is an affront to God. [MHT 25] Citing Maine, the Hebrew laws were "progressive." [OMJ 230] [15] The command to conquer the earth [Genesis 1:28] is evidence that humanity is invested with dignity by God. ER also rejects Augustine's claim that humankind is in desperate need of grace [OMJ 122-3] Unlike Augustine, who justifies slavery, ER proudly distinguishes between the Christian claim that Judaism is bound by Pharisaic legalism on one hand, [OMJ 129] but limits slavery much more than Augustine. [OMJ 141] ER argues that the aim, end, or *telos* of Jewish law is to outlaw slavery. [OMJ 207] There is no tolerance for debt slavery. [OMJ 129] Judaism's "God centered humanism" [OMJ 149] conditions society to affirm freedom as the condition of human dignity. [OMJ 95] This sensibility, that human beings should be free because their dignity is God given, is enshrined in the right to privacy and [MHT 28] the outlawing of self-incrimination [bSan 17a] [OMJ 173] [[16]]

ER's modernity is manifest not only in his willingness to respectfully reconsider the format of the covenant revelation and affirm the human/divine partnership. He happily applies and synthesizes social science findings with what he takes to be the *telos* or goal of the law. He laments what he takes to be the myopic view of Israeli political parties that stymied the composition of a right granting constitution.

> Perhaps in the future Israel's political literature will be written by persons who are not professional party politicians and then it will command more universal interest. [EIC 36]

For ER, authentic Judaism, unlike Israel's political system, is not Statist. The State, being sovereign, is the embodiment of the Law in pagan legal orders but not for Torah law. [17] According to ER, a law that is no more than the formal hierarchy of authority, like Kelsen's, Austin's, and the Soviet system are inconsistent with Judaism. [OMJ 115] [18] Since freedom and dignity reflect the *telos* of the law, the individual, on the basis of law, has the right, and in Judaism, the obligation to defy the state, the king, and even the rabbis if that person is convinced that the people in power acted wrongly. [OMJ 97-98]

It is because humanity and God are copartners in revelation, humans may, for ER, suspend what they believe to be God's law. The Torah commands that Israel "live" by the law [Lev 17:5] which was taken to mean that the dignity of life supersedes other Torah obligations. [bYoma 85b, MHT 32] The rabbis took Psalms 119:126 to authorize the suspension—but not nullification—of the Torah law itself. [[19]] ER asks rhetorically "how did the rabbis justify their arrogance?" [MHT 32] This formula reflects the Haredi retort with which ER struggles in his sparring with his ideological adversaries on his Right. Consequently, he is the first modern Orthodox rabbi that I found to refer to the Right Wing Orthodox approach as heresy:

> It is the reactionaries in Orthodoxy who bear much of the guilt for this tragic phenomenon [the intimidation of dissent] Their heresy [!]] is that they regard their own Biblical and Talmudic interpretation as canonized in the same measure as the texts themselves–which was never true. They are repeating this heresy again, in Israel, and the Diaspora, so that already Jewish sociologists detect the possibility of further schisms within Orthodoxy. [OMJ 232]

> requires acknowledgment of the divine origin of the commandments and [the] firm resolve to keep them. OMJ 262-3

The extremist Orthodox claim is parried, ironically, by an appeal to reason and Judaism's basic norm. [[20]] But note well that ER requires a belief in the Torah's divine origin, and **not necessarily to Mosaic authorship** because for ER, the rabbis engage in Revelation by dint of their authorized evolving the Law**!**

The dialectic of Jewish law insists upon antinomies, which the rabbis, as "partners in the development of the law," [OMJ 204] are authorized to resolve. ER here calls attention to the application of justice in human life, moving toward the abolition of slavery. [OMJ 207] It is precisely because God is both immanent and transcendent that the rabbis were entrusted to preserve Judaism's abiding morality in the application of Halakhah .

ER views Jewish Tradition historically and not conceptually. He adopted the descriptive approach of Professor Menahem Elon

. By reviewing the norms recorded in the past in context, one may better understand how those norms ought to be applied in the present. This perspective has enabled and empowered ER to advocate his opinion and not submit to the intimidating pressure of those who are uncomfortable with his modernistic and confessed liberal tendencies. He observes that in the present rabbis are afraid to rule liberally because of social and political pressure [OMJ 262]

2. Liberal Motifs in Rackman's Thought

ER wants a liberalized law to emerge. While reading the tradition expansively, ER

insists upon treating the tradition with integrity. While Jewish law outlaws sterilization

[OMJ 116] ER suggests that the serilzation of criminals, in violation of one statute, may

save lives and therefore be permitted. [21] The case for liberal rulings occur when statues

and norms are in conflict. Similarly, ER writes that regarding artificial

insemination,“Jewish Law is exceedingly liberal.” [OMJ 112] Leniency is associated

with liberalism. ER is trying to show how the rules of Judaism direct and purify the soul

and are not gratuitously or arbitrarily imposed to give people grief. While adopting the

lenient ruling regarding Artificial Insemination by a donor, ER suggests that the offspring

is permitted to anyone but the other offspring of the anonymous donor. [[22]]

If Jewish law may be be suspended in emergency cases, then there

would be no purpose in being gratuitously stringent in the applications of Jewish law. The rabbinic virtual abolition of the Sota ordeal [OMJ 112] is taken by ER to be a ritual of reconciliation, the *telos* of which to allay the husband’s suspicions regarding what he takes or mistakes to be his wife’s waywardness. [23] He observes that some Orthodox rabbis permit the use of a dishwasher for milk and meat if the utensils are cleaned on separate runs. [[24]] Note that leniency is defined by a permitted deviation from communal expectations, and not the letter of Talmudic law.

Regarding the use of the microphone use on Shabbat, ER avoids taking a stand regarding its permissibility on the legal merits of the matter, preferring instead to suggest that some regard the prohibition to be Biblical, rabbinic, or not forbidden at all [OMJ 271] He then invokes the principle of emergency to justify its use. While R. Moshe Feinstein is adamant that the microphone prohibition might be Biblical, and that there is no room for either leniency or respect for alternative opinions, ER argues that Jewish law may be otherwise understood. [[25]] While true to his own position regarding pluralism within Jewish law, treating his opposition with the highest of respect, [[26]] ER applies the principles of strict construction, that the letter of the law may well allow for microphone use, and failing that leniency, the emergency principle discussed above would allow local rabbis discretion. Ironically, it is the local rabbi and not charismatic gadol who is authorized to make these decisions. [[27]] The shift from reason to charisma, articulated by R. Herschel Schachter, [[28]] is not without precedent in the Jewish tradition. [29]

Ever concerned about his identity within the Orthodox consensus, ER claims that "Halakhah dictates that men be separated from women in the synagogue." [OMJ 272] He does not cite the source of this norm in the canonical Judaism of the Dual Torah. It is likely that this assertion follows from his Orthodox culture. [[30]] Like his comment on the microphone, he concedes the existence of rabbinic restriction, alluding to R. Soloveitchik's position, that the Bible requires separation of the genders and rabbinic law demands segregation with a partition, [31]while others, referring to the more restrictive R. Feinstein, believe that the Torah actually demands the partition segregation. Without demonstrating his view regarding the status of the synagogue partition, he again invokes the emergency principle to allow for leniency.

ER also suggests the electricity may be permissible according to Jewish law. [OMJ 41, MHT 2] He does not cite the lenient readings, but his leniency regarding the use of microphones, now contextualized, is consistent. Elsewhere, [OMJ 53] ER apologetically claims that its use is based on the prohibition to use the power of creation. This assertion is proclaimed apologetically, but not anthropologically and no sources justifying his contention are cited. ER's contention that men initiate divorce but women's consent is required [OMJ 217] is also apologetic, as the woman's consent was a subsequent development in the history of Jewish law and not a norm in the Dual Torah canon.

While unhappy with Rabbi Moshe Feinstein's invalidating non-Orthodox marriages to overcome the aguna situation, he concedes that the liberalizing result should not be dismissed. [MHT 70]

ER is unable to solve the problem of bastardy, in spite of the fact that the offspring suffers for the wrongs of the parents. [OMJ 212-213] While he cites limiting precedents, ER does not raise the possibility of applying DNA testing to determine who the biological parents really are.

3. **Women in the Thought of R. Emanuel Rackman**

ER recognizes the conflict between the rules recorded in the past regarding women [32] and the sensibilities of the modern age. [MHT 120-121] [33] Applying the principle of freedom, which for ER is the operational ethic underlying Jewish law [OMJ 267] and the historical precedent for diversity, ER applies a mindset similar to Ronald Dworkin's moral reading of the law which fills in the gaps in the law with the judge's ethical bias. Specifically, the Scripture's view, revealed by God, regarding inheritance, has been changed in order to give women what a human sense of fairness takes to understands to be their due. [OMJ 268]

ER notes that while R. Feinstein outlawed the bat mitzvah ritual because the practice was initiated by the Reform, [MHT 1-2] [34] R. Isaac Nissim did find a precedent for this rite. [35] He further claims that unlike R. Nissim, "very few rabbis have been equally liberal [in accepting innovation] as far as women are concerned." [MHT 7]

ER has no difficulties allowing women to have their own Haqafot on Simhat Torah or women's prayer groups. He alludes to the restrictive ruling the REITS Five [36] which claimed that the women's prayer groups violated several principles, precedents, policies, and conventions. But ER astutely calls attention to the practice of Ashkenazi women to recite a blessing before performing the lulav bouquet waving on Sukkot. According to ER, a women reciting this blessing" is really lying." [MHT 65] [37] ER claims that women observed the rite and with time adopted the practice of reciting the blessing "And then came rabbis who rationalized approval.

ER concedes that halakhic development is often political and not logical. Rabbis differ on any given issue, with one view prevailing over the other. ER's approach to law is instrumental and result oriented–he will apply any method or reasoning, given his canon of reasonable limits–to insure that the law's moral minimum [38] and freedom aspiring *telos* be achieved. He envisages women's prayer services which include Qaddish and Qedusha, "without anyone objecting." [MHT 66] Consistent with his doctrine of continuous revelation, ER implies that an Orthodox consensus is sufficient to validate a practice. While ER prefers families not pray in different settings based upon gender, he realizes that he cannot prohibit, on policy grounds, what he [a] knows, the REITS Five notwithstanding, is not forbidden by explicit statute, and [b] which some women with sincere passion want. ER here takes the position that anything that is not forbidden is indeed permitted, or authorized. [39] His realization that "women are not counted in a 'Minyan' may be unalterable"–because the canonical data and the historical Orthodox rabbinic consensus are in concert–indicates the limits of his own sense of Revelation regarding how far the liberal envelope might be pushed. [40]

When there is no rabbinic consenus, ER believes that one may follow whom one wishes. He cites Rabbi Eliezer Waldenberg, who permits the abortion of a deformed fetus, with his colleague, Rabbi

J.D. Bleich, strongly demurring. [MHT 110] And as long as there are legitimate lenient opinions, it is for Rackman legitimate to adopt them. [41] ER does not discuss the merits of the case or the status of the fetus in Jewish law in coming to his conclusion [42] and he does not address what makes an opinion legitimate. [43]

ER anxiously searches for validating precedents in order to reject what has been taken to be canonical Jewish law when the situation requires such liberalism. When Yeshiva University allowed women to learn Torah , it "ignored the **tradition** that women are not to be taught the 'Torah Sheba'al Peh. Bar Ilan University also ignores the **prohibition."** [emphasis mine] [MHT 66-67] ER takes past usage, called ambiguously "tradition," and then argues that Bar Ilan University ignored the negative orm that he labels **prohibition,** in Hebrew, ***issur,*** suggesting that Jewish law **does** change and is merely providing an instance that many within the Orthodox consensus has declared to be valid. That women not studying oral Torah is a "Tradition" in the canonical sense, [44] or that the canonical documents actually issued an unambiguously a negative norm, has been discussed extensively in modern Orthodox literature. Since Traditional ordination no longer obtains in

modernity, ER hints that he would not object strongly to Orthodox women earning the rabbinic diploma. [MHT 66], a position strongly opposed by main stream Orthodoxy [45] and some Traditional Conservative Jews as well. [[46]]

The most controversial position taken by ER regarding women is his attitude toward annulling marriages when Jewish divorces [*gittin*] cannot be obtained. While in recent times ER has been vocal and public regarding nullifying marriages, [[47]] his recent position has roots in earlier writing. Recalling that humankind is, for ER, a copartner in a Revelation that is simultaneously Divine and human, ER is consistent to his system when he declares that "in family law and civil law the demands of life are as the logical implications of the [canonoical] texts. [OMJ 174] He therefore adopts the lose construction of Rabbi Abraham ben David [Raavad] and rejects the strict constructionist [or positivist, ay] position Maimonides as being less flexible in the face of the recorded, positive statute. The implications of this choice, that a ruling may be reversed only when it violates positive canon, go undiscussed. For Maimonides and Bet Yosef, the Amoraic Talmud ends the canon, whereas for Raavad, the decisions of the past generation is canon. [48] [OMJ 175]

ER calls the reader's attention to the Tosafist requirement that a woman's consent is needed for divorce. [OMJ 124-125] He takes this enactment to be a liberal reflex and precedent for subsequent policy changes, but does not consider the possibility that the Tosafist stringency has cultural parallels in a Christian Europe that is growing more restrictive regarding the ending of marriages. [49]

Because equality and freedom are goals of the law for ER, ER argues that the ancient precedents be activated and extended to address contemporary needs [OMJ 241-243] He argues that Rabbi Professor Menahem Elon, well known as an Associate Justice on the Israeli Supreme court, allows human input "in the application of biblical legislation" to allow humans to apply their own source of right, and invoking the idioms of "natural law" and "categorical imperative." [MHT 133] This doctrine is strikingly similar ER's and Conservative Judaism, as noted above. Like ER, Elon advocates the nullifying of marriages when Jewish divorces are unobtainable. [50] Since the rabbis have the right to confiscate property, the rabbis have the right to confiscate the marital ring, which is property, by which the marriage came into being. [MHT 37]

III. **Constitutionality in the Thought of Emanuel Rackman**

R. Emanuel Rackman's understanding of the Halakhah, with a natural law, human reason -driven reading, is similar to, if not influenced by, the legal philosophy of Ronald Dworkin who, as a matter of principle, takes rights seriously in an empire of law whereby the law is an instrument of the ethical. Applying the mindset of Brisk, albeit with an alternative trajectory, ER reads the Halakhic literature for what he takes to be its ethical substrate, which to his mind is the ultimate ground of normative right.

In the Brisker Halakhic tradition, , the unchanging divine concept, divined by the Masoretic sage, [51] is defined, applied, and ultimately limits how the positive Talmudic statute might be defined. By appealing to Nahmanides' reading of "You must do what is right and good," [Deuteronomy 6:18] it is the good that must be obeyed and the individual norms are not as binding, but as is the obligation to do good. [52] Endorsing the position of R. Walter Wurzberger, who claims that the Halakhah is not an end [Greek teloV] but a guide, [53]

ER is defines his Orthodoxy idiosyncratically. He views the law as method and guide, the letter of which is not ultimately binding in all situations. He believes that Jewish law is binding, it reflects but does not exhaust either Divine intent or normative will. God's holding Cain accountable for his brother's murder is, for ER, grounded in a morally based natural law. [MHT 106] [54] Advocating halakhic activism, ER views humanity's free will as the moral source for activist decisors reckoning "with social needs." [MHT 107]

ER's avant garde legal system, while in no way fundamentalist, remains fundamentally Orthodox. Assuming a maximalist reading of Hebrew Scripture, ER dismisses what he takes to be the extreme or minimalist position of most contemporary critics. However, the current state of Biblical scholarship no longer views the Albright maximalist understanding of Scripture favorably. But ER is emotionally attached to the very traditionalism that his mind and method are prepared to reconsider and on occasion reject. Like R. Joseph D. Soloveitchik, ER

is not prepared to engage in interfaith dialogue, [55] even though no scholar of note has cited a statutory norm that would prohibit the practice. And like R. Soloveitchik in "Confrontation," ER argues his case on policy, which while legitimate, is not binding, and as noted ER does not cite specific halakhot that would be violated in such dialogue. [56] Nevertheless, ER freely contrasts Judaism to Christianity, but not in a forum where his position is subject to peer review or intellectual interchange. [57]

ER often applies "reason" or apologetics to demonstrate that Judaism can function in the moment of modernity. His apologetic treatment of the slave is negated by Jewish law's outlawing the freeing of the Canaanite slave. [OMJ 130] [58] He wishes and claims, but does not demonstrate that women and men are equal in Judaism. [OMJ 134]

ER's reliance on rabbinic consensus against the plain meaning of the canonical text finds precedent in post-Talmudic rabbinic culture. Raavad's concept of canon includes the great sages of the previous generation. [59] While most seriously affiliating Orthodox Jews take care to immerse utensils in the miqveh, there has been no call, to my recollection, for re-introducing the giving of the priestly gifts of meat to an Aaronide after slaughter, in spite of the clear sense of the canon. [60] While issues like microphone and mechitsa are culture defining issues which determine who is considered insider or outsider to the community, even though the canonical information is, at best ambiguous—and for which ER appeals to emergency flexibility [61] rather than exegesis or consensus for leniency—other matters, like Hadash grain or community eruvim, where the current consensus is not always congruent with the plain sense of the canon, are not raised by communal Orthodox rabbis or by ER. [62] Thus, ER is advancing a *halakhic* policy, but a consistent theory of law.

ER's Ashkenazi Orthodox background bleeds through in his transliterations.. He refers to the Council of Mandates as the *Waad ha-Mandatim,* [IEC 65] or *Wa'adat ha-Huqa* [*IEC 38]* with the **vav** being pronounces as the Arabic *wow.* But the *qof* is not augmented or doubled. *Bayot haHinuch* reflects popular usage but not phonetic precision, which would be *be'ayot*. When writing *tachnit* as *tochnit* or *rosho* instead of *rasha,* ER's Ashkenazi Orthodox rabbinic culture, which was not precise in its phonological articulation, becomes apparent. Thus, if there is no

principle of significance at stake, ER will not challenge the Orthodox consensus.

ER is painfully aware that his philosophy of Jewish law is “one man’ Judaism:

“Most halakhic authorities regard the halakhah as a body of rules handed down by the Divine Sovereign to enable the Jew to live according to the His will.” {MHT 1]

ER concedes that there is a majority, with which he, as a modern, disagrees, and which his idiosyncratic reading of the validating tradition legitimates. He portrays the Brisk or Analytic school as one which sees the rabbi as a jurist and not an activist legislator. He argues that there is a “legitimacy of diversity” [MHT 3] in Judaism that legitimates a range of opinion which includes his own. According to ER’s understanding of the Analytic School, it is claimed that the Talmud maintains that it is the women’s desire to be in a bad marriage than to be single. [MHT 8] [63] This observation is taken to be a rule of the Halakhic system. [64] For ER, it reflects a social reality that informs the decisor. Different social realities move decisors to read the realities and the statutes differently.

ER’s reading of the Talmud for its **ethical** substrate, like Brisk’s reading of the Talmud for its **conceptual** substrate, are different in content but similar in form. ER takes the analystic Briskers to be too positivist when they refuse to become activist decisors, but he calls the more extreme Orthodox, also often Briskers, heretics because they identify their spin on the documents to be the moral equivalent of the document itself. In other words, activist decisors exist on the Right as well as the Left within Orthodoxy.

ER’s secular education focused on politics, not *Wissenschaft des Judentums*, which he read [given the readings cited in footnotes!] but did not master. For example, ER disagrees with those who claim that the folk saying, “a woman would rather be married than to sit as a widow/spinster,” [OMH 125] [65] In point of fact, a *description* of the rabbis, here a saying of Resh Laqish, is simply not binding rabbinic legislation. At stake in this matter and the agenda of ER’s life’s work is that ER is what Jeffrey Gurock calls an “accommodator,” and the consensus of most of Orthodoxy’s rabbis reflects the mindset of modernity’s “resistors.” [66] For ER, earlier authorities accepted the “modernity” of their

time, like R. Jacob Tam defining of Christianity as a non-idolatrous religion with whom business may be undertaken three days before and three days after their holy days. [MHT 9] It is the utility of R.Tam's conclusion and not the cogency of his claim that made the opinion into *de facto* law, and a rabbinic consensus is, for ER, sufficient to alter normative practice. By adopting this position, ER appears to ignore the Scripture, grounded in what he otherwise accepts to be revelation, that there is an element of Law that is absolute. [67]

There are two scholars, uncited in ER's work, that when referenced, explain ER's system.

Rabbi Professor M. S. Feldblum, who taught at Yeshiva University and subsequently, at

Bar Ilan University, accepted and applied critical study to the Talmud, he specialized in the tractate Gittin, and actually advocated, like Menahem Elon, nullification of the marriage when a Jewish divorce was unobtainable. [68] Those who advocate what is popularly understood as "Tradition" strongly opposed this reading. [69]

Recalling ER's ethical reading of the law, his concern for integrity in the reading of the Law that is honest to God, because it is revelation and honest to human realities because the Law must be applied by humans to human reality, we find a model in the writings of Ronald Dworkin. For Dworkin, Law is an instrument of liberalism which treats all of its citizens equally, paying attention to their particular needs. [70] Individual dignity [71] is enshrined by a Law that is neutral on the issue of what the "good" really is, allowing that choice to be made by the dignity endowed individual.[72] ER, like Dworkin, realizes that liberty, the right to act freely, often yields unequal realities.

Because ER is so concerned with individuality and the right to dissent he, like Dworkin, takes rights seriously. For Dworkin, a right is a claim of the individual [73] over homogenization of the democratic and sometimes tyrannical consensus. Rights insure the dignity of the citizen, who is politically and psychologically empowered to acdt as a citizen whose character and prerogatives are enshrined in statute . In **Freedom's Law, [74]**

Dworkin, like ER, argues that the law must be read ethically by judges who find principles, or a moral substrate—as defined by Wurzberger and ER above—that become the formula whereby the statutes of the legal order are to be applied. Unlike the Jewish Left, which for ER denigrates God's role in the creation of law, ER's Orthodoxy insists upon textual and and intellectual integrity. For Dworkin as well as ER, laws occasionally confront the jurist with conflicting legal claims and values, [75] so that formal equality must be rejected in favor of real equality in life. By advocating proactive autonomy, [76] Dworkin echoes ER's One Man's Judaism.

V. **Conclusion**

Emanual Rackman is a self-defined Orthodox Jew whose traditional Judaism is informed by and is synthesized with his chosen secular discipline, Political Science.

A political liberal who is a religious moderate conservative and, in the context of the current Orthodox continuum, inhabits the extreme Left of Jewry's Right, Rackman takes God's will and human dignity seriously, even when the two seem to conflict.

Rackman is one of the few Orthodox thinkers to apply, albeit furtively, the findings of moderate Bible Criticism to his normative approach to Law. Since the Torah's composition and interpretation is a Divine/human partnership, a Dworkinian balance between competing claims is sought. The so –called unchanging Divine law is subject to change on ethical, social, and pragmatic grounds. ER's isolated statements ado imply that there is merit in the Bible criticism, but he never actually affirms the theory in a way that the simple reader might notice. While I suspect that this Straussian strategy was adopted to avoid a repetition of the Louis Jacobs Affair in England, where Rabbi Jacobs *bona fides* as an Orthodox rabbi was withdrawn by Rabbi Brodie because the former accepted the Higher Biblical Criticism, ER's strategy is consistent with Maimonides' ruling that the doctrinal rules are violated not be state of belief, but by articulation. [77]

Rackman interprets Jewish law liberally and ethically, and is willing to innovate,

as in the case of his advocacy and implementation of the nullification of marriages when religious divorces are not available.

Rackman's traditional background regularly reveals itself, in his diction, his reverence for and study of the Law, and his insistence that a real commanding God is the Torah's ultimate if not literary Author. And his Orthodox socialization is evidenced by his Ashkenazi background bleeding through the academic Sefardic Israeli phonology that has become the convention of the secular academy. The rejection of his liberal reading of Jewish Law on the part of what he takes to be Orthodoxy's parochials, or modernity resisters, moved Rackman to regard that Orthodoxy as his adversary. When, as noted above, ER maintains that Orthodox Right attaches canonicity to its spin of the canon's plain meaning, ER views its position as heresy, an idiom singularly appropriate in medieval rather than modern discourse.

A passionate Zionist, ER calls attention to Israel's constitutional inability to recognize the individual dignity with sufficient seriousness.

For ER, the Law of Torah carries the *telos* of human dignity, with legal statutes that are not be understood and applied literally or philologically, as suggested by legal positivists like Maimonides, but according the ethical substrate implied by the individual laws, which in turn provide the template and benchmark for their implementation.

While ER's unique synthesis expresses the sensibilities of many modern Orthodox affiliates who try to live with moral, religious, and Jewish integrity in two very different-- American and Orthodox Jewish--constructions of reality, the road he has taken is lonely and will trouble most Orthodox readers. Even those who might endorse his legal activism may recoil at the theological radicalism that underlies and justifies this activism. Hence, ER's synthesis is unique to one man, and hence ER's religion and life project is well defined by his the title of his first major Jewish work, **One Man's Judaism**.]

[1] Menahem Elon, **ha-Mishpat ha-'Ivri: Toledotav, Meqorotav, 'Eqronotav** (Jerusalem, Magnes, 1973), 3-4. Elon's first description is the historical development of Jewish, then he outlines the legal norms of the order, and last, the documents in which the sources are recorded.

[2]For ER, modernity should not be cofnused with vulgarity license. Some prefer the adjective "centrist" to describe the Orthodox phenomenon that ER advocates [MHT 64] ER finds the term "centrist" to be a position on a continuum and not a position espouses with passion. On correcting wrong, on applying an ethical reading of the positive statutes of the Divine law, ER affirms an extremism of ethical activism. [MHT 64]

[3] The second of the eight articles of Classical Reform's Pittsburgh Platform reads: "We recognize in the Bible the record of the consecration of the Jewish people to its mission as the priest of the one God, and value it as the most potent instrument of religious and moral instruction. We hold that the modern discoveries of scientific researches in the domain of nature and history are not antagonistic to the doctrines of Judaism, the Bible reflecting the primitive ideas of its own age, and at times clothing its conception of divine Providence and Justice dealing with men in miraculous narratives. http://data.ccarnet.org/platforms/pittsburgh.html.

The Conservative thinker, R. Joel Roth, accepts as dogma the claim that the Torah is on one hand God's will, but is mediated by four sources, J, E, P, and D. See his **The Halakhic Process: A Systematic Analysis** (New York: JTSA, 1986), 1-12, and the penetrating discussion in Eliot N. Dorff, **The Unfolding Tradition: Jewish Law after Sinai** (New York: Aviv, 2005), 214-215. Dorff's own view, which ER clearly rejects, is that the Jew obeys God and the changing view of God changes Jewish law. ER's view comports well with Roth's but would view Dorff's position to be outside the pale. But ER's Bible seems to be closer to the Liberal Moveoments than it is to what most readers, Orthodox and non-Orthodoxy understand Orthodox theology to be .

[4] ER here assumes that if a Medieval Masoretic sage endorses an opinion, that view attains virtual canonicity and may be cited as a precedent.

[5] See for instance ed., Walter Jacob, **American Reform Responsa: Collected Responsa of the Central Conference of American Rabbis,** (New York: CCAR, 1983), 3-4, is willing to reconsider discarded practices not out of nostalgia or Orthodox-envy, but because a new generation has a right to select from the panoply of the past those usages that are fouind to be meaningfull precisely because the notion of "divine enactment" is rejected. In this regard, classical and so-called Traditional Reform differ aesthetically, but not theologically.

[6] Kelsen define's the basic norm as a "Transcendental-logical presupposition" that authorizes the subsequent legal order. **The Pure Theory of Law** (Berkel4y, Los Angeles, London. 1978: University of California Press), 201. It is the axiomatic law outsider the legal order that commands obedience to that given legal order.. Elon's basic norm is the "ultimate legal principle."213 is conceded to be similar to Kelsen's formula. Elon's discussion of the "sources of law", legal, historical, and literary, 211-212, are the three ways in which the idiom "sources of law" may be understood, and which provide the conceptual framework for his book. The basic norm provides the legal source, i.e., the norm, that validates subsequent normative legislation. For Kelsen on the sources of law see 232-233.

[7] This formulation is in Hebrew ***'ol malchut shamayim***, accepting of Divine sovereignty.

[8] I suspect but cannot yet prove that ER is responding, politely but firmly, to Mordecai Kaplan's secular reconstruction of Jewish peoplehood.

[9] Jose Faur, "Understanding the Covenant," **Tradition** 8 (1968), and **Studies in the Mishne Torah:Book of Knowledge (**Hebrew) (Jerusalem: Rav Kook, 1978), 19-25 for a discussion of how the Covenant actually works.

[10] This view conflicts with Maimonides, but may be consistent with Nahmanides' position, which will be discussed below and with which ER agrees.

[11] Most Orthodox Jews do not believe that secular education is by definition heretical. But Ahron Soloveitchik accepted critical study for every discipline **except** when applied to the written and oral Torah canon, because this methodology, to his view, denies the sanctity of the Torah. See his **Logic of the Heart, Logic of the Mind: Wisdom and Reflections on Topics of our** Times (Jerusalem: Genesis 1991), 46, where Soloveitchik claims that "Bible and

Talmud critics, whose goal by definition is to undermine *k'dushas haTorah,* must be ignored." Note that Soloveitchik sees this as a matter of his own definition,. ER rejects the "extremist" who believe that secular learning contaminates the soul. Note well that Soloveitchik attaches the quality of "wisdom" to his reflections.

[12] H.L.A. Hart's rule of recognition defines how a rule of obligation, in Judaism, **mitsvot**, may as such be recognized. See **The Concept of Law** (Oxford: Clarendon, 1979), 97-107.

[13] Milton Himmelfarb, e.d., **The Condition of Jewish Belief** A symposium compiled by the editors of **Commentary** Magazine (New York, Macmillan, 1966), 179-184.

[14] The triad is similar to Albo's, [Roots 1:4] but is addressing the challenge of Kaplan by applying the rhetoric of Solomon Schechter. See **Studies in Judaism** (Philadelphia: Jewish Publication Society, 1915) xix For ER, the seven Noahide laws reflect the "minimum

morality." [MHT 142]. This idiom is strikingly similar to H.L.A. Hart's moral minimum in **The Concept of Law,** 160-163.

[15] Henry Sumner Maine, **Ancient Law (**Dorset, 1986) 174, ER's citation. I did not find this citation in Maine, but in 164, Maine believes that the Testatorship laws were manipulated and liberalized by the rabbis 164 In an oral communication, Prof. David Novak of the University of Toronto derided the doctrine of "continuous revelation" because there is no criterion regarding what is recognizable as revelation and what is not. For Deuteronomy, the criterion regarding what is Revelation, or the basic norm The law is not subject to amendment, i.e., adding or subtracting, Deuteronomy 13:1, a prophet may not annul the law, 13:1,6, 18:22-23, the Law is not in heaven, 30:12, following Rashi and not Nahmanides. The latter, being a mystic, believes that the Divine law needs not be divined by a diviner. ER's belief in "continuous revelation" is therefore consistent with his explicit rejection of legal positivism.

[16] ER cites Norman Lamm, "The Fifth Amendment and Its Equivalent in the Halakhah," **Judaism**

5:1 (Winter 1956), 53059.

[17] See Jose Faur "**'Al Qiddush ha-Shem u-Val Ya'avor: Mahloqet ha-Rambam ve-ha-Ramban**

Bar Ilan Yearbook in memory of Professor Mayer Simha Feldblum, ed., Tsevi Aryeh Steinfeld (Ramat Gan: Bar Ilan, 5766} 373-4.

[18] ER here offers a popular but incorrect reading of Kelsen, whose "pure theory" describes how law works. The Kelsenian ideology, if there is one, is one of order. The scientist describes but does not evaluate the moral worth of the law. It is no accident that ER affirms the "Natural Law" doctrine that Kelsen rejects.

[19] For a discussion of this concept, see "***Hora'at Sha'ah:*** The Emergency Principle in Jeiwsh Law and a Contemporary Application, **Jewish Political Studies Review** 13:3-4 (Fall 2001), 3-39.

[20] Ironically, Kelsen is here helpful to ER's position, but is not cited because of positivism's impatience with Natural Law theories of Law, which appeal to ethics but may become idiosyncratic and arbitrary. . For Kelsen, the basic norm is that one must obey the author of the First Constitution. In Torah law, the source of the basic norm is God. Kelsen, 202.

[21] When norms are in conflict, it is often the ethical discretion of the judge, who functions as a legislator, that resolves the conflict by creating a normative policy in a judicial ruling. xxxxxxxxx

[22] ER ignores the principle that when in doubt, even Torah doubt, we follow the majority and the possibility of relations with a test tube sibling is remote. Given the rabbinic legend regarding Jeremiah's birth, one could argue that without the coital act, there would be no restriction whatsoever. In a personal communication, Rabbi M.D. Tendler affirmed that "there can be adultery with a hypodermic syringe." And R. Tendler is not generally sympathetic to R. Rackman's position.

[23] ER's interpretation is plausible, but not necessary, and rings very modern. Given the ancient Near Eastern precedents, the Trial by Ordeal motif should not be dismissed without consideration. See for example CH 2, where the ordeal is

imposed when the facts cannot otherwise be determined.

[24] Here ER reflects his culture. See ShA YD

[25] OMJ 41.Iggrot Moshe Orah Hayyim 1: 104 regarding opposition to bat mitsva celebrations. ER does not consider the possibility that R. Feinstein might be driven in his ruling by policy or culture considerations.

[26] See also Marc. D. Angel with Hayyim Angel, **Rabbi David HaLevy: Gentle Scholar and Corugeouso Thinker** (Jerusalem and New York, Urim, 2006) for a Sefardic rabbi, albeit fundamentalist, whose approach to Halakhic decision making is methodologically similar to ER. See Rabbis Angel on custom in R. Halevi's thought. 128-140.

[27] Maimonides, Yad, Introduction.

[28] Tape, the Pesak process, and "**Quntres be-'Inyanei pesaq halakhah, " Beit Yitzhak** 38 (5766).

[29] See Faur. **Supra**, who argues that the debate between the charismatics and positivists finds its root in the Judaisms of Nahmanides and Maimonides. See also Jose Faur, **In the Shadow of History: Jews and *Conversos* at the Dawn of Modernity (A**lbany: SUNY, 1992). 12-15.

[30] For a positivist discussion n this topic, see Alan J. Yuter, "Women in the Jduaism of the Dual Torah" **The Encyclopaedia of Judaism** Volume IV Supplement I, ed, Jacob Neusner, Alan J. Avery -Peck, and William Scott Green (Leiden-Boston, Brill, 2003) 1942-1943. 1941-1953.

[31] His remarks are found in a published letter in **Conservative Judaism** (Fall 1956).

[32] Consider for example Ahron Soloveitchik's apologia upholding what is taken to be the "traditional" approach. Soloveitchik accepts the "mandate" that women recite a blessing "who has made me according to His will," **Logic of the Heart,** 97.when that blessing is unauthorized by the rabbinic canon. See the discussion of R. Obadiah Joseph, Responsa **Yehavveh Daat** 4:4. Soloveitchik implies that

commandments were given to men and not women because women are not in need of control. He claims, wrongly, that *rehem***,** womb and mercy share the same root. For those who study Judaism scientifically, there are two distinct roots for "mercy" and "womb" that appear as one word, and Soloveitchik's apologetic conjecture ignores the explict ruling of bHorayyot 13a that for the Judaism of the Dual Torah, men have greater and not lesser sanctity than women because [a] they are assigned more sanctifying commandments and [b] therefore are given precedence for redemption after they are taken captive. See the devastating, trenchant critique of Tamar Ross, **Expanding the Palace of Torah: Orthodoxy and Feminism (**Waltham: Brandeis, 200438-45

[33] See also Avraham Grossman, **Pious and Rebellious: Jewish Women in Medieval Europe** (Waltham: Brandeis, 2004) in and my review, **Edah Journal 5:2 (**Sivan 5766).

[34] Actually, the practice was invented by Mordecai Kaplan, the founder of Reconstructionism.

[35] ER does not deal with legal theory. The line of argument assumes that Jewish law requires a precedent when, in fact, all that is required is the absence of a negative norm and the consensus of the community.

ER does not assign the rite to policy, although he does not make the argument that unless an act is forbidden explicitly, it is permitted. Instead, he relies, like a jurist in the American tradition, upon preedent,

See "Women in the Judaism of the Dual Torah" for a discussion of the relevant issues and sources.

[36]See Herschel Schachter, "Va-telachna be Iqvei ha-Tson, " in **Be-'Iqve ha-Tson: Berurei Halakhah**

(Jerusalem: Bet Midrash of Flatbush , 1997), 21-36.

[37]Rashi, Mahzir Vitri, was unhappy with the practice. S.v. ve-chen horah.

[38] Hart, 160-163.

[39] Bet Yosef Yoreh Deah 1 and Kelsen, 42, who deals with minimal liberty, i.e., whatever is not forbidden is permitted. Kelsen's positivism is not approving of legal systems, but provides a means of understanding them. And in this passage, the function of law is to carve out, by silence, freedom.Specifically, "a minimum of freedom, however, can be regarded as legally guaranteed only to the extent that the legal order proibitss interference." 43.

[40] There are popular traditions current that Rabbis Daniel Sperber and the late Shelomo Goren did approve of egalitarian Orthodox liturgical settings, but I have not found documentation for these assertions.

[41] ER does not address bHullin 44a, which requires that rulings be made on principle and an accurate reading of the canon. Consistent stringency is seen as foolish, consistent leniency is wicked.

[42] For a discussion and citation of the literature on abortion, see Alan J. Yuter,

Person and Property in Jewish Legal Thought," in ed. Nahum Rakover, **Jerusalem: City of Law and Justice**, Proceedings of the Third International Seminar on the Sources of Contemporary Law (Jerusalem: Jewish Legal Heritage Society 1998), 287-308. In this essay it is claimed that the fetus possesses the status of property, and may be destroyed, at least according to the Dual Written and Oral Torah when would be permitted to destroy proeperty

[43] For Kelsen on validity, see 1-17 220229. For ER, an opinion "accepted by an Orthodox rabbi, by dint of his Orthodoxy, is within the pale of consensus. One finds a similar approach in Reform Judaism, where an act, performing a marriage on Shabbat, should be permitted if an Orthodox rabbi who was "accepted" would do the act. See **Sefer ha-Yashar**101.10, and R. Solomon Freehoff, in **American Reform Responsa** 412-414. Neither Freehoff nor ER examine the merits of the ruling and both are flexible when searching for usable precedents.

[44] See Mayer Twersky. "A Glimpse of the Rav," in **Rabbi Joseph B. Soloveitchik: Man of Halacha, Man of Faith,** ed., Meanechm D. Genack (Hoboken: KTAV, 1998), 110. For Twersky, the great scholar's intuition, and not demonstration, is normative. 104, 107, 108, 110 and 188. See "Women," **Encyclopaedia,** 1941-1942.

[45]Herschel Schacter, web site

[46] See Marc. B. Shapiro, **Saul Liberman and the Orthodox** (Scranton: University of Scranton,, Hebrew section, letter to Rabbis Dimitrovksy, Halivni Weiss, Zlotnik, Faur, and Francus, the senior Talmud faculty of the Jewish Theological Seminary in Adar 5749, 37-39, arguing that one ought not to denude the title "rabbi" of its judicial function, which cannot to his view be assumed by women. As if responding to R. Lieberman's positon, ER observes that if people accept women as judges, as they may accept by consensus non-Sabbath observing men, the issue regarding women rabbis would be solvable. Note the irony that the Orthodox ER is significantly more lenient and less text grounded than the late Rector of Conservative Judaism's rabbinical school

[47] I was present at an RCA meeting in the Jewish Center in New York City when a younger, "cookie cutter"

Centrist rabbi who was an RCA officer confronted ER rudely and publically on this issue.

[48] See **Bet Yosef** to **Tur, Hoshen Mishpat**, 25, which summarizes the range of opinion regarding the meaning of erring in applying canonical statute. By preferring the Raavad's position, ER sees in human insight a source of evolving canonicity through continuous revelation.

[49] Avraham Grossman, **Pious and Rebellious** , **Pious and Rebellious : Jewish Women in Medieval Europe** (Waltham: Brandeis, 2004) and my review in **Edah Journal 5:2 (**Sivan 5766).

[50] MHT 12, Menahem Elon, Petahim 4/5 (September 1972, 24-25 and subsequently, **HaMishpat ha-'Ivri**,

520-523.

[51] Twersky actually uses the idiom, *supra.,* "mystical intuition",108, to describe the power and right of the right rabbis to rule not from demonstration, but intuition..

[52] Nahmanides and Maimonides disagree on the very nature of law. Like Raavad, Nahmanides relies on intuition and not canonical statute. Consider their responses to Leviticus 19:2. Maimonides regards the command to be holy is limited to obeying God's commands, whereas Nahmanides argues, against the Aggadic Midrash cited by Rashi and the Halakhic, canonical Midrash, that one must remove oneself from impurity and not be halakhically technically correct while behaving outrageously. I have failed to find any evidence that holiness may be acquired by intuition, but the Maimondean view is supported by Numbers

15:38-39, that obeying the commandments one becomes holy to God. Similarly, the commandment blessing proclaims that by performing an explicitly commanded act, one attains holiness. I suspect that the medieval debate regarding whether one recites a commandment blessing for the observance of a custom turns on this issue.

[53] "Covenantal Imperatives," **Samuel Mirsky Memorial Volume,** ed., Gerson Appel, (New York: Sura Institute and Yeshiva University, 1970), 12, cited in MHT 36.

[54] Maimonideans would presumably, on the basis of the rabbinic canon, argue that God is at first allowing people to define their own laws, and the means by which others are judged become the benchmarks for their own judgment. bSota 8b.

[56] See the very cogent essay of Reuven Kimmelman, "Rabbis Joseph B. Soloveitchik and Abraham Joshua Heschel on Jewish Christian Relations, **Edah Journal Vol: 4 Issue: 2 - Date: Kislev/5765.** Kimmelman argues that there is no formal prohibition regarding interfaith dialogue. On the other hand, the Soloveitchik reliance on intuition, especially in light of Twersky's remarks, cited above, indicates that the real rabbis are the great rabbis whose intuition is the source of law. On the issue of interfaith dialogue, Rackman identifies with historically conditioned sensibilities, which for Soloveitchik is not, as noted by Kimmelman, given to demonstration so an appeal to inspired intuition must be made.

[57] I strongly suspect that R. Soloveitchik's talk on Korah, an implicit critique of the egalitarian "common sense" approach of Conservative Judaism, reveals a weakness of the anti-dialogue position. It was Moses who had no fear of dialogue or peer review. Korah, on the other hand, and something—his own apostasy—to hide. In other words, the Torah canon narrative seems to indicate that those afraid of dialogue or peer review have a deficiency to conceal.

[58] Leviticus 25:47, **bBerachot** 47b, **Gittin 38a**, and Ibn 'Ezra to Lev. 25:47.

[59] Cited in Bet Yosef, Hoshen Mishpat, 25.

[60] mHullin 10:1

[61] Note well that the Soloveitchik tradition is acutely aware of the emergency principle, which was not applied to the *mehitsa by* either Soloveitchik or his followers. See Twersky, *supra.,* 113.

[62] In one oral communication, a Long Island, New York modern Orthodox rabbi predicted that the **daf yomi** spread of information would eliminate silly leniencies and stringencies. After learning tractate Shabbat in the **daf yomi c**ycle, he told me that he understood why many rabbis avoid the community eruvim. But he would not stop relying on the eruv because his community considers the license legitimate.

An Orthodox RCA rabbinical judge, who is unsympathetic to ER's leniency regarding the nullification of marriages, told me that while he appreciates the stringent reading regarding eruv, "we cannot live without the leniency." Thus, ER's actual approach is shared by many who reject the trajectory of his agenda, but in fact apply the same method.

[63] bBQama 101a.

[64] Yet R. Soloveitchik would teach Torah to women, against the received Tradition Twersky, 112. The ground for this decision is "his intuitive understanding of what the *internal* dyanamic of *Maorah* [oral evolving and

legitimating Tradition] prescribes for the contemporary predicament. Now, ER incorrectly views Soloveitchik's approach as positivist, when in fact it reifies regnant culture to be virtually statutory.

ER and the analytic school are *similarly* subjective but their subjectivities serve alternative Orthodox agendae.

[65] bQeddushin 7a, bYebamot 108b, bKetubbot 75a, and bBQama 111a. This folk saying, in all its citations, is attributed to Resh Laqish, indicating that not every Aramaic passage must be assigned to the Saboraic period. I happily thank Prof. Yaakov Elman for explaining the need for caution in these matters.

Thus the claim, based in intuition or culture reified into "Tradition," is far reaching given the epigrammatic syntax and the fact that it is a saying of one but one sage. For ER, "the Law labored under an assumption"

which is not true for all time.

[66] See Jeffrey Gurock, "Resisters and Accommodators: Varieties of Orthodox Rabbis in America, 1886-1983," *American Jewish Archives* (November, 1983): 100-187. Reprinted in *The American Rabbinate: A Century of Continuity and Change, 1883-1983.* (New York :KTAV, 1985) l0- 97.

[67] See Leviticus 4 for a list sacrifices to be offered when an individual, high priest, political leader [*nasi*]

and the *Edah* could make. The tractate Horayot and Maimonides' *Shegagot* deal with and assume that there are indeed absolutes in the Dual Torah canon. How one derives absolutes in ER's requires further study.

[68] Meyer. S. Feldblum, "A Proposal for a Comprehensive Solution to the *Aguna/Mamzerut Problem"* ***Dine Yisrael*** 19 (5757-59 and the trenchant critique of J. David Bleich, Survey of Recent Halakhic Periodical Literature, **Tradition** 33:2 (1999). 202-215. Note that in his critique Rabbi Bleich denies R. Felblum the rabbinic honorific. Both were professors and Orthodox rabbis.

[69] J.D. Bleich, who refers to R. Feldman as "Dr.," like Dr. David Feldblum, a traditional conservative rabbi who actually possesses Orthodox ordination and whose son is a rebbe at Yeshiva University.

[70] Ibid., 204.

[71] Ibid., 191.

[72] It is a matter of dignity that a person has a right to define what is good for her or him

Ronald Dworkin, **A Matter of Principle Empire** (Cambridge: Harvard, 1985), 203.

[73] Dworkin, **Taking Rights Seriously (**Cambridge: Harvard, 1978),, 147.

[74] Ronald Dworkin, **Freedom's Law: The Moral Reading of the American Constitution** (Cambridge: Harvard, 1996)

[75] Ronald Dworkin, **Law's Empire** (Cambridge: Harvard, 1986), 180-181.

[76] Dworkin, **Freedom's Law**, 101-104.

[77] Mishneh Torah, Teshuva, 3:6-8.

[78]