Women's Dignity and the philosophy of Halakhah: what is the right question?

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The question I want to consider today is how to set up an intellectual framework for dealing with the problem of women within Orthodox halakhah.

The widespread assumption among scholars of Jewish feminism today is that the question of power provides the key to understanding the issue. They believe, in principle, that halakhah could incorporate egalitarian insights if women were able somehow to attain power more approximating the power held by those who dominate important religious positions; in that event, their interpretations of sources would be accepted as legitimate as well. For example, Susannah Heschel wrote few years ago as the following:

Jewish feminism is not about equality with men…Feminism is about women’s refusal to submit to male authority. The real issue is not equality, but power. Who’s in charge? Who defines Judaism, and who determines wether or not we get to dance with the Torah?

Seeing the question as entirely one of power is a position consistent with that of the Critical Legal Studies (CLS) movement that emerged in the United States during the 1970s. The central claim of CLS is that the interpretive dimension of adjudication is a fraud and a pretense. Given that a text can allow for all possible meanings, the number of interpretive options is so great that the choice among them is arbitrary and the judge making that choice will necessarily give voice to his own values. Every law, accordingly, is simply a mask for power, for the interpretive dimension is, in effect, a veil placed over the exercise of political will and force. If that view is accurate and can be confirmed by analysis of a significant number of contemporary halakhic responsa, then the question is
not whether there exist legitimate alternative interpretations of the halakhic sources; it is entirely a matter of who holds the key—the power—to determining the “official,” binding, narrative.

I must admit that until quite recently I shared Heschel’s view, and even now I do not regard it as fundamentally off-base, but I am not certain that that point of view provides a complete and genuine picture of the halakhic reality as I understand it. If we examine halakhic responsa throughout the ages in depth, I doubt we will reach a sweeping conclusion that all or even most of them express only the decisor’s subjective world view and values, cloaked in the trappings of legitimate halakhic exegesis. At times, to be sure, such an assessment will be accurate; but it is far from universally the case.

I think it would be more accurate to embrace a weaker claim according to which a decisor may interject (most probably unconsciously) his own values yet truly and sincerely believe that he has reached the true position of the halakhah and the demand to do “the right and the good”.

Beyond that, the concept of power as portrayed in the CLS model strikes me as too simplistic. As Michel Foucault has importantly taught us, we must come to a different understanding of the concept of power. It does not operate solely on a vertical axis, from above to below; rather, it is more diffuse, deployed within a network of relationships among entities and from below to above as well. It should not be thought of solely as something oppressive; it has a creative role in producing knowledge and discourse and does not necessarily instill false consciousness. It can sometimes be engaged in truth.
That given, it becomes necessary to reformulate the question. Because Foucault’s model suggests that we already possess power, the question is no longer merely one of how to attain power in order to fight the religious establishment in support of a more egalitarian interpretation of halakhic texts. Instead, we must ask **how to use wisely** the power of the community in order to take a more significant and weighty part in the legal-halakhic game in which we are participants.

I want to suggest that creating an “alternative halakhic story” is involved with just this sort of reasonable use of power. By that I do not mean the proposing of local halakhic solutions to one or another problem that women face. I am not seeking the halakhic tools that can be used to effectuate desired change in a specific halakhic matter (though I of course do not deny the importance of such local solutions). An “alternative halakhic story” is much wider and composed of two elements:

First, we must create a halakhic genealogy with the goal of uncovering the hidden values or moral paradigms on which halakhic rulings related to women rely and the exegetical tactics and the rhetoric that have been used to generate the hegemonic story. Second, when halakhic rules fail to produce gender justice for women we have to propose a preference for halakhic principles that can overcome them.

**Let me explain and demonstrate those elements one by one:**

A new halakhic story is bound up in discovering the halakhic genealogy and the hidden paradigms that have shaped the *halakhah*’s hegemonic attitudes. As such, this mission is entwined with the transition from a perspective of necessity to one of contingency; a transition that I believe embodies one of the most important aims of post-modernism, as notably expressed by Foucault and Rorty. To achieve the transition from one perspective
to another, Foucault made use of the genealogical method. Genealogy means, quite literally, the study of origins; as a method, it does not necessarily preclude regarding the subject being studied in a positive light but is most often used critically. Scholars have noted that the genealogical method must sometimes be understood as the search for divergence, for the un-necessary connections between the links of the chain. Thus, the genealogies that Foucault proposes in *Madness and Civilization* or in *History of Sexuality* are meant to liberate us, either from the dichotomy between madness and reason or from a particular world view regarding sex and sexuality.

Similarly, halakhic genealogy unfolds the legal background of the hegemonic halakhic story and provides examples of how certain links in the chain have been forgotten, how the genealogical continuity presented by the hegemonic story is not necessarily the only one possible. It therefore has a liberating effect and therapeutic value as well, particularly from the illusion of necessity as if this is the only way the final verdict can be shaped.

To illustrate, let us consider contemporary halakhic rulings concerning fertility issues. If we examine by tracing the halakhic genealogy, trends within those rulings, we find a very interesting paradigm: in all matters related to abortion and contraception, the signal tendency is one of stringency, while in matters related to modern artificial fertility-the decisions tend to be extremely lenient. In other words: sex without procreation is treated strictly; procreation without sex is treated leniently, on the premise that reproduction at almost any cost is the preferred value. What can account for this pro-natalist tendency? Certainly, there are multiple explanations (like the Holocaust), but I do believe they must be supplemented by an understanding of the gender-related issues that underlie the
ideology reflected in the decisions. In my judgment, a latent concept of gender that defines women and femininity with reference to women’s biological functions constitutes a necessary condition for this trend. This concept does not regard the value of woman as an “end in itself” (in the Kantian sense); rather, it sees her primarily in her reproductive role—as a means. And if this suggestion seems too subversive, listen carefully to the words of Rabbi Yehuda Henkin, who does not necessarily reject all aspects of religious feminism. In a 1978 responsum he wrote as follows on the question of spacing pregnancies:

If a question is presented to me, I clarify whether the woman wishes to use contraception for the child’s sake, or in order to go out to work. Here, there is a difference between countries. Whereas in the United States, toddlers stay at home until the age of five and only then go to nursery school, here, in the Holy Land, babies are placed in crèches at age three or less, enabling women to go out to work. In such a case, therefore, there is no room for a dispensation (Resp. Benei banim, 1:30, p. 95).

This conclusion implies that the woman, as an independent subject with her own needs and interests, is not taken into account in the ruling (unless her health is in danger). Indeed, when the question is presented from the woman’s viewpoint, it usually elicits a more stringent ruling.

Uncovering the moral paradigm underlying the exclusion of women from religious ritual is even more outrageous. The primary basis for that exclusion is the image of woman as a “ticking sexual time-bomb.” The idea of holiness is profoundly tied to this—the more a woman is hidden, the holier the atmosphere. In other words, woman is equated with the unholy or even the “anti-holy”; at the same time, man is seen
as a “sex-obsessed hormone dump.” Halakhic genealogy can uncover this paradigm, present it to modern Orthodox men and women, and ask whether they are prepared to look in the mirror and then buy into this image.

Uncovering the problematic moral consciousness on which many halakhic rules rely will likely force the modern Orthodox community to confront the question of why it continues to cooperate with that consciousness, even though it has managed, in certain areas, to find halakhic solutions that enable it to overcome similarly problematic situations. For example, the halakhic principle of “acting in the interests of peace” overcomes the arguably racist halakhic rule—a rule not applied, thank God—that forbids violating the Sabbath in order to care for a sick gentile. (A sick Jew may be cared for) In other words, modern Orthodox society will have to account in a meaningful way for its inconsistencies: why, when it is the dignity of women that is at stake, does it fail to apply halakhic principles that would allow for reasonable solutions?

I am not so naïve as to think that such a process will encounter no resistance, given the clear and obvious “danger” that it might bring about radical changes in the structure of religious life. Indeed, we can already identify a typical sort of response, a tactic used effectively against efforts such as those I am proposing; and it seems to me that part of the critical project of the alternative halakhic story is to expose that tactic and publicly show it for what it is. I call this form of response “formalistic reductionism,” by which I mean that whenever one identifies an effort to uncover the morally problematic value system implicit in halakhic rulings with respect to women, the conservative counter-attack goes something like this: “You misunderstand entirely; it’s entirely a
formalistic matter, and questions of values, if one is concerned about them, are situated totally elsewhere.”

That is what happened for example, with respect to women’s prayer groups. The most interesting element in the counterattack was the “formalistic reduction.” Minyan was suddenly transformed into something seemingly less important, a merely legal category having no bearing whatsoever on such matters as religious atmosphere or level of sanctity. The value component was shifted to individual prayer, prayer “of the heart.” Of course, it was not suggested that men abandon worship in a minyan and shift their focus from the “formal” minyan to heartfelt individual prayer. On second thought there may be something more going on here, for a similar pattern, in an entirely different area, has been noted by sociologists of the workplace. Every profession entered by women has suffered an immediate reduction in status. Even the entry of women into the field of medicine was followed by emergence of medical fields valued more and less highly.

What this suggests is that the weapon of formalistic reduction offers those who wield it not only theological benefits, allowing a return to the safe harbor of neutral objectivity without confronting disturbing moral issues and perhaps the need of change; I also offers the diminution of women’s accomplishments in the area at issue. If women want to worship in the masculine “style,” that style becomes less valued (at least rhetorically) and is considered unchangeable on purely formalistic grounds.

It is clear as well that moving the focus of discussion to halakhic formalism closes the door to analysis and ultimately divests the halakhah of all moral significance. There are, to be sure, Jewish religious philosophies that value the neutralization of halakhah’s value component and regard the highest form of divine service to be adherence to
halakhah simply as divine dictate (like Ishaayahu Leibovitch); but I do not believe those views carry significant weight within modern Orthodoxy. That being so, uncovering “formalistic reductionism” directs the community back to fundamental questions regarding the moral concepts that shape its religious world. Is the community prepared to accept this formalism as its overall religious philosophy? If not—and I assume that answer will be the one most often given—why accept it only as part of the counterattack against feminism?

The more we critically parse halakhic narratives on various subjects, the more we uncover both the rhetoric and the interpretive tactics used by decisors in grounding their positions, and the more we identify instances of rhetoric harmful to women, especially when used by contemporary Rabbis, and uncover their interpretive tactics and their manner of construing sources, the more we see that there is no moral necessity to the existing halakhic story. At the same time, opening up the halakhah’s genealogy can indicate the path to be taken in constructing an alternative halakhic story. An important question, though, is whether it will always be possible to do so. And here we come to the second part of the process which is:


To this point, we have been engaged in parsing the dominant halakhic narrative into its factors and uncovering the various ways in which it is problematic. But how can we create a different story? The exegetical tools at our disposal are many and varied and in many cases can be useful in forging a different halakhah. On occasion, however, the halakhic rules will not be able to withstand the feminist critique. Creating a new halakhic
story, therefore, will likely require, at times, the favoring of halakhic principles over halakhic rules.

An interesting suggestion in this regard has recently been made by Rabbi Prof. Daniel Sperber, to prefer the principle of “human dignity” over the humiliating rule of “congregational dignity”. The rule of “congregational dignity” serves as the halakhic reason for barring women from reading Torah in the synagogue before a congregation of men.

What strategy has been applied against this proposal? First, we again see “formalistic reductionism”: it has been argued repeatedly, in quite a few articles, that the concepts of “congregational dignity” and “human dignity” are something entirely different from what we think they are; they are, it is claimed, formal and objective and therefore not subject to change. For example, Prof. Schochetman, a legal scholar and expert in Jewish law, maintains that both “congregational dignity” and “human dignity” are formal concepts and therefore objective and unchangeable:

“Human dignity” is a term used only with respect to something that is shameful to every person by virtue of being a person, such as going naked, and not with respect to something that only one or more individuals see as shameful to themselves….If we apply that to the matter at issue…we are speaking of a very specific group of women who argue that they suffer distress as a result of being denied the possibility of being called to the Torah as men are. If we are speaking of something that is not regarded as an affront to women in general, we cannot apply there the principle of “great is human dignity,” for the entire community of women is not affronted by it (p. 311).
Given this formalistic understanding of “human dignity,” I truly wonder whether it can ever be applied as a binding moral principle within the halakhic infrastructure!

A second prong of the counterstrategy is to note that even though the principle of human dignity is firmly anchored in the Jewish tradition it has been used by decisors over the ages only rarely, in extraordinary cases. Accordingly, it has been argued that while Sperber’s position is grounded in the halakhic literature, as a practical matter halakhic decision making does not favor the sort of reasoning he has proposed.

I have to say that this sort of argument is quite depressing. It does not deny the legitimacy of the proposal but argues only that “we don’t do things that way”, an argument I take to mean that the problem is not perceived as serious enough to warrant deploying the heavy weaponry of favoring a principle over a rule. Still, I believe the important role of religious feminism includes restoring sanity, a restoring of the balance between what matters more and what matters less, and avoiding the transformation of legalism into a sort of idolatry. And so, whenever the foregoing argument is trotted out, there is a need for someone to proclaim loudly that the emperor, in fact, has no clothes.

I suggested at the outset that based on the model advanced by Foucault, the halakhic community function as a player in the game and already has the power to influence the shaping of the hegemonic halakhic narrative. But that is not the full picture; for one who is empowered must know as well how to implement that power wisely. Only in that way will it be possible to achieve any sort of consensus.

Here I believe we can usefully resort to insights from the field of rhetoric, especially as developed in the writings of the legal scholar and philosopher Chaim Perelman. In his studies Perelman teaches us that when an issue involves conflicting
values and cannot be resolved by reference to objective standards; it may be helpful to look to rhetorical mechanisms since rhetoric makes it possible for certain opinions to prevail over other, competing opinions.

I cannot deal here with all of Perelman’s perceptions, but I want to look briefly at one of his insights that strikes me as critically important for the matter at hand.

Perelman determines that when a speaker sets out to persuade an audience, the first, most basic, and perhaps most important thing for him or her to confirm is that the audience accepts the premises of the speech; without that acceptance, the presentation will be doomed to failure. If agreement exists on basic premises, it may be transferrable to conclusions as well; but if there is no agreement as to premises, or if any such agreement is very tenuous, the speaker will have to use every possible means to bolster it—or may be well advised simply not to speak.

Borrowing from Perelman’s analysis, I believe that the success of the Orthodox feminist project depends in great measure on attaining that basic agreement on fundamental principles or moral values. And here I come full circle, returning to the “alternative halakhic story” I proposed earlier. The whole point of that story was to present moral values regarding which the modern Orthodox community is indeed in disagreement. By presenting those paradigms, it can force many modern Orthodox Jews to confront the basic premises that they are unwittingly buying into and which, as a practical matter, they most likely reject in most areas of their lives. If we can show that there is no divide in the values, and that the distinction between how they are applied in our religious and our secular dimensions of life is an artificial one, our task will be made
easier, for we will widen the circle of people within the halakhic community who will express their dissatisfaction with the status quo or will, at least, be troubled by it. By doing so we can shed light on the fact that the Orthodox community does share, for the most part, the same values, but lapses into inconsistency when denying the relevance of these values to women. We also might bolster the agreement on premises, as suggested by Perlman and increase our chances in this stubborn game.

To me, the gender project within philosophy of halakhah is important as an additional layer in the new narrative being spun in recent years—a narrative of women who see themselves as obligated by halakhic discourse but also by the values of equality and justice. The new “halakhic story” they are writing will likely bring about a considerable degree of liberation both to our generation; but especially for our sons and daughters in the future.