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**'NOTHING ABOUT US WITHOUT US':¹ TOWARD A
LIBERATORY HETERODOX HALAKHA**

*Laynie Soloman**
*Russell G. Pearce***

ABSTRACT

The role and function of “halakha” (Jewish law) in Jewish communal life is a divisive issue: while Orthodox Jews tend to embrace Jewish law, non-Orthodox Jews (here deemed “Heterodox”) generally reject Jewish law and halakhic discourse. We will explore the way in which Robert Cover’s work offers an antidote to categorical Heterodox distaste for halakha specifically, and law more broadly, providing a pathway into an articulation of halakha that may speak to Heterodox Jews specifically: one that is driven by creative “jurisgenerative” potential, that is informed by a paideic pluralism, and that is fundamentally democratic in its commitment to being shaped not by its authors or enforcers but by the people who imbue it with meaning.

¹ This popularly used phrase emerged from disability justice organizers and activists. See JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* (Univ. Cal. Press, 2000) (discussing history of this phrase); *ENCYCLOPEDIA OF DISABILITY* 427 (Gary L. Albrecht et al. eds., 2001) (discussing its political implications).

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We explore four examples of Heterodox halakhists whose work is grounded in such a vision for law articulated by Cover: Rachel Adler, Tikva Frymer-Kensky, Mark Washofsky, and Gordon Tucker. These four scholars, responding to distinct cultural moments and emerging socio-political realities, develop attempts to transform halakhic life and discourse. Inspired by Cover, they each offer reflections of an approach to halakha as it could be, imagining alternative approaches to Jewish law-making.

Our analysis builds on these frameworks, which are shaped by Robert Cover's work. Through the incorporation of two core principles for Jewish law-making—"a judge has only what his eyes see,"² and "the heart alone knows its bitterness"³—we attempt to expand the analysis of these thinkers to articulate and illustrate a path to progressive psak among Heterodox Jews that dis-locates notions of authority and expertise in law-making, and embodies the well-known dictum created and popularized by disability justice activists: nothing about us without us, suggesting a framework for pluralist approaches to Jewish law that are liberatory and community-driven.

² Babylonian Talmud, Bava Batra 130b-131a.

³ Babylonian Talmud, Yoma 82a, 83a.

I. INTRODUCTION: ROBERT COVER, JEWISH LAW, AND HETERODOX JUDAISM

In the spirit of Robert Cover's expansive and inclusive vision of jurisprudence, we seek to invite dialogue regarding compelling liberatory perspectives on *halakha* (Hebrew for "the path" or "the going," often translated as "Jewish law"),⁴ particularly among Heterodox Jews—a term we use to encompass non-Orthodox Jews who make up the super-majority of American Jews.⁵ We do so at a time of greatly increased interest in Talmud study, Jewish learning, and personal practice among Heterodox Jews.⁶ Even Reform Judaism, the largest component of Heterodox Judaism and historically the most averse to *halakha*, is signaling growing interest in halakhic approaches to Judaism.⁷ To this growing conversation, we offer the

⁴ See, e.g., Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. REV. 465, 484 (1998) [hereinafter *Halacha and Aggada*]; 1 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* 129-33 (Acad. Stud. Press, 2021) [hereinafter *JEWISH LAW AND AMERICAN LAW*]; LEON WIENER DOW, *THE GOING: A MEDITATION ON JEWISH LAW* (1st ed., 2017). We will use the English spelling *halakha*. See *Halakhah*, SEFARIA, <https://www.sefaria.org/texts/Halakhah> (visited Feb. 6, 2022).

⁵ This includes both (1) those who see themselves as firmly planted in one or more of the mainstream Jewish denominations—Conservative, Reconstructionist, Reform, Renewal—and (2) those who occupy space outside of these denominations. Our analysis reflects the communities in which we are situated: Jewish communities in the United States in the late twentieth and early twenty-first centuries. We recognize that these ideas do not necessarily translate completely throughout the Jewish world, nor should they be taken as cross-communal assumptions or assertions to be placed on a global scale.

⁶ Coinciding with a shift to expansive online offerings, non-Orthodox (deemed "Heterodox") Jewish educational organizations are reporting an increase of engagement, particularly in online learning offerings. See Shai Goldfarb Cohen, *Introduction to Our Special Issue Change and Challenge: Jewish Education in the Time of COVID-19*, 87 J. JEWISH EDUC., 270, 270-283 (2021); Benenson Strategy Group, *Virtual Engagement Research*, CHARLES & LYNN SCHUSTERMAN: FAM. PHILANTHROPIES (2020), <https://www.schusterman.org/sites/default/files/VirtualEngagementResearchFindings2020.pdf>. These educational experiences include Rabbis and lay people from a wide range of Heterodox movements.

⁷ As an illustration, A. Brian Stoller recently edited a volume of the CCAR Journal: The Reform Jewish Quarterly on "Halacha and Reform Judaism" in the spring of 2020. *The Reform Jewish Quarterly Spring 2020*, CENT. CONF. AM. RABBIS (Spring 2020), <https://www.ccarnet.org/the-reform-jewish-quarterly-spring-2020>. Stoller asserts that "there are numerous other ways—compelling, authentic, and

jurisprudential framework for a pluralistic, liberatory, and participatory *halakha*.

Robert Cover's work is especially appropriate for this task. Cover famously drew upon examples from Jewish law and lore in developing his jurisprudential framework in "*Nomos and Narrative*," highlighting the creative, world-building, aspirational elements of law.⁸ Highly influenced by Jewish thought, Cover draws upon Jewish ideas, texts, and stories as he works toward expansive definitions of law and legal process. Since his death, scholars of Jewish law have increasingly turned to Cover's work to explicate *halakha* (Hebrew for "the path" or "the going," often translated as "Jewish law").⁹ In this article, we hope to further this analysis and explore the jurisgenerative potential of Cover's work as it may apply to those who commit to Jewish life and practice beyond Orthodox expressions.¹⁰

We use the term "Heterodox" to de-normalize Orthodox halakhic discourse, by locating it as one of many, as well as to capture the multiplicity of halakhic world-building endeavors that can—and do—exist among Heterodox Jews. While Orthodox Jews categorically embrace *halakha*, differing on the law's nuances and application, Heterodox Jews for the most part reject *halakha*—both in discourse and in popular practice—with a few exceptions for well-established rituals.¹¹ Indeed, many—if not most—Heterodox Jews ground their Jewish commitments in a set of universalist, liberal values that they believe oppose *halakha*. As a result, some scholars and leaders have

authentically Reform ways—of thinking about and engaging with halachah." See A. Brian Stoller, *At the Gates—The Redemption of Halachah*, Spring 2020 CCAR J.: REFORM JEWISH Q. 1 (2020).

⁸ ROBERT COVER, *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* (Martha Minow et al. eds., 1993).

⁹ See, e.g., 2 SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* (Acad. Stud. Press, 2021). Specifically look at *Halacha and Aggada*, *supra* note 4. CHAIM N. SAIMAN, *HALAKHAH: THE RABBINIC IDEA OF LAW* (Princeton Univ. Press, 2018) [hereinafter HALAKHAH]; Chaim N. Saiman, *Framing Jewish Law for the Contemporary Law School*, 19 JEWISH L. ANN. 93-121 (2013) [hereinafter *Framing Jewish Law for the Contemporary Law School*]; Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 4 HARV. L. REV. 106, 813 (1993).

¹⁰ See *supra* note 5.

¹¹ See JACK WERTHEIMER, *THE NEW AMERICAN JUDAISM: HOW JEWS PRACTICE THEIR RELIGION TODAY* 66 (Princeton Univ. Press 2018) (noting that Heterodox Jewish families celebrate "the High Holidays and celebrate key annual rituals such as the Passover Seder and Hanukkah candle lighting").

taken to refer to these movements during this era of Jewish history as “post-halakhic,” implying a broad rejection of *halakha* among Jews that we describe as “Heterodox.”¹² This tension between deeply held core values and the perceived role and function of law among Heterodox Jews contributes to an antipathy to *halakha* that weakens the world-building potential of these communities—a weakness that may be particularly damaging at a moment when commentators predict a significant decline in the number of Heterodox, but not Orthodox, Jews.¹³ To be sure, we do not argue that this decline can, or should, be addressed by embracing and enforcing Orthodox halakhic norms among Heterodox Jews. We assert instead that an expanded, democratized approach to *halakha* for Heterodox Jews is a cultural transformation that is already under way but may still likely be unrecognizable to many.¹⁴ Our goal in rooting *halakha* in Robert Cover’s jurisprudence is to invigorate, popularize, and expand the already-growing Heterodox halakhic discourse. Indeed, key scholars and lawmakers situated in various Heterodox Jewish communities have turned to Cover for inspiration as they reimagine what *halakha* can and should be for Heterodox Jews.

Our examination of how Cover’s work informs halakhic perspectives that have appeal for Heterodox Jews begins with influential thinkers—Rachel Adler, Tikvah Frymer-Kensky, Mark Washofsky, and Gordon Tucker—who have employed Cover’s insights to ground their robust Heterodox approaches to *halakha*.¹⁵ These scholars, in different ways, demonstrate Cover’s vision of law as liberatory and redemptive; by doing so, their work refutes perspectives that would reject *halakha* based on the premise that Jewish law is necessarily authoritarian or oppressive.¹⁶ We then build on their work to articulate new elements of a pluralist, communal, and

¹² See JACK COHEN, *JUDAISM IN A POST HALAKHIC AGE* (Acad. Stud. Press 2010); Shaul Magid, *Hasidism, Mitnagdim, and Contemporary American Judaism*, in 2 *THE CAMBRIDGE HISTORY OF JEWISH PHILOSOPHY: THE MODERN ERA* 280-307 (2012); Jacob J. Staub, *Reconstructionism: Judaism for Today*, 36 *JUDAISM* 195 (1987).

¹³ Edieal J. Pinker, *Projecting Religious Demographics: The Case of Jews in the United States*, 2 *J. FOR SCI. STUDY RELIGION* 60, 229–51 (2021).

¹⁴ ELI Talks, *Rabbi Benay Lappe—An Unrecognizable Jewish Future: A Queer Talmudic Take*, YOUTUBE (May 29, 2014), https://www.youtube.com/watch?v=CBWIEAR_GQY&t=3s.

¹⁵ See *infra* Part III.

¹⁶ See *infra* Part II.

democratic framework for Heterodox *halakha* informed by Cover, including halakhic principles and approaches to *psak halakha* (legal rulings), that has the potential to strengthen the democratized, community-driven, anti-authoritarian, world-creating function of Heterodox Jewish perspectives.

A first step in this direction is for Heterodox Jews, who self-consciously reject Jewish law to conceive of their Jewish commitments, regardless of the degree to which they explicitly reject the application of *halakha* as inhabiting Cover's description of a *nomos*. Their Jewish *nomos*—the universe shaped by their Jewish lives, institutions, behaviors, and interpretations—might include a broad range of activities which must be measured differently than their Orthodox counterparts. These may include: participating in holiday celebrations, honoring ties to Jewish cultures and languages, learning in Jewish community, engaging in political work, ritual observance and creation.¹⁷ All of these actions and behaviors constitute a Heterodox *nomos*, a world in which Heterodox Jews live. Naming this *nomos* as an authentic expression of *halakha* opens the door to Heterodox Jews rethinking their understanding of the ways in which *halakha* is already a discursive reality in their lives, both individually and communally. This rethinking thus creates a potential pathway for a larger number of Heterodox Jews to engage the concept of *halakha* that they previously conceived as alien.

In turn, this engagement and acknowledgement of existing *nomoi* (plural of “*nomos*”) is essential to invigorating the communal and democratic framework for halakhic dialogue within the Heterodox community. Together with the ways that Adler, Frymer-Kensky, Washofsky, and Tucker refute the assumption that Jewish law is necessarily reactionary and oppressive, the communal and democratic engagement opens the possibility for broad halakhic discourse and ways of being within the Heterodox Jewish community.¹⁸

¹⁷ See *supra* note 13.

¹⁸ In addition to the work of these scholars, Heterodox communities are paying increased attention to *halakha* and the materials upon which it is based. These include relatively new institutions that cross Heterodox movements, such as Hadar, SVARA, UnYeshiva, as well as greater attention within the longstanding movements and in local communities. See, e.g., HADAR, <https://www.hadar.org> (last visited Feb. 6, 2022); SVARA, <https://svara.org> (last visited Feb. 6, 2022); UNYESHIVA, <https://www.judaismunbound.com/unyeshiva> (last visited Feb. 6, 2022); Erica Asch,

Our analysis builds on these assumptions, which are shaped by Robert Cover's work. Through the incorporation of two core principles for Jewish law-making—"a judge has only what his eyes see"¹⁹ and "the heart [alone] knows [its] bitterness"²⁰—we attempt to expand the analysis of these thinkers to articulate and illustrate a path to progressive *psak* among Heterodox Jews. Our approach, informed by these principles, aims to dislocate notions of authority and expertise in law-making in an effort to embody the well-known dictum created and popularized by disability justice activists: *nothing about us without us*.²¹ It further offers a framework for pluralist approaches to Jewish law that are liberatory and community-driven. We then reflect on a case study on the application of this approach: the *Trans Halakha Project*.²² This initiative "aims to curate existing resources that have been developed for trans Jews and by trans Jews, identify new areas of *halakha* that have yet to be developed, and finally to create opportunities for developing new halakhic literature and practice guides that speak directly to these areas of need."²³

Consistent with the pluralistic commitment of our method, we offer these perspectives as a contribution to the ongoing dialogue within the Jewish community, not as the exclusive way to conceptualize Heterodox *halakha*. All Jews—regardless of denominational or movement affiliation—share the histories of an unfolding canon and tradition, and thus may take inspiration from Cover's jurisprudence, as many Orthodox scholars have. Our arguments, in particular, aim to speak directly to Heterodox Jews. Indeed, the development of Heterodox *halakha*, in both general methods and their specific applications, is important to each of us personally. Laynie²⁴ is a trans, queer, white, Ashkenazi teacher of rabbinic literature and Associate Rosh Yeshiva at SVARA, where they co-founded the *Trans Halakha Project*, an initiative designed to

Communal Halakhic Decision-Making, Spring 2020 CCAR J.: REFORM JEWISH Q., 174 (2020).

¹⁹ Babylonian Talmud, Bava Batra 130b-131a; Babylonian Talmud, Sanhedrin 6a; Babylonian Talmud, Niddah 20a.

²⁰ Babylonian Talmud, Yoma 82a, 83a.

²¹ CHARLTON, *supra* note 1 (noting the origin of this phrase).

²² This project is housed at SVARA: A Traditionally Radical Yeshiva.

²³ *Trans Halakha Project*, SVARA: TRADITIONALLY RADICAL YESHIVA, <https://svara.org/trans-halakha-project> (last visited Jan. 19, 2022).

²⁴ Pronouns: they/them.

establish and uplift halakhic discourse for and by transgender and non-binary Jews. They have been teaching and studying rabbinic literature—specifically Talmud—in a wide range of Heterodox *yeshivot* (homes for rigorous Jewish text study). *Halakha* has been a grounding force in their life, and they aim to nurture communities of learning and practice that support marginalized people as they claim creative agency in their relationship to Jewish tradition.²⁵ Russ²⁶ is a white, cis-gender, heterosexual law professor who studies at SVARA, is an Ashkenazi Jew who has written from time to time about Jewish law. He participates in an unaffiliated synagogue, Kolot Chayeinu, that falls within Heterodox Judaism, and has in the past held a social justice leadership position in the Union of Reform Judaism. He views his Judaism as the foundation for his life and his work, including his commitment to liberatory and redemptive practices within Jewish and American law.²⁷

Both of us find Robert Cover's personal commitments and scholarly values to be an inspiration. *Zecher tzadik l'vracha*, may the memory of this righteous scholar be a blessing. We offer this article as a *midrash* on his work.

II. ON HETERODOX JEWS & HALAKHA

In order to fully explore the potential impact and influence of Robert Cover's jurisprudence work on shaping a vibrant liberatory halakhic ethos among Heterodox Jews, we begin with a broad analysis of Jewish denominations and their relationships to *halakha*. Here it is important to note that denominational distinctions as they currently exist are a feature of European and Ashkenazi communities; thus, they have been shaped by and reflect European and Ashkenazi culture, ideologies, and aesthetics. Such denominational distinctions and categorizations may not directly apply to the traditions and practices

²⁵ Laynie Soloman, *Hot Off the Shtender: Towards Halakhic Euphoria*, SVARA: TRADITIONALLY RADICAL YESHIVA (2020), <https://svara.org/hot-off-the-shtender-towards-halakhic-euphoria>.

²⁶ Pronouns: he/him.

²⁷ See, e.g., Christina John et al., *Subversive Legal Education: Reformist Steps Toward Abolitionist Visions*, FORDHAM L. REV. (forthcoming 2022) (on file with authors); Russell G. Pearce & Emily Jenab, *Reflections on Identity, God and Lawyers*, COSMOLOGICS MAG. (2017), <https://ssrn.com/abstract=3172984>; Russell G. Pearce, *The Jewish Lawyer's Question*, 27 TEX. TECH L. REV. 1259 (1996).

of non-Ashkenazi communities, including among Sephardi Jews and Mizrahi Jews.²⁸ We suspect, however, that aspects of this analysis of *halakha* may apply across denominations and cultural affiliations.

Orthodox norms, ideologies, and interpretations of *halakha* have often defined the parameters of modern halakhic discourse in all communities. Heterodox Jews tend to begin their consideration of *halakha* with the Orthodox Jewish approach, whether they are arguing for a modification of that approach or a rejection of *halakha* altogether. In Orthodox Judaism, “halakha is a regulatory system that governs virtually every aspect of the life practiced by observant Jews for centuries.”²⁹ The traditional (and dominant Orthodox) perspective on the source of halakhic authority, notes Chaim Saiman, is that *halakha* is

based on the belief that God revealed both the written and oral Torah to Moses at Mount Sinai. The oral Torah was passed down through the generations until it became crystallized in the Mishnah and Talmud. Following the completion of the Talmud, halakhic authority was vested in the scholars of each generation, later to be embodied in the *Shulhan Arukh* along with its commentaries, responsa and associated communal practices. In brief, [halakha] requires each Jew to live in accordance with the halakhah outlined in the Talmud, as understood by its subsequent interpreters. . . . Rabbinic authority was a normative force within the community, and those who openly rejected its foundational norms were considered outside the fold.³⁰

The source of authority and locus of decision-making for Orthodox *halakha* is the community of “recognized Torah scholars and halakhic experts,”³¹ individual Orthodox leaders and groups of Orthodox

²⁸ See AVIVA BEN-UR, *SEPHARDIC JEWS IN AMERICA: A DIASPORIC HISTORY* (N.Y.U. Press, 2009); MARC D. ANGEL, *THE SEPHARDIM OF THE UNITED STATES: AN EXPLORATORY STUDY* (American Jewish Year Book ed., 1973); ELLA SHOHAT, *TABOO MEMORIES, DIASPORIC VOICES* (Duke Univ. Press 2006).

²⁹ HALAKHAH, *supra* note 9.

³⁰ *Id.* at 213-14. See *JEWISH LAW AND AMERICAN LAW*, *supra* note 4, at 129-33 for a more detailed overview.

³¹ CHAIM I. WAXMAN, *SOCIAL CHANGE AND HALAKHIC EVOLUTION IN AMERICAN ORTHODOXY* 170 (Liverpool Univ. Press ed., 2017) (noting that even though the

scholars, renewed in each generation.³² This understanding of tradition, authority, and halakhic process is fairly consistent across Orthodox perspectives.³³

Orthodox approaches to halakhic interpretation tend to reflect conservative impulses, emphasizing continuity and preservation.³⁴ Suzanne Stone explains that the Orthodox understanding of *halakha* “defers to particular past generations—the bearers of tradition—on the assumption that generations closer to the source of revelation may have privileged knowledge of the traditions or greater wisdom.”³⁵ Orthodox scholars and experts, Chaim Waxman observed, “view themselves as upholders and reinforcers of the tradition,” not “innovators.”³⁶ Accordingly, Orthodox Judaism is “inherently resistant to change, and especially rapid change.”³⁷ This aversion to radical change does not imply that change is impossible within Orthodox communities. Instead, it suggests that legal change happens at a slower pace than within communal practice itself; as David Weiss Halivni notes, “[c]hanges did take place, *but they were not done consciously*.”³⁸ Rather than widespread legal change, “changes were integrated into community life long before they sought—and received—legal sanction.”³⁹

general framework is the same across Orthodoxies, the definition of recognized scholars and experts varies across Orthodox communities).

³² Stone, *supra* note 9, at 851.

³³ See Soloman, *supra* note 25.

³⁴ Many have claimed that the conservative impulses that emerged among Ashkenazi Orthodox *poskim* and rabbis must be heavily contrasted with the more creative approaches among traditional Sephardi *chachamim*, religious leaders. JOSEPH DWECK, RUPTURE AND RECONSTRUCTION: A SEPHARDIC RESPONSE 82 (2020); ZVI ZOHAR, RABBINIC CREATIVITY IN THE MODERN MIDDLE EAST (2013).

³⁵ Stone, *supra* note 9, at 852.

³⁶ WAXMAN, *supra* note 31, at 169.

³⁷ *Id.* at 24.

³⁸ *Id.* at 169 (emphasis in original).

³⁹ *Id.* On occasion, though, rabbinic authorities have made major changes, such as the takanah of Rabeinu Gershom that banned a man from marrying multiple women among Ashkenazi Jews. While some have described this change as a “revolution,” others have characterized it as the ratification of an existing practice. See Peretz Segal, *Jewish Law During the Tannaitic Period*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 101, 112 (N. S. Hecht et al. eds., 1996); Eliav Shochetman, *Jewish Law in Spain Before 1300*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 271, 292 (N. S. Hecht et al. eds., 1996);

This conservatism has led to communal and social views that are anathema to many Heterodox Jews. For example, almost all Orthodox Jewish communities maintain binary gender⁴⁰ distinctions between men and women: they enforce gender-segregated seating in ritual spaces, view women and men as having different halakhic obligations and status and typically only ordain men as rabbis.⁴¹ By contrast, Heterodox movements, generally speaking, practice gender egalitarianism in which people of all genders sit together in prayer spaces, have the same halakhic obligations, and are ordained as rabbis and religious leaders. Additionally, Heterodox movements have, for the most part, embraced LGBTQ Jews on a policy level, and ordain LGBTQ rabbis and religious leaders, while most—though not all—Orthodox communities openly exclude LGBTQ Jews from full communal participation and religious leadership.⁴² These differences

Avraham Grossman, *Ashkenazim to 1300*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 299, 317-19 (N. S. Hecht et al. eds., 1996).

⁴⁰ In such communities, nuances in understanding distinctions between “gender” and “sex” are erased.

⁴¹ Progressive streams of Orthodoxy have done tremendous work advocating for and asserting the importance of feminism in Orthodoxy, as well as for the opportunity for women to serve as rabbis and/or religious leaders. See the work of the Jewish Orthodox Feminist Alliance (JOFA) and Yeshivat Maharat. This phenomenon has been analyzed in recent years: ILAN FUCHS, *JEWISH WOMEN'S TORAH STUDY: ORTHODOX RELIGIOUS EDUCATION AND MODERNITY* (Routledge 2014); Michael J. Brody & Shlomo M. Brody, *Orthodox Women Rabbis? Tentative Thoughts that Distinguish Between the Timely and the Timeless*, 11 HAKIRA, THE FLATBUSH J. JEWISH L. & THOUGHT 25, 25-58 (2011); Daniel Sperber, *On Women in Rabbinic Leadership Positions*, 8 ME'OROT 2, 8 (2010); Reb Mimi (Miriam Sara) Feigelson, *Review of Rabba, Maharat, Rabbanit, Rebbetzin: Women with Leadership Authority According to Halachah by Daniel Sperber*, 38 NASHIM: J. JEWISH WOMEN'S STUD. & GENDER ISSUES 169, 171 (2021).

⁴² See Nathaniel Helfogot et al., *Statement of Principles on the Place of Jews With a Homosexual Orientation in Our Community*, BLOGSPOT (2010), <https://statementofprinciplesnya.blogspot.com>; Karni Kissil & Haya Itzhaky, *Experiences of the Orthodox Community Among Orthodox Jewish Gay Men*, 27 J. GAY & LESBIAN SOC. SERVS. 371, 371-89 (2015) [hereinafter *Experiences of the Orthodox Community*]; Haya Itzhaky & Karni Kissil, “*It's a Horrible Sin. If They Find Out, I Will Not be Able to Stay*”: *Orthodox Jewish Gay Men's Experiences Living in Secrecy*, 62 J. HOMOSEXUALITY 621, 621-643 (2015) [hereinafter “*It's a Horrible Sin*”]; STEVEN GREENBERG, *WRESTLING WITH GOD AND MEN: HOMOSEXUALITY IN THE JEWISH TRADITION* (Univ. Wis. Press 2004); Josefin Dolsten, *Israeli Orthodox Rabbi: Judaism Doesn't Ban Same-Sex Couples Building Families*, TIMES ISR. (Oct. 13 2020), <https://www.timesofisrael.com/israeli-orthodox-rabbi-judaism-doesnt-ban-same-sex-couples-building-families>.

within the Jewish community are mirrored in broad political differences that lead to distinct or opposing political affiliations, as “71% of Jewish adults (including 80% of Reform Jews) are ‘Democrats or independents who lean toward the Democratic Party.’ But among Orthodox Jews, three-quarters say they are ‘Republican or lean that way.’”⁴³ It is not surprising that Heterodox Jews view *halakha*, which they understand through an Orthodox lens and refracted through Orthodox cultural and political norms, as the product of a hierarchical expert-driven process in conflict with their commitments to social justice, equity, and egalitarianism in all parts of their life. Due to this perspective, many Heterodox Jews ultimately reject halakhic discourse and practice.

Indeed, a former President of Reconstructionist Judaism, grouping the Heterodox movements together, noted that “[m]any Reconstructionists and other liberal Jews seem afraid of the term *halakha*, reacting as if it invokes some dark presence coming out of the past to crush them with its oppressive weight.”⁴⁴ Approximately 26% of Conservative Jews view “observing Jewish law . . . as essential to being Jewish,” in contrast to approximately 11% of Reform Jews.⁴⁵ The Conservative and Reform percentages are much closer to each other than either is to the approximately 80% of Orthodox Jews who do,⁴⁶ demonstrating that perhaps the “great divide in American Jewish religious life is between the Orthodox and everyone else.”⁴⁷ Roberta Kwall notes that

progressive or liberal Jews [a category in which she includes both Conservative and Reform Jews] may be guided by, and even observant of, *halakha*, but their

⁴³ Becka A. Alper & Alan Cooperman, *10 Key Findings about Jewish Americans*, PEW RSCH. CTR. (May 11, 2021), <https://www.pewresearch.org/fact-tank/2021/05/11/10-key-findings-about-jewish-americans>.

⁴⁴ Daniel Cedarbaum, *Reconstructing Halakha*, RECONSTRUCTING JUDAISM (May 6, 2016), <https://www.reconstructingjudaism.org/article/reconstructing-halakha>.

⁴⁵ WAXMAN, *supra* note 31, at 44.

⁴⁶ WAXMAN, *supra* note 31, at 41-42; ROBERTA K WALL, THE MYTH OF THE CULTURAL JEW: CULTURE AND LAW IN JEWISH TRADITION 126-27 (2015) (“Although the Pew Report reveals a substantial difference between Conservative and Reform Jews in terms of certain markers of observance, this difference still is not as significant as that which exists between Conservative Jews and those who self-denominate as Modern Orthodox.”).

⁴⁷ WERTHEIMER, *supra* note 11, at 67.

daily existence is not governed by *halakhic* norms in the same way as their more traditional counterparts. It is a well-known fact that despite the difference in formal prayer services, few differences exist “in the private lives and orientations” of most members of Conservative and Reform synagogues. The 1990 and 2000 National Jewish Population Studies reveal that Conservative and Reform Jews “share much in their patterns of *personal* observance” and overall outlook on issues such as interfaith marriage, same-sex marriage, ordination of gay rabbis, and whether Jewish membership should be determined by either one’s mother or father.⁴⁸

Accordingly, while Conservative Jews may be more likely than Reform Jews to say Jewish law is “essential,” most Conservative and Reform Jews do not look to *halakha* to guide their lives. As Kwall notes, even beyond the 77% of religious Jews who identify as Conservative and Reform, the 20% of the religious Jewish population consisting of Heterodox Jews who belong to other movements or to no particular movement⁴⁹ share this general orientation to *halakha*.⁵⁰

Jack Wertheimer makes a similar point that despite differences in “sensibilities” and ritual observance,⁵¹ Heterodox Jews, in contrast to Orthodox Jews, do not look to *halakha* for rules for living a Jewish life. They “claim they don’t know precisely how a Jewish religious life ought to be lived (some elites excepted) [and] deem a pick-and-choose approach as the only sane one in an age of autonomy[.]”⁵² For

⁴⁸ KWALL, *supra* note 46, at 126; WERTHEIMER, *supra* note 11, at 56 (“[A] Conservative Rabbi . . . expressed his exasperation over the constraints his movement creates when it comes to his officiation at interfaith marriage ceremonies. ‘Why,’ he asked ‘should I invoke Halacha on this matter when most of my congregants do not observe Halacha in any other aspect of their lives?’”).

⁴⁹ *Jewish Americans in 2020*, PEW RSCH. CTR. (May 11, 2021), <https://www.pewforum.org/2021/05/11/jewish-americans-in-2020>. These include Reconstructionist, Renewal, and Humanistic Jews. See KWALL, *supra* note 46, at 93, 120-21.

⁵⁰ KWALL, *supra* note 46, at 260.

⁵¹ WERTHEIMER, *supra* note 11, at 56-57.

⁵² *Id.* at 67.

the Heterodox, “the Jewish religion plays a role in their lives at peak moments.”⁵³ Wertheimer observes that

these peak moments—both the highs and the lows—tend to revolve around major events in the life of the family. On a lesser scale, year in, year out, family and religion are also intertwined during a handful of annual dates marked on the Jewish calendar, principally when family members attend synagogue together on the High Holidays and celebrate key annual rituals such as the Passover Seder and Hanukkah candle lighting.⁵⁴

Accordingly, as Wertheimer notes, while many Heterodox Jews self-consciously reject the notion of *halakha*, *they have in practice adopted a set of norms that delineate* their own path for living a Jewish life.

This stated rejection of *halakha* is seen in both the practices and attitudes of Heterodox Jews, and in the official perspectives of some of the Heterodox Jewish movements. The Reform Movement, which represents the largest segment of the Jewish community and of the Heterodox Jewish community—approximately 44% of Jews who identify themselves as religious Jews⁵⁵—decidedly “rejects the concept of Jewish law as obligatory on all Jews.”⁵⁶ Ramie Arian, a leading Reform Rabbi notes on the official Union of Reform Judaism website that “the central dividing point between Reform and Orthodox Judaism is over the question of halacha, that is, Jewish law.”⁵⁷ This “dividing point” is characterized by an emphasis on autonomy and change within Reform communities as opposed to a binding framework of obligation.⁵⁸ Arian notes that for him, Torah and

⁵³ *Id.* at 65.

⁵⁴ *Id.* at 66.

⁵⁵ *Jewish Americans in 2020*, *supra* note 49, at 57.

⁵⁶ DANA EVAN KAPLAN, *THE NEW REFORM JUDAISM: CHALLENGES AND REFLECTIONS* 5 (2020).

⁵⁷ Ramie Arian, *What is the "Platform" of Reform Judaism, and Specifically What is it about Reform that Makes Some Other Jews so Angry?*, REFORMJUDAISM.ORG, <https://reformjudaism.org/learning/answers-jewish-questions/what-platform-reform-judaism-and-specifically-what-it-about> (last visited Jan. 19, 2022). For a scholarly survey of Reform Jewish perspectives on halakha, see Rachel Sabath Beit-Halachmi, *Halachah in Reform Theology from Leo Baeck to Eugene B. Borowitz: Authority, Autonomy, and Covenantal Commandments*, Spring 2020 CCAR J.: REFORM JEWISH Q. 17 (2020).

⁵⁸ Arian, *supra* note 57.

halakha “are a record of how our people, in widely differing times, places and societal circumstances, experienced God's presence in their lives, and responded. Each aspect of *halakha* is a possible gateway to experience of the holy, the spiritual.”⁵⁹ The individual interpretation and application of the tradition is subject to personal autonomy.⁶⁰ If “we are knowledgeable” and “confront it seriously and take its claims and wisdom seriously,” then “we are free to choose”—“a [potentially differing] personal understanding of what God wants us to do.”⁶¹ Despite rejecting the notion of binding Jewish and obligatory law, Reform rabbis and scholars have continued the tradition of rabbinic responsa that interpret the Jewish tradition and apply Jewish sources, albeit providing “advisory” rather than “authoritative” answers.⁶²

Conservative Judaism—the second largest Jewish movement⁶³—takes a different public approach to *halakha*, although this difference is not entirely reflected in the practice of Conservative Jews.⁶⁴ The Conservative Movement views *halakha* as binding and obligatory, but emphasizes openness to change and adapting the application of *halakha* to meet communal and societal needs.⁶⁵ As Conservative Judaism's *Statement of Principles* declares, “We recognize the authority of the Halakhah which has never been monolithic or immovable. On the contrary, as modern scholarship has abundantly demonstrated, the Halakhah has grown and developed through changing times and diverse circumstances.”⁶⁶

The Conservative Movement's approach to determining *halakha* is expert-based and hierarchical. As a general matter, the Conservative Rabbinic Assembly's Committee on Jewish Law and

⁵⁹ *Id.*

⁶⁰ KAPLAN, *supra* note 56, at 10.

⁶¹ MARK WASHOFKY, *JEWISH LIVING: A GUIDE TO CONTEMPORARY REFORM PRACTICE* (URJ Press, 2001).

⁶² *Id.*

⁶³ The Conservative Movement comprises approximately 23% of Jews who identify themselves as religious. See *Jewish Americans in 2020*, *supra* note 49, at 57.

⁶⁴ WAXMAN, *supra* note 31, at 41-42; KWALL, *supra* note 46, at 126-27 (“Although the Pew Report reveals a substantial difference between Conservative and Reform Jews in terms of certain markers of observance, this difference still is not as significant as that which exists between Conservative Jews and those who self-denominate as Modern Orthodox.”).

⁶⁵ David Golinkin, *The Crisis in Jewish Law Today*, 4 *RESPONSA MOMENT* 8 (2014).

⁶⁶ EMET VE-EMUNAH, *STATEMENT OF PRINCIPLES OF CONSERVATIVE JUDAISM* 15 (1988).

Standards sets halakhic policy for Rabbinical Assembly, Conservative rabbis, “and for the Conservative movement as a whole.”⁶⁷ The Committee approves *teshuvot* (legal responsa) through a voting body—“[a]pproved teshuvot represent official halakhic positions of the Conservative movement. . . . Members of the Committee can also submit concurring or dissenting opinions that are attached to a decision, but do not carry official status.”⁶⁸ Although the majority sets the “official halakhic positions of the Conservative movement,” a plurality of halakhic opinion is acknowledged through concurring opinions, dissenting opinions, and the Conservative Movement’s position that “[a]uthority for religious practice in each congregation resides in its rabbi (its *mara d’atra*).”⁶⁹

Reconstructionist and Renewal Movements have various expansive and creative approaches to *halakha* that emphasize adapting traditional forms to current circumstances. The Reconstructionist Movement describes its approach to Jewish tradition with the dictum “the past has a vote, but not veto.”⁷⁰ In applying this notion, the Reconstructionist Movement differentiates itself from the Reform Movement’s rejection of the conception of *halakha* as a binding framework for Jewish life and practice. Unlike the Conservative Movement, however, the Reconstructionist Movement explains:

We differ [from the Conservative Movement] specifically on the issue of how far one may go in amending Jewish law and who has the right to be involved in that process. We believe that rabbis and scholars should work together with committed lay members of the Jewish community formulating guides to Jewish practice for our time.⁷¹

⁶⁷ *Committee on Jewish Law and Standards*, RABBINICAL ASSEMBLY, <https://www.rabbinicalassembly.org/jewish-law/committee-jewish-law-and-standards> (last visited Oct. 24, 2021).

⁶⁸ *Id.*

⁶⁹ VE-EMUNAH, *supra* note 66, at 22.

⁷⁰ *Who Is A Reconstructionist Jew?*, RECONSTRUCTING JUDAISM (Dec. 2, 2016), <https://www.reconstructingjudaism.org/article/who-reconstructionist-jew>.

⁷¹ *Id.*

The Renewal Movement describes itself as “an attitude, not a denomination, and offers tools to all branches of Judaism,”⁷² understanding *halakha* as a “living way of walking in the world.”⁷³ The movement describes its approach as “integral halachah,” a phrase coined by movement leader Zalman Schachter-Shalomi that attempts to “[anchor] innovation in the traditional halachic process by adding this new category—which goes beyond the classical system while simultaneously including it.”⁷⁴ Through an initiative at the Integral Halachah Institute, rabbinic leaders within the Renewal Movement participate in shaping halakhic discourse and theory for movement affiliates.⁷⁵ These efforts within the Renewal movement view *halakha* as a communal enterprise but do not put forth a particular process or method for halakhic decision-making within the movement.⁷⁶

In sum, Heterodox Jewish movements formally take a range of positions on *halakha*. Each movement is committed to adapting *halakha* to modern sensibilities, with different approaches on the obligatory nature of practice, the “binding” role of precedent and traditional practice, and the role of individual autonomy in the unfolding halakhic process. All, however, see their movement’s respective rabbis and leaders as the authorities in the halakhic practices and frameworks developed within each of their movements. Regardless of these distinctions, popular practice among members is fairly limited, even in cases of pluralist and progressive halakhic paradigms. Numerous factors contribute to this separation and rupture between many American liberal Jews and halakhic discourse. As previously noted, Heterodox Jews tend to conflate “*halakha*” with “Orthodox *halakha*,” normalizing the practice of Orthodox Jews as the primary path to halakhic engagement. Additionally, as communities that are informed by progressive values—including egalitarianism,

⁷² *What Is Jewish Renewal?*, ALEPH: ALL. JEWISH RENEWAL, <https://aleph.org/what-is-jewish-renewal> (last visited Oct. 24, 2021).

⁷³ *Id.*

⁷⁴ *Integral Halacha*, ALEPH: ALL. JEWISH RENEWAL, <https://aleph.org/integral-halachah> (last visited Feb. 2, 2022). See ZALMAN SCHACHTER-SHALOMI & DANIEL SIEGEL, *INTEGRAL HALACHAH: TRANSCENDING AND INCLUDING JEWISH PRACTICE THROUGH THE LENS OF PERSONAL TRANSFORMATION AND GLOBAL CONSCIOUSNESS* (Trafford Publ’g, 2009).

⁷⁵ *Integral Halachah Institute*, ALEPH CAN., <https://www.alephcanada.ca/integral-halachah-institute> (last visited Feb. 2, 2022).

⁷⁶ *Id.*

democracy, universalism, feminism and gender justice, anti-oppressive praxis—many see *halakha* as a constricting relic of the past. Feminist Jewish perspectives, for example, have highlighted the kernel of patriarchy that lies at the heart of *halakha* as a discourse that has been dominated and shaped by men exclusively for centuries.⁷⁷

For many Heterodox Jews, the roots of this antipathy are not only found in a misalignment of values but also as a result of a limited understanding of law as a hierarchical state-backed regulatory system.⁷⁸ This particular understanding of law—which we argue is a misunderstanding—bases itself on the assumption that *halakha*, as a form of law, is necessarily a traditionalist, conservative, expert-driven, authoritarian enterprise. These attitudes and assumptions underlying the popular Heterodox view that *halakha* is authoritarian and oppressive help explain the limited effectiveness of the significant efforts on the part of religious leaders and scholars among Heterodox Jews to shape a progressive halakhic discourse. As Audre Lorde famously remarks, “The master’s tools will never dismantle the master’s house.”⁷⁹ If law, more broadly—and thus *halakha* specifically—is truly a traditionalist, conservative, expert-driven enterprise that has been shaped by patriarchal values at its core, why should it be saved?

Such critiques are legitimately lodged at various legal systems and have been dynamically leveraged against *halakha* by scholars and thinkers throughout history. They are not to be ignored. Nonetheless, they do not entirely capture the potential of communitarian *halakha* as a world-building discourse: a bridge between reality and aspiration, the source of liberatory yearnings, and the product of democratic and participatory processes.⁸⁰ What is needed is a retooling, recovering, and reimagining of *halakha* as a system imbued with liberatory,

⁷⁷ See, e.g., *infra* Part III; JUDITH PLASKOW, STANDING AGAIN AT SINAI: JUDAISM FROM A FEMINIST PERSPECTIVE 60-74 (1990); Mara H. Benjamin, *Tracing the Contours of a Half Century of Jewish Feminist Theology*, 36.1 J. FEMINIST STUD. RELIGION 11, 11 (2020).

⁷⁸ See, e.g., Rachel Rafael Neis, *The Seduction of Law: Rethinking Legal Studies in Jewish Studies*, 109 JEWISH Q. REV. 119, 136-37 (2019).

⁷⁹ Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 99 (Cherríe Moraga & Gloria Anzaldúa eds., 1983).

⁸⁰ COVER, *supra* note 8.

creative potential, that may help to awaken a popular Heterodox halakhic discourse.

III. ROBERT COVER'S COMPELLING FRAMEWORK FOR HETERODOX *HALAKHA*

Robert Cover offers an antidote to the categorical Heterodox distaste for *halakha* specifically and, more broadly, the law. His jurisprudence, grounded in the Jewish legal tradition, provides the tools for constructing Heterodox *halakha* with the potential for engaging Heterodox Jews while avoiding the objectionable characteristics Heterodox Jews associate with Orthodox *halakha*.

As a result, leading Heterodox Jewish thinkers, such as Rachel Adler,⁸¹ Tikva Frymer-Kensky,⁸² Mark Washofsky,⁸³ and Gordon Tucker,⁸⁴ have built upon Cover's vision of the law to articulate approaches to *halakha* that speak to Heterodox Jews that emphasizes relational, flexible, community-driven aspects of law. We begin with an analysis of Cover's theory, and then explore its implications for shaping Heterodox *halakha* as articulated by these four Jewish thinkers.

A. Robert Cover's Jurisprudence

Cover begins his groundbreaking article, "*Nomos* and Narrative,"⁸⁵ by declaring that "[w]e inhabit a *nomos*—a normative universe"⁸⁶ where "[w]e constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void." This *nomos* is comprised of "the professional paraphernalia of social control [such as the] rules and principles of justice, the formal institutions of

⁸¹ Rachel Adler, *Feminist Folktales of Justice: Robert Cover as a Resource for the Renewal of Halakhah*, 45 CONSERVATIVE JUDAISM 40, 40-55 (1993).

⁸² TIKVA FRYMER-KENSKY, STUDIES IN THE BIBLE AND FEMINIST CRITICISM 63-281 (2006).

⁸³ Mark Washofsky, *Against Method: Liberal Halakhah Between Theory and Practice*, in BEYOND THE LETTER OF THE LAW: ESSAYS ON DIVERSITY IN THE HALAKHAH, 17, 17-77 (Pittsburgh: Rodef Shalom Press, 2004).

⁸⁴ GORDON TUCKER, HALAKHIC AND METAHALAKHIC ARGUMENTS CONCERNING JUDAISM AND HOMOSEXUALITY (Rabbinical Assembly 2006).

⁸⁵ See generally COVER, *supra* note 8; see also LEVINE, *supra* note 9.

⁸⁶ COVER, *supra* note 8, at 95.

the law, and the conventions of a social order.”⁸⁷ It also contains “varied and complex materials [that] establish paradigms for dedication, acquiescence, contradiction, and resistance.”⁸⁸ Thus, law—and with it, all normative behaviors,—is “inseparably related to . . . the narratives that locate it and give it meaning.”⁸⁹ These “communal” narratives “provide the context” of normative “behavior and render it intelligible.”⁹⁰ In this way, “law becomes not merely a system of rules to be observed, but a world in which we live.”⁹¹ As Cover notes, “[t]o inhabit a *nomos* is to know how to *live* in it.”⁹²

Essentially, Cover argues that law is shaped by communities who give meaning to law, normative behaviors, and practices. Indeed, all laws are situated within a discourse created by the community itself—what stories we tell about a practice, our memories of it, what associations we have as individuals or collectives with the practices themselves. All of that is, according to Robert Cover, constantly shaping the law—or, in our case, *halakha* as a type of legal system.

This normative universe is constituted through “world-creating” and “world-maintaining” patterns.⁹³ Cover describes the dynamic, creative process of world-building as “jurisgenesis,” which creates unique contained “paideic” communities, each containing: “(1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.”⁹⁴ Cover uses Jewish law to illustrate a world-creating *nomos*:

Law as Torah is pedagogic. It requires both the discipline of study and the projection of understanding onto the future that is interpretation. Obedience is correlative to understanding. Discourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic. Interpersonal commitments are

⁸⁷ *Id.*

⁸⁸ *Id.* at 97.

⁸⁹ *Id.* at 95-96.

⁹⁰ *Id.* at 102.

⁹¹ *Id.* at 96.

⁹² *Id.* at 97.

⁹³ *Id.* at 105-06.

⁹⁴ *Id.* at 103, 105.

characterized by reciprocal acknowledgment, the recognition that individuals have particular needs and strong obligations to render person-specific responses.⁹⁵

In the sphere of world-creating, legal participation occurs through commitments that members of the community share and “live by.”⁹⁶

Such legal worlds are dynamically constructed through creative and generative discourse. On the other hand, in the “world-maintaining” project, which Cover refers to as “imperial,” institutions enforce “universal” norms which “need not be taught at all, as long as they are effective.”⁹⁷ The imperial model does not require a strong reliance on “interpersonal commitments”; instead, it is upheld through “only upon a minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms.”⁹⁸ To maintain a stable community, world-maintaining requires clearly defined boundaries, i.e., “common meanings for the normative dimensions of their common lives—to maintain their coherence” by regulating membership.⁹⁹

Cover’s jurisprudence de-normalizes the bias that Jewish law must embody a world-maintaining ethos as is seen in some Orthodox communities or state-enforced legal systems.¹⁰⁰ Instead, Cover’s jurisprudence demonstrates that Heterodox Jews are already part of a halakhic system, whether they know it or not.¹⁰¹ To the extent that a *nomos* reflects communities of interpretation that share those norms, Heterodox Jews already inhabit a *nomos* as we *all* do. Heterodox Jewish communities share “narratives, experiences, and visions” that “generate distinctive responses” to the texts and traditions of Judaism.¹⁰² Additionally, much like Orthodox *halakha*, Heterodox *nomos* functions as a guide for living a Jewish life, both within and outside of the Jewish community. Heterodox Jews have constructed

⁹⁵ *Id.* at 105-06.

⁹⁶ *Id.* at 144.

⁹⁷ *Id.* at 106.

⁹⁸ *Id.*

⁹⁹ *Id.* at 109.

¹⁰⁰ *See supra* Part II.

¹⁰¹ *See supra* Part II.

¹⁰² Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 42 (1983).

“integrated [Jewish] world[s] of obligation and reality from which the world is perceived.”¹⁰³ Indeed, they “inhabit a [Jewish] *nomos*” by living it.¹⁰⁴

These existing *halakhot* (plural of “*halakha*”) naturally reflect unique and different understandings of Jewish law than Orthodox *halakha*. Since the *nomoi* of Heterodox Jewish communities are shaped by unique narratives and experiences—distinct both from Orthodoxy and from each other—it follows that their *halakhot* can, should, and must reflect very different understandings and practices of Jewish law from the beliefs that have shaped Orthodoxies. Indeed, the fact that aspects of Heterodox *halakha* are at odds with Orthodox *halakha* makes it no less of an authentic *nomos* according to Cover, for whom pluralism is of paramount importance.¹⁰⁵ Cover locates this pluralism within the:

traditional solution given by the Talmud to the question of whether the School of Hillel or the School of Shammai was truly correct. “Both are the words of the Living God.” The acceptance of the idea that the single great mythic event of lawgiving can issue in apparently inconsistent precepts and understandings but that the apparent inconsistency can, itself, be the product of two correct readings of a larger understanding . . . It was a myth that created legitimacy for a radically diffuse and coordinate system of authority . . . without an “hierarchically determined authoritative voice.”¹⁰⁶

Cover argued that this pluralism was indeed a positive, claiming that “we ought to stop circumscribing the *nomos*; we ought to invite new worlds.”¹⁰⁷ Cover valued the participation of communities and individuals in shaping *nomos*.¹⁰⁸ Such an appreciation for pluralism stems from Cover’s emphasis on the power of communities to shape *their nomos* as authentic and essential participants in the processes of

¹⁰³ LEVINE, *supra* note 9, at 484.

¹⁰⁴ COVER, *supra* note 8, at 97; LEVINE, *supra* note 9, at 484.

¹⁰⁵ COVER, *supra* note 8, at 97, 111-13; Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 239, 243, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1993).

¹⁰⁶ COVER, *supra* note 8, at 243.

¹⁰⁷ *Id.* at 172.

¹⁰⁸ *Id.* at 97, 111-13, 125.

world-building.¹⁰⁹ As Avi Soifer notes, Cover favored “realization of a very human, earthbound community where there could be rules, but no rulers. . . [c]onceivably, legal norms, working primarily by consent rather than by coercion, could instill a sense of obligation along with tolerance of diversity and even recognition of basic rights.”¹¹⁰

As communities participate in world-building processes to give shape to unique *nomoi*, they have an obligation to shape them aspirationally, informed by visions of what *should* be rather than what *is*. Cover argues that a legal *nomos* need not be reactionary or immutable, but should instead be liberatory and redemptive, a bridge between reality and aspiration.¹¹¹ *Halakha* can then honor existing practices, forms, and values *alongside* that which has not yet been created but exists in the potential forms to be interpreted.

Cover offers the radical antislavery constitutionalism of Frederick Douglass as an example of this liberatory and redemptive *nomos*.¹¹² While William Lloyd Garrison rejected the Constitution entirely because it permitted slavery, Douglass instead embraced and imagined “a vision of an alternative world in which the entire order of American slavery would be without foundation in law.”¹¹³ Such a process reinterpreted and reimagined the constitution *and* re-located this reimagined reality in a foundational legal text, engaging the liberatory potential of people to create radical change. In connection with *nomos*, Cover explains that the notion of redemption “has the connotation of saving or freeing *persons*, not only “worlds” or understandings.”¹¹⁴ A liberatory and redemptive approach to law exemplifies “movements [that] set out to liberate persons and the law and to raise them from a fallen state.”¹¹⁵ Cover notes that “[r]edemption takes place within an eschatological schema that postulates (1) the unredeemed character of reality as we know it, (2)

¹⁰⁹ *Id.* at 97, 111-13, 121-31, 136.

¹¹⁰ Aviam Soifer, *Preface*, in ROBERT COVER, *NARRATIVE, VIOLENCE AND THE LAW* vii, xi (Martha Minow et al. eds., Univ. Mich. Press 1992).

¹¹¹ COVER, *supra* note 8, at 101, 103, 131-38. See *Halacha and Aggada*, *supra* note 4, at 474.

¹¹² COVER, *supra* note 8, at 131-38.

¹¹³ COVER, *supra* note 8, at 137; *Halacha and Aggada*, *supra* note 4, at 474.

¹¹⁴ COVER, *supra* note 8, at 132.

¹¹⁵ *Id.*

the fundamentally different reality that should take its place, and (3) the replacement of the one with the other.”¹¹⁶

To illustrate the liberatory and redemptive aspirations of law and their relationships to world-creating processes, Cover explores a series of Jewish legal texts, beginning with the Mishna, an early guide to rabbinic thought and practice, codified in approximately 200 C.E.: “Shimon the Righteous was one of the last men of the great assembly. He used to say: the world stands upon three things: upon Torah, the Temple service, and upon generous acts of piety.”¹¹⁷ Cover then brings an interpretation of Mishnah from Joseph Karo¹¹⁸ who, citing and elaborating on earlier commentators, understands this Mishnah as a description of the process through which worlds are continuously created and sustained.¹¹⁹

According to Karo’s read, the early sage Shimon the Righteous claims that the world—the Jewish *nomos*—stands on, is constituted by, and is constructed through these three things. Karo comments on this earlier text, noting that the exilic state of the Jewish people prevents these three practices from being fully engaged “to the extent desirable,” but that “there is a difference between the [force needed for the] preservation of that which already exists and the [force needed for the] initial realization of that which had not earlier existed at all”¹²⁰ Here, Karo identifies the world-creating foundation of *halakha* using what Cover describes as the “strong forces” of “culture-specific designs of particularist meaning.”¹²¹ Cover observes that Karo’s “strong forces” “create the normative worlds in which law is predominantly a system of meaning rather than an imposition of force.”¹²²

Karo writes that, beyond world-creating, the world of halakhic *nomos* “continues to exist upon the basis of” Rabbi Simeon b. Gamaliel’s teaching that “[u]pon three things the world [continues to] exist[]: upon justice, upon truth, and upon peace.”¹²³ Cover describes

¹¹⁶ *Id.*

¹¹⁷ Mishnah Avot 1:2.

¹¹⁸ See, e.g., AMY MILLIGAN, SHULCHAN ARUKH 959 (Denis M. Fahey ed., 2010).

¹¹⁹ See Jacob ben Asher, Arba’ah Turim, Hoshen Mishpat 1; Jonah ben Abraham Gerondi (Rabeinu Yonah), Commentary on Mishnah Avot, 1:2.

¹²⁰ COVER, *supra* note 8, at 105.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 104.

these “broad principles [as] essentially system-maintaining ‘weak’ forces. They are virtues that are justified by the need to ensure the *coexistence* of worlds of strong normative meaning.”¹²⁴ Cover, relying on Karo, explains how *halakha* has boundaries¹²⁵ and is yet “held together [unlike secular law] by the force of interpretive commitments—some small and private, others immense and public.”¹²⁶ Indeed, Karo’s framework for *halakha* does not inevitably require a reliance on a highly conservative *nomos* governed by expert authorities, as is seen in many communities today that consciously center halakhic discourse and practice. In Cover’s view, notes Suzanne Stone, “Jewish law provides a test case of a legal system lacking institutional hierarchy, in which law is primarily a system of legal meaning. According to Cover, there was ‘no well-defined hierarchy of law articulating voices in Judaism.’”¹²⁷ In this view, it is the communities themselves that drive authentic legal interpretation that decides questions of Jewish *nomos*.

As we have seen, in what is likely a restoration of the dynamic interplay between law and narrative that is most native to *halakha*,¹²⁸ Cover paves a path for visionary halakhic change-making. His emphasis on narrative and communities of interpretation creates space for the incorporation of “extra-legal” material into the world of Jewish law-making within a legal system that honors the interpretive community’s agency in defining the meaning of any “law.” In these senses not only do Heterodox Jews live within a halakhic world and discourse that is unique and authentic to their own community, but they also *shape halakha*, according to Cover, through their communal behaviors, commitments, and interpretations. If Heterodox Jews could understand their Heterodox halakha as *authentic halakha*, then they would better appreciate its role in their lives as Jews and take more express ownership of it. As Heterodox Judaism faces future tests, the ability to self-consciously identify and engage the world-creating and world-maintaining aspects of *halakha* offers a powerful resource that goes beyond the far less inspirational challenge of making Jewish policies from a perspective outside of an Orthodox halakhic discourse.

¹²⁴ *Id.* at 104.

¹²⁵ *Id.* at 109.

¹²⁶ *Id.* at 98-99.

¹²⁷ Stone, *supra* note 9, at 828 (citing Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 68 (1987)).

¹²⁸ See generally, LEVINE, *supra* note 9.

B. Cover's Influence on Heterodox Halakha

Cover's vision of law provides a pathway into an articulation of *halakha* that speaks to Heterodox Jews. This pathway is one that is driven by creative "jurisgenerative" potential; informed by a paideic pluralism; and fundamentally democratic in its commitment to being shaped, not by its authors or enforcers, but by the people who imbue it with meaning. We will explore four examples of Heterodox halakhists whose work is grounded in such a Coverian vision for law: Rachel Adler,¹²⁹ Tikva Frymer-Kensky,¹³⁰ Mark Washofsky,¹³¹ and Gordon Tucker.¹³² These four scholars, responding to distinct cultural moments and emerging socio-political realities, develop attempts to transform halakhic life and discourse. Inspired by Cover, they each offer reflections of an approach to *halakha* as it could be, imagining alternative approaches to Jewish law-making.

For Adler, and later for Frymer-Kensky, Cover's work provides the foundation upon which a fundamentally feminist halakhic discourse can flourish.¹³³ Cover's emphasis on world-building, on jurisgenerativity, and on the centrality of narrative inspire Adler as she creates openings for this new halakhic reality to take shape.¹³⁴ Frymer-Kensky builds on this frame, and uses Cover's work to invite feminist Heterodox Jews more actively into a stance of authorship and self-determination regarding both the lived and interpreted aspects of *halakha*.¹³⁵ For Washofsky, Cover enables "liberal halakhists" to reject attempts to make *halakha* objective that result in formulaic methods and equations.¹³⁶ Cover provides a model for flexible, dynamic, and contextually grounded rulings that reflect the specific needs and values of liberal Jews, not beholden to Orthodox ideologies.¹³⁷ Finally, Tucker draws heavily on Cover in an attempt to introduce an alternate "enhanced" method of law-making into the broader discourse of Conservative Jewish jurisprudence that would

¹²⁹ Adler, *supra* note 81.

¹³⁰ FRYMER-KENSKY, *supra* note 82, at 263-81.

¹³¹ Washofsky, *supra* note 83, at 17-77.

¹³² TUCKER, *supra* note 84.

¹³³ FRYMER-KENSKY, *supra* note 82, at 263-81; Adler, *supra* note 81, at 40.

¹³⁴ Adler, *supra* note 81, at 40.

¹³⁵ FRYMER-KENSKY, *supra* note 82, at 269.

¹³⁶ Washofsky, *supra* note 83, at 18-19.

¹³⁷ *Id.* at 40-41.

allow for the “normalization” of gay and lesbian Jews.¹³⁸ Cover’s notion of the committed interpretive community, his willingness to name “extra-legal” material as legitimate, and his utopian orientation give shape to Tucker’s new method.¹³⁹

It is noteworthy that these instances reflect moments in which scholars turn to Cover as a source of resolution and change in order to solve two seemingly insurmountable foundational ideological tensions. The first source of tension is the challenge posed to conventional *halakha* by the advent of feminist praxis and discourse.¹⁴⁰ The second is the attempt to create an “inclusive” *halakha* that affirms gay and lesbian Jews.¹⁴¹ It should not surprise us that scholars and progressive *poskim* would turn to Cover in moments of distress; his own life as a scholar-activist highlights the role of law as a source for change-making.¹⁴² As such, his malleable and dynamic frameworks buttress a retooling of *halakha* that makes it a force for creative change.¹⁴³

We aim here to name and explore how Cover’s work has been used to amplify creativity, flexibility, and just law-making among Heterodox Jews. By analyzing these voices together, we can see the powerful force that Cover presents to Heterodox Jews seeking to reinvigorate and democratize halakhic discourse. These scholars invoke Cover to solve what we might deem a halakhic “problem,” that emerges when seemingly new identities, experiences, and communities that have previously been subjugated are finally seen. However, some scholars, such as Adler and Washofsky, additionally understand the ways in which these problematic cases presented to the halakhic system offer insight into the necessity to re-tool *halakha* entirely. Addressing these problems through a broader, constant reworking, or “engendering”—as Rachel Adler suggests—reflects Cover’s understanding of law as deeply aspirational.¹⁴⁴ This would demand, not an episodic moment in which we create change to solve a

¹³⁸ TUCKER, *supra* note 84, at 19-20.

¹³⁹ *Id.* at 22.

¹⁴⁰ Adler, *supra* note 81; FRYMER-KENSKY, *supra* note 82.

¹⁴¹ TUCKER, *supra* note 84.

¹⁴² Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, in ROBERT COVER, NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1993).

¹⁴³ Adler, *supra* note 81, at 40.

¹⁴⁴ *Id.* at 41-42.

specific problem, but an ideological overhaul of a current status quo that grounds itself in an imperial worldview.¹⁴⁵

C. Toward A Feminist Halakha: Robert Cover, Rachel Adler, and Tikva Frymer-Kensky

Jewish feminist scholars have long recognized the potential power contained in Cover’s approach. Rachel Adler and Tikvah Frymer-Kensky both draw upon Cover in their respective theories—which are in direct conversation with one another—as they sought to reconcile their feminisms with their inherited tradition at the close of the twentieth century.¹⁴⁶ Both Adler and Frymer-Kensky understand feminism, like previously emerging socio-political paradigms, as a “challenge” to *halakha*, but not one that would necessitate the demise of the halakhic system.¹⁴⁷ The notion that women should be fully equal citizens with equal “rights” highlights the limitations and oppressive implications of a system that legislates *about* women, treating non-men as halakhic objects rather than actors.¹⁴⁸ Their work seeks to expand and reframe *halakha* as a feminist system—or, at the very least, a system that can reach feminist conclusions through feminist means—and they each draw from Cover to create this synthesis.

Rachel Adler describes the potential utility of Cover for progressive Jews more broadly. What begins for her as a way in for feminist *halakha* in the face of what she sees as second-class citizenship in halakhic communities becomes an invitation to all progressive Jews to begin searching for new narratives to inhabit.¹⁴⁹ As she notes directly, “[f]eminist Jews constitute another group for whom Robert Cover’s work presents an extraordinary resource.”¹⁵⁰ Feminist Jews have a shared commitment with Cover: a resurrection of jurisgenerativity that results not only in a new application of law or *halakha*, but one that is able to “transform the normative universe Jews inhabit.”¹⁵¹

¹⁴⁵ *Id.* at 43.

¹⁴⁶ *Id.* at 43; FRYMER-KENSKY, *supra* note 82, at 263.

¹⁴⁷ Adler, *supra* note 81, at 43; FRYMER-KENSKY, *supra* note 82, at 263-64.

¹⁴⁸ Adler, *supra* note 81, at 43-44; FRYMER-KENSKY, *supra* note 82, at 263-64.

¹⁴⁹ Adler, *supra* note 81, at 44.

¹⁵⁰ TUCKER, *supra* note 84.

¹⁵¹ Adler, *supra* note 81, at 40.

Adler has as a central project the goal of locating a feminist Jewish jurisprudence in *halakha*, which she dubs “engendered Judaism”—

An engendered Judaism is an alternative vision of how Judaism is to be interpreted and lived out, but it is not an anomic vision nor is it necessarily outside the possibilities of Judaism’s moral universe. In his classic essay “*Nomos* and Narrative,” Robert Cover argues that the possibility of alternative visions is inherent in the nature and origin of law. Law is not reducible only to formal lawmaking, Cover maintains, because it is generated by a *nomos*, a universe of meanings, values and rules, embedded in stories. A *nomos* is not a body of data to master and adapt, but a world to inhabit. Knowing how to live in a nomic world means being able to envision the possibilities implicit in its stories and norms and being willing to live some of them out in praxis.¹⁵²

Adler’s “engendered Judaism” is shaped by Cover’s framing of law and inspired by Cover’s emphasis on the legal world beyond formal law-making. Adler breathes new life into Cover’s “*Nomos* and Narrative,” which becomes a foundational text for her feminist approach to *halakha*.¹⁵³

Adler highlights the aspirational realm of law, the creative jurisgenerative, and the distinction between world-building and world-maintaining as the concepts that animate her “engendered Judaism.” By focusing on these attributes of law, Adler attempts to move *halakha* from a system of rules enforced by an elite body separate from the people into a dynamic system of communities of interpretation that creatively “sustain the sense of meaning and shared purpose [that is] essential to social survival.”¹⁵⁴ She sees Cover’s writing as opening possibilities “to think freshly about halakhah, because it counters precisely those features which progressive Jews, and progressive feminists in particular, find repressive in the traditional formulations

¹⁵² *Id.* at 41.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

of halakhah.”¹⁵⁵ Cover, Adler argues, helps us see *halakha* as it *could be*. “[D]ynamic rather than static, visionary rather than conservative, open to the outside rather than closed, arising communally, cooperatively, potentially covenantally, rather than externally imposed and passively obeyed.”¹⁵⁶

Halakha, then, is both “maintained” and “remade” by a committed community who “stands to resist or reject it in order to live out some alternate legal vision.”¹⁵⁷ The *committed community* is at the center of *halakha*; it is the collective that comes to define *halakha* through their (dis)obedience.¹⁵⁸ Cover’s articulation refracted through Adler’s lens presents us with a democratized halakhic system, which enables feminist jurisprudence to thrive.¹⁵⁹

Adler directly critiques “liberal” halakhists who have continued to inhabit the pre-existing normative universe, bridging to stories that are still rooted in Orthodox notions of *halakha*.¹⁶⁰ Liberal halakhists, for the most part, find themselves merely “adapting” the same stories to a new moment.¹⁶¹ Instead, an overhaul of the stories is needed.¹⁶² She observes that “the goal of so-called ‘liberal halakha’ is to repair inadequacies of classical halakhah exposed by modernity while leaving the system basically intact.”¹⁶³ While liberal halakhists may reach progressive solutions, they have not come to embody a progressive world-building endeavor. Here, too, Adler is equipped with Cover’s analysis, which she claims “transcends” the ways in which liberal halakhists are currently thinking about law.¹⁶⁴ Positivism and formalism lie at the heart of current practices of liberal halakhists, which are not enough to create the systemic change that Adler believes feminism demands.¹⁶⁵ In this model, halakhic change and decision-making “remains in the hands of a rabbinical elite whose prescriptions are to be handed down to hypothetically obedient communities.”¹⁶⁶

¹⁵⁵ *Id.* at 42.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 43-44.

¹⁶¹ *Id.* at 43.

¹⁶² *Id.* at 42.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

This is a striking critique that acknowledges that even the most progressive *poskim* among us orient themselves toward an imperial, world-maintaining perspective on law-making.

For Adler, Cover can empower us to reject the world-maintaining status quo and enter into a period of creative, relational, dynamic *halakha* that is shaped *by the people*.¹⁶⁷ Such a change in consciousness, when ushered in by a committed community that is informed by feminist values and discourse, would surely bring into being a new formation of “engendered Judaism.”

Like Adler, Frymer-Kensky draws upon Cover’s work in order to pave a path forward for a feminist vision of *halakha*. In two essays, Frymer-Kensky responds to the broad critiques of *halakha* by her feminist colleagues who claim that feminism simply cannot be reconciled with Jewish law.¹⁶⁸ As Frymer-Kensky acknowledges the impulse to abandon Jewish law for the sake of feminist values and commitments, she suggests that the feminist critique of *halakha* is not inevitable, and is instead contextual; while *halakha* is being applied in ways that objectify and subjugate women, the broader system itself embodies a feminist ethos.¹⁶⁹ These papers, “Halakhah, Law, and Feminism” and “The Feminist Challenge to Halakha,” offer a new way of thinking about *halakha* that attempts to resurrect its identity as a feminist project. Her argument is best summed up as follows:

[T]he deepest level of the feminist challenge to law and ethics, the feminist distrust of the deep structure of legal systems, is not applicable to *halakhah*. Feminism often worries about a system which pays greater attentions to norms and rules than to people and relationships. This is not a problem for *halakhah* . . . *Halakhah* is noteworthy for the fact that it has historically been willing to sacrifice and to bend norms for the sake of relationships. This manifests itself in the huge enterprise of decision-making within *halakhah*. Legal rulings attempted to cope with the fact that individuals may suffer from the generalizations that are necessarily inherent in lawmaking. The decisions of halakhic

¹⁶⁷ *Id.*

¹⁶⁸ These two essays, “Halakhah, Law, and Feminism” and “The Feminist Challenge to Halakhah” are both be found as chapters in FRYMER-KENSKY, *supra* note 82.

¹⁶⁹ *Id.* at 262.

courts frequently urged (and urge) compromise rather than victory. They also often subordinate individual rules to general relation-statements such as harmony within the home. In fact, it has been said that in many respects *halakhah* speaks with what used to be called “the feminine voice,” a term that is mercifully quickly passing into oblivion.¹⁷⁰

Frymer-Kensky claims that there is a feminist ethos native to halakhic thinking which emerged out of the Jewish experience of marginalization throughout history.¹⁷¹ She claims that Jews who have shaped *halakha*—despite holding power within their communities—have been marginalized vis-à-vis dominant cultural religious ideologies: “Jews, who developed *halakhah*, have been people on the periphery of the power bases of society, as indeed women have been.”¹⁷² The marginalized experience of *poskim*, as well as those living and embodying *halakha* throughout history, created a halakhic system that is imbued with this experience and ethos—one that is empathic, relational, and fundamentally feminist.

This kernel of feminism within *halakha* remains undiscovered by leaders, scholars, and *poskim* who have shaped the patriarchal face of *halakha* for centuries. We must, then, shed the narratives that have been passed down to us about what *halakha is*, and turn instead to what *halakha should be*, “God’s way and the way in which we should follow God’s ways.”¹⁷³

In order to fully follow God’s ways, Frymer-Kensky suggests that we must uncover “a new *halakha*” and recast it in a new narrative.¹⁷⁴ Frymer-Kensky summons Cover’s work to authorize and give shape to this endeavor.¹⁷⁵ She highlights the ways in which Cover sees “all law is really a concretization of the narrative in which it is embedded,” held together by the relationships among a community of interpreters.¹⁷⁶ As she attempts to root *halakha* in the relational, she further draws on Cover’s work:

¹⁷⁰ FRYMER-KENSKY, *supra* note 82, at 263-64.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 268.

¹⁷⁴ *Id.* at 266.

¹⁷⁵ *Id.* at 269.

¹⁷⁶ *Id.*

This type of relationship between narrative of the people and the legal statutes is inherent in the organization of the books of the Torah in which the laws are given in context of the release from slavery to form a holy, just society. Jewish learning exhibits this kind of thinking when we talk about the relationship between the *aggadah*, the nonlegal theological and ethical analysis section of our tradition, and the halakhah. And our very system of laws gets its authority from a narrative, from a foundation narrative of what Jewish people are about and where they got their Torah.¹⁷⁷

Narrative, the multi-textured world from which “law” derives its power and meaning reminds us, Frymer-Kensky argues, that the *nomos* is contextual.¹⁷⁸ The new *halakha* for which Frymer-Kensky advocates puts forth a new narrative, distinct from that which has come before it Orthodox and Conservative approaches.¹⁷⁹ As such, it demands a new *nomos*.

Frymer-Kensky speaks to several examples of existing halakhic processes that are in line with this new narrative, including highlighting the authority of *minhag* as a populist, democratic source of Jewish law.¹⁸⁰ While Frymer-Kensky does not connect this to Cover, this notion of *minhag* is a useful and essential area of connection between the two. Specifically, she writes about rabbinic injunction of *puk hazi*, the invitation from Talmudic sages (which appears as early as the mishnah), to figure out the *halakha* by going out and seeing how ordinary people behave: “The principle of *puk hazei* becomes less and less popular as time goes on, but in practice the people nevertheless sometimes asserts itself as the final arbiter of halakhic norms.”¹⁸¹ When the force of the people is recognized and central, those who have been formerly subjugated or deemed irrelevant by leaders become halakhic actors.¹⁸² Such an emphasis on custom crystalizes the role of the community as central, rather than reifying an

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 265.

¹⁸⁰ *Id.* at 261, 276.

¹⁸¹ *Id.* at 276.

¹⁸² *Id.* at 276-78.

“imperial” view of *halakha* that seems to maintain and enforce norms.¹⁸³

Frymer-Kensky also refers to Cover’s notion of “violence of the law” when unpacking the ways in which her vision of a new *halakha* is—as *halakha* has *always been*—an unenforceable commitment made by communities that consent into halakhic praxis.¹⁸⁴ She argues that because *halakha* lacks any substantial or material enforcement, making it free of what Cover has described as “violence” of the law, “[t]he way is mapped: it is not forced . . . The sanctions that the Mishnah and Talmud spell often demand a political power that the writers of these texts did not possess. They could not coerce Jews to follow these prescriptions.”¹⁸⁵ Instead, these behavioral norms are to be “performed voluntarily by the community in response to the divine calling rather than as a result of human coercion.”¹⁸⁶ Again, here through Cover, Frymer-Kensky offers a path into a vision of *halakha* that is shaped by its own community rather than external enforcement, which supports a more democratized, more fundamentally feminist way of law-making.

An analysis of Adler and Frymer-Kensky’s respective work, with attention to the ways in which they utilize Cover, highlights the points of connection and overlap in their approaches to envisioning a feminist *halakha*. However, their theories have several key distinctions. Where Adler and Frymer-Kensky most substantially disagree, though, is in their respective readings of *halakha* as a fundamentally feminist project. Adler maintains that, at its core, *halakha* requires a “systemic critique” because the categories, processes, and content at the heart of *halakha* were constructed “by members of a male elite who have also monopolized its application.”¹⁸⁷ Frymer-Kensky, on the other hand, sees the system itself as inhabiting a feminist ethos at its core.¹⁸⁸

In other words, Frymer-Kensky suggests that the flaw is in the *application*; Adler sees the system itself as reflective of exclusion. Application in new contexts, then, would continue to reflect and reify

¹⁸³ *Id.* at 278.

¹⁸⁴ *Id.* at 268.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Adler, *supra* note 81, at 43.

¹⁸⁸ FRYMER-KENSKY, *supra* note 82, at 263-64.

a broken system. It is here that the limitations of current liberal halakhists are exposed:

To argue that the system requires no systemic critique, a liberal halakhist must ignore or discount the fact that halakhic rules, categories and precedents were constructed and applied without the participation of women, that they reflect perceptions of women as a commodified sub-class, and that they are inadequate or inimical to concerns which women themselves might raise if they were legal subjects rather than legal objects.¹⁸⁹

Here, Adler demonstrates the belief that without a systemic critique, women will remain second-class citizens in *halakha*.

Just as the interpretive process of world-building takes place both in and beyond a legislative system, so too does the process of enforcement of the law. Frymer-Kensky and Adler here, too, depart on their understanding of the violence present in halakhic application. While Frymer-Kensky argues that *halakha*, by nature of being a communally-based set of agreements without state enforcement power lacks violence, Adler reminds us that the lack of state power behind the enforcement of halakhic norms does not prevent the law from being maintained through violence.¹⁹⁰ Adler argues that the violence of *halakha* is certainly present, making reference to the violence enacted at women at the Western Wall by those who are antagonistic to feminism.¹⁹¹ Violence and coercion in this case are enacted through “hurled chairs, tear gas,” and “police citations,” along with verbal harm and harassment, all of which, Adler argues, “testify to the inseparability of violence from the hermeneutical process.”¹⁹²

Through their agreements and distinctions, these approaches to feminist halakhic aspirations that draw on Cover’s work should provide a foundation for new Heterodox *halakha*. An emphasis on the visionary, the world-building, the juris generative—through these, Cover has provided a way in for these feminist scholars.¹⁹³ Cover

¹⁸⁹ RACHEL ADLER, *ENGENDERING JUDAISM: AN INCLUSIVE THEOLOGY AND ETHICS* 29 (1999).

¹⁹⁰ Adler, *supra* note 81, at 44.

¹⁹¹ *Id.* at 45.

¹⁹² *Id.*

¹⁹³ Adler, *supra* note 81, at 40; FRYMER-KENSKY, *supra* note 82, at 269.

moves us toward a halakhic reality that emphasizes justice and liberation, and that finds space in and through *halakha* for those who have been previously—or currently—subjugated.

IV. TOWARD HALAKHIC FLEXIBILITY & DYNAMISM: ROBERT COVER AND MARK WASHOFSKY

A third example of this movement to incorporate Cover's analysis among heterodox halakhists can be found in Mark Washofsky's treatment of halakhic methodology and process.¹⁹⁴ Washofsky critiques the broader halakhic discourse that seeks to move toward objectivity and offers a plea to fellow poskim for a truly progressive approach to law-making.¹⁹⁵ Cover, again, provides the material, inspiration, and framing for Washofsky's argument.¹⁹⁶ Washofsky begins his analysis by distilling the challenge facing liberal halakhists:

Our topic is frustrating because we can't get anyone to listen to us. We liberal halakhists occupy a middle ground between two groups of Jews who respond to our work with a mixture of apathy and disdain. To our left stand those Jews who dismiss traditional Jewish law as at best irrelevant and at worst positively injurious to our most deeply cherished liberal values. Jewish law, they claim, supports doctrines and teachings that inevitably contradict our intellectual and ethical commitments on issues such as human freedom and autonomy, social justice, gender equality, and the relations between Jews and the non-Jewish world.¹⁹⁷

To their right are Orthodox thinkers and scholars who do not take liberal halakhists seriously.¹⁹⁸

Washofsky and his contemporaries face a tremendous dilemma: the people to whom liberal halakhic discourse wishes to speak are closed to the idea of Jewish law entirely; meanwhile, the thinkers with whom these halakhists see themselves in coalition—

¹⁹⁴ Washofsky, *supra* note 83, at 40.

¹⁹⁵ *Id.* at 19.

¹⁹⁶ *Id.* at 40.

¹⁹⁷ *Id.* at 17.

¹⁹⁸ *Id.* at 18.

namely Orthodox thinkers and scholars—reject their contributions.¹⁹⁹ The liberal laity and Orthodox scholars share the same basic assumptions, which, according to Washofsky, are flawed: “Both see *halakhah* as a body of objectively correct legal decisions. That is, there exists something that one can identify as “the” *halakhah*,’ a collected mass of rulings, interpretations, and behaviors that comprise the authoritative core and content of the Jewish legal teaching.”²⁰⁰

The notion of halakhic objectivity has led liberal Jews to reject *halakha* entirely, and as such, liberal halakhists must find new ways to articulate what *halakha* truly *is*—or, perhaps—what it *can be*, so that it can be properly practiced and appreciated among liberal communities. Additionally, an emphasis on objectivity among Orthodox *poskim* has led to the devaluation of liberal *psak* and, according to Washofsky, a misunderstanding of the powerful dynamic, flexible, relational aspects of this process, along with *halakha* more broadly.²⁰¹ As such, Washofsky argues against the notion of objectivity in *halakha*, claiming that there is no one core halakhic method or singular formula.²⁰² While there are “rules, principles, and procedures” that are utilized and followed, they “do not determine the conclusions that the halakhist draws.”²⁰³ Washofsky notes that the fact that two different conclusions can be reached indicates that what is happening in the halakhic process is far from formulaic.²⁰⁴

Rejecting formalist approaches that he sees present among both Orthodox and liberal halakhists, Washofsky attempts to defend his approach by highlighting the fundamental flexibility, dynamism, multivocality and contextual responsiveness of *halakha*.²⁰⁵ Again, Cover helps him make his case:

Our normative commitments determine how we interpret and apply laws “rules and formal institutions”; the narratives that supply law’s purpose tell us what the law is. In this sense, it is futile to draw firm methodological boundaries between law and meta-law.

¹⁹⁹ *Id.* at 17.

²⁰⁰ *Id.* at 19.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 20.

²⁰⁴ *Id.* at 21.

²⁰⁵ *Id.*

These insights speak just as directly to the Jewish legal process.²⁰⁶

Directly rooting his argument in “*Nomos* and Narrative,” Washofsky attempts to honor the profound role of narrative in law-making in order to undermine arguments in favor of halakhic objectivity.²⁰⁷

If our legal rulings are situated within a narrative, they must, too, be situated within a context and relationship, generating a specific and unique ruling for that particular moment. Such an objective formula could not reach these conclusions. Additionally, Washofsky utilizes Cover to elevate the narrative material contained in a halakhic ruling as, in fact, legal material:

All the elements cited in a rabbinical responsum, the “nonlegal” as well as the “legal” are “halakhic” in that they function to support and justify the halakhic conclusion. Both are integral and essential to the process of *pesak*, because *pesak* does not and cannot take place without them. A judgement of “which view will better serve the community” may in fact be a subject of controversy, but take away that meta-halakhic judgement and you knock the legs out from under the legal decision itself.²⁰⁸

Making this shift demands that we recognize that *halakha* does not take place in an “ideological vacuum,” and that many factors contribute to halakhic outcomes that cannot be captured in a formulaic analysis.²⁰⁹ The very fact that multiple outcomes can be valid and that *poskim* must contextualize their *psak* shows how situated in narrative *halakha* is. Thus, *psak* does not exist outside of lived experience, context, and narrative, and is best understood, according to Washofsky, through Cover’s frame.²¹⁰ The apparently non-halakhic material—the “narrative”—that is both named and unnamed in a *teshuva*, for example, is in fact *halakha*.²¹¹ *Halakha* is not the *psak*, the final answer and “rule”; rather, it is the process and world that both

²⁰⁶ *Id.* at 41.

²⁰⁷ *Id.* at 40-41.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 41.

²¹⁰ *Id.* at 42.

²¹¹ *Id.*

leads to *psak* and in which this *psak* is understood, interpreted, and lived out.²¹²

It is for this reason that Washofsky argues against “method,” suggesting that a consistent and “objective” formula for deriving *psak* undermines the project of *halakha* entirely.²¹³ Such a universally applied method or formula would distill *halakha* to *psak*, equating “law” with simply “ruling.”²¹⁴ Through Cover’s analysis, Washofsky puts forth an argument in favor of a halakhic discourse that is expansive, multivocal, and creative. This discourse is “beyond the letter of the law” and is, in fact, law.

Narrative’ is the translation we often give to the term *aggadah*, which we tend to distinguish from *halakhah*. Yet the halakhic conclusions that these writings advance would be incoherent (if they could be formulated at all) in the absence of the normative commitments that the narratives express. Call these normative commitments by any other name: ideology, theology, politics; they are necessarily and inescapably *halakhic* all the same.²¹⁵

Washofsky implores readers to identify their ideological, theological, and political commitments as *halakha*, and to name them as such.

At stake for Washofsky is nothing less than the authenticity of liberal *halakha*, which he believes self-consciously incorporates ideological commitments along with historical realities and context into the making and shaping of *halakha*.²¹⁶ Through his analysis of Cover, Washofsky demonstrates that this choice is, in reality, made by *all poskim*, and that the distinct feature of liberal *halakha* is in its self-awareness in doing so.²¹⁷

Washofsky relies on Cover’s jurisprudence to reject formulaic notions of legal objectivity, and incorporates Cover’s thinking throughout this treatment of liberal meta-halakhic thinking. Specifically, Washofsky claims that

²¹² *Id.*

²¹³ *Id.* at 44.

²¹⁴ *Id.*

²¹⁵ *Id.* at 42.

²¹⁶ *Id.* at 17.

²¹⁷ *Id.* at 54.

a successful essay in liberal *halakhah* is one that frames and supports the conclusion – whether we happen to agree with it or not—in the language of *our* community, that raises the intellectual and moral level of our discourse, and that speaks to us in a voice that we can recognize—or wish to recognize—as our own.²¹⁸

Liberal *halakha*, for Washofsky, should speak to, for, and by the community in which it is situated.²¹⁹ Here again, formulaic and “objective” *psak* is far from ideal and would circumvent the possibility of being shaped by a community’s individual ways of being and understanding that should give way to the behavioral norms that are being legislated.

V. TOWARD ALTERNATE HALAKHIC METHODS: ROBERT COVER & GORDON TUCKER

A final example in this spirit is that of a prominent *teshuva*, halakhic responsum, authored by Gordon Tucker for the Conservative Movement’s Committee on Jewish Laws and Standards (“CJLS”) that attempts to “normalize” gay and lesbian relationships on the topic of “homosexuality.”²²⁰ While the works we have explored thus far live in the realm of theory, this next example brings us, at least in part, into the reality of *halakha le’ma’aseh*: the practical application of law—though we have claimed this as a false binary distinction.²²¹ In his paper, Tucker evokes Cover as a force through which to ordain and ground the position that “male and female homosexuality can be reconciled with Judaism, conceived through a Halakhic lens.”²²² After a robust six-part argument that weaves together primary sources, first-person narratives, and sociological information about the experiences of gay and lesbian people in America in the early twenty-first century, Tucker turns to what he deems “an alternative (enhanced) halakhic

²¹⁸ *Id.* at 56 (emphasis added).

²¹⁹ *Id.*

²²⁰ TUCKER, *supra* note 84, at 1.

²²¹ *Id.* at 1-2.

²²² *Id.* at 31.

method” to infuse Conservative Judaism’s halakhic process with the ethos of Robert Cover.²²³

Tucker uses the status of gay and lesbian Jews in recent CJLS proceedings as a window into the limitations of Conservative jurisprudence. His paper attempts to answer the posed question to the CJLS about the permissibility of gay and lesbian relationships, and by doing so comments more generally about the process of Conservative law-making, arguing that

methods that have been used in the Conservative Movement have been conceived in an overly narrow way, and that this constriction of method has put Conservative halakhic practice at odds with the historical consciousness that has been the root of the fabulously fruitful intellectual and theological achievements of Conservative Judaism and its scholars.²²⁴

Gordon’s argument resembles both Adler’s rejection of the halakhic system’s categorical exclusion of members of the Jewish community *and* Frymer-Kensky’s advocacy on behalf of a sacred kernel of feminine justice at the heart of *halakha* that is waiting to be restored.

Prior to the submission of Tucker’s paper, the CJLS had accepted a range of positions regarding gay and lesbian relationships. None of the previously accepted papers provided—or even approximated—a sense of what Tucker deems “normalization,” which he sees as the necessary, compassionate response strikingly absent from the papers of his peers.²²⁵ Instead, most papers opted to maintain oppressive systems of discrimination against gay and lesbian Jews.²²⁶

²²³ Tucker writes about Cover as he applies his work to gay and lesbian Jews in this paper. Elsewhere Tucker explores Cover more broadly, see Gordon Tucker, *The Sayings of the Wise are Like Gourds: An Appreciation of the Works of Robert Cover*, 45 CONSERVATIVE JUDAISM, No. 3 (1993).

²²⁴ TUCKER, *supra* note 84, at 1.

²²⁵ *Id.* at 2-4.

²²⁶ The following is the full list of teshuvot, statements, and addendums presented to the CJLS that address the status of gay and lesbian Jews: *Consensus Statement on Homosexuality*, EH 24.1992a (1992); Joel Roth, *Homosexuality*, EH 24.1992b (1992); Reuven Kimmelman, *Homosexuality and the Policy Decisions of the CJLS*, EH 24.1992c (1992); Mayer E. Rabinowitz, *On Homosexuality*, EH 24.1992d (1992); Elliot Dorff, *Jewish Norms for Sexual Behavior: A Responsum Embodying a Proposal*, EH 24.1992e (1992); Kassel Abelson, *The Status of Homosexuals in the*

Tucker observes at the start of his halakhic paper that:

[V]irtually every position in recent years that has argued against the normalization of Jewish gays and lesbians has done so not out of any stated animus toward, or fear of, gays or lesbians (what is sometimes called, with some hyperbole [in Tucker's view], "homophobia"), but rather out of theological/halakhic or more general halakhic concerns.²²⁷

These arguments against the "normalization" of gay and lesbian Jews are "not predicated on the idea that homosexuality was inherently destructive of Jewish society, but rather on the idea that legitimating it would be destructive of the halakhic system."²²⁸ Therefore, the lack of full-fledged affirmation of gay and lesbian relationships—and thus gay and lesbian Jews themselves—is, as Tucker sees it, the result of an overly narrow halakhic toolkit that relies almost exclusively on

Synagogue: A Concurring Opinion, EH 24.1992f (1992); Avram Israel Reisner, *On Homosexuality and Biblical Imperatives: A Concurrence*, EH 24.1992g (1992); Howard Handler, *In the Image of God: A Dissent in Favor of the Full Equality of Gay and Lesbian Jews Into the Community of Conservative Judaism*, EH 24.1992h (1992); Kassel Abelson, *Placing Homosexual Rabbis in Congregations*, EH 24.1993a (1993); Arnold Goodman, *Placing Homosexual Rabbis in Congregations*, EH 24.1993b (1993); Aaron Mackler, *A Concurring Opinion to Arnold M. Goodman's 'Placing Homosexual Rabbis in Congregations'*, EH 24.1993c (1993); Ben Zion Bergman, *The Gay Placement Question: A Dissenting Opinion*, EH 24.1993d (1993); Joel Roth, *Homosexuality Revisited*, EH 24.2006a (2006); Elliot Dorff, Daniel Nevins, and Avram Reisner, *Homosexuality, Human Dignity and Halakhah*, EH 24.2006b (2006); Elliot Dorff, Daniel Nevins, and Avram Reisner, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples* (an appendix to "*Homosexuality, Human Dignity and Halakhah*"), EH 24.2012a (2012); Aaron Alexander, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples: A Concurrence*, EH 24.2012b (2012); Leonard Levy, *Same-Sex Attraction and Halakhah*, EH 24.2006c (2006); Baruch Frydman-Kohl, *Homosexuality and Halakhah*, EH 24.2006d (2006); Loel Weiss, *Same-Sex Attraction and Halakhah: A Concurring Opinion*, EH 24.2006e (2006); Myron Geller, Robert Fine and David Fine, *A New Context: The Halakhah of Same-Sex Relations*, EH 24.2006f (2006); Gordon Tucker, *Halakhic and Metahalakhic Arguments Concerning Judaism and Homosexuality*, EH 24.2006g (2006).

²²⁷ TUCKER, *supra* note 84, at 11. This point is highly contestable, given that homophobic tropes, phrases, and rulings are present in virtually all of these papers. A discussion of the queerphobic, heterosexist, and cissexist rhetoric overwhelmingly found in these papers, however, is beyond the scope of this particular paper.

²²⁸ *Id.* at 3.

positivist approaches to law.²²⁹

Lawmakers in the CJLS overwhelmingly see *halakha* as a relatively fixed system, whose inputs are exclusively bound within the system itself.²³⁰ Such positivist arguments “posit the canonicity of basic norms, from which all derivational pathways must begin.”²³¹ In other words, several of Tucker’s peers—particularly those writing *teshuvot* for the CJLS in 2006—believe that it is *ethical* to affirm gay and lesbian relationships, but that it is *against halakha*.²³² Tucker critiques this as a positivist approach, probing readers to consider, essentially, what is said about the halakhic system as a whole when this is the primary concern that animates halakhists.²³³

Tucker goes to great lengths to express the benefits of positivism within the halakhic system, noting that it is an “attractive point of view” in that it provides “objectivity, predictability, and independence of fad” that enables it to seemingly transcend any particular community, moment, or relationship.²³⁴ Yet, Tucker claims, “we have usually treated it not as the *best* approach to Jewish law, but as the *only* authentic approach to Jewish law.”²³⁵ With this analysis, Tucker boosts Adler’s critique of liberal halakhists broadly and positivism specifically; he suggests that the CJLS “has, from its inception, worked under this paradigm,” whether arriving at a permissive or restrictive outcome.²³⁶ In other words, while the outcomes may, at times, move toward more inclusive or just rulings, the procedure remains fixed in a realm of positivism that does not account for a flexible, dynamic *process*. Agitated by these overly positivist prior rulings and inspired by Cover, Tucker sets out to establish a new method of Jewish law-making. Unlike Adler, however, Tucker advocates against a broad overhaul of the halakhic system. For Tucker, positivism should remain a primary tool, though it should be “one legal philosophy among many,” complemented by other approaches.²³⁷

²²⁹ *Id.* at 11.

²³⁰ *Id.* at 8.

²³¹ *Id.*

²³² *Id.* at 3-4.

²³³ *Id.* at 11-12.

²³⁴ *Id.* at 8.

²³⁵ *Id.* at 10.

²³⁶ *Id.* at 11.

²³⁷ Tucker, *supra* note 223.

These additional non-positivist approaches are to be invoked in specific moments, which Tucker deems “hard cases,” exceptional circumstances in which a new compelling reality demands to be addressed by the halakhic system, the reality of which “cannot be accommodated by the positivist, precedent-controlled legal method which has characterized halakhic discourse”²³⁸ In such cases, Tucker’s Cover-inspired approach is to be evoked, forming what Tucker names as an “alternative (enhanced) halakhic method.”²³⁹ Tucker’s language of “enhanced” indicates that the goal is not to transform *halakha*, but to solve “hard” cases, like the status of gay and lesbian Jews. He writes in a footnote:

[T]he need for an alternative approach to halakhah does not negate the validity of the positivist method for most normal purposes. Responsa should, and will, continue to be written in that mode. But for hard cases...we need a way of “unsimplifying,” and thus enriching, the normal mode of operation in order to achieve a result that both reflects a deep fealty to the legal tradition and conforms to certain compelling and undeniable realities.²⁴⁰

This alternative method is shaped profoundly by Cover’s attitudes, and Tucker includes Cover as the primary source materials from which this method derives, particularly the emphasis on narrative as fundamentally legal material, and the democratizing force of the “committed community” to shape law through their behaviors and interpretation(s).²⁴¹

As he explores the community’s role in shaping *halakha*, Tucker explores Cover’s description of the sit-ins of the Civil Rights Movement from 1961-1964 in which

the movement’s community affirmed that the Constitution of the United States has a valid moral claim to obedience from the members of the community. Yet the community also affirmed an understanding that the Constitution’s guarantee of

²³⁸ *Id.*

²³⁹ TUCKER, *supra* note 84, at 19-20.

²⁴⁰ *Id.* at 19 n.42.

²⁴¹ *Id.* at 23.

equal protection includes a right to be served in places of public accommodation without regard to race. In the face of official interpretations of the Constitution that permitted continued discriminatory practices in public accommodations, the movement had this choice: it could confirm its public behavior to the official "law" while protesting that the law was "wrong, or it could confirm its public behavior to its own interpretation of the Constitution."²⁴²

According to Cover, both obedience and disobedience are present.

A community that acquiesces in the injustice of official law has created no law of its own. It is not *sui juris* . . . The community that disobeys the criminal law upon the authority of its own constitutional interpretation, however, forces the judge to choose between affirming his interpretation of the official law through violence against the protesters and permitting the polynomia of legal meaning to extend to the domain of social practice and control.²⁴³

Tucker uses this description from Cover as an analogy through which to analyze the status of gay and lesbian Jews: "They are a fully committed group who have elaborated, and are elaborating still, norms for sexual lives . . . that stand against 'state' or, more properly, against the halakhic establishment."²⁴⁴ Similar to the civil rights sit-ins, gay and lesbian Jews present both obedience and disobedience as

they thereby force all official interpreters of halakhah, such as the CJLS, to choose between reaffirming the official interpretation, and thus criminalizing and isolating this committed community, or "permitting the polynomia of legal meaning" to extend to the delicate but vital area of family structure. This is our test: Shall we see ourselves as defenders of the official precedents against those who are constructing new legal interpretations out of the necessities of their reality? Or

²⁴² *Id.* at 20 (citing COVER, *supra* note 142, at 147).

²⁴³ *Id.* at 20.

²⁴⁴ *Id.*

shall we “be part of the bridge” that links the official vision of halakhah with reality of people whom that official vision would condemn to celibacy?²⁴⁵

Through their obedience and disobedience of the law, gay and lesbian Jews participate in co-creating the legal system.

Thus, Tucker’s approach enables “commitment within a community itself [to] generate legal meaning and make legal claims that command attention.”²⁴⁶ Such dilemmas have been presented to the CJLS in past moments; this is not without precedent in the Conservative Movement.²⁴⁷ Tucker notes that previously deregulated and unregulated areas of human life have been lived out and interpreted by groups of people beyond the formal legislative branches of the CJLS that has led to broad “normalization,” such as Zionism and egalitarianism.²⁴⁸ Regarding egalitarianism,

the vision that grew out of this blend of halakhah and narrative informed the practices of more and more communities, which in time came to include synagogues, *havurot*, and college communities. The received halakhic tradition, governed by precedent, was failing to account for a reality that would not go away: here were egalitarian communities that were preserving, not dismantling, Jewish tradition.²⁴⁹

Tucker goes on to outline, essentially, the mainstreaming of behaviors and ideologies outside of halakhic precedent but not outside of halakhic possibility, made into *halakha* by “communities that develop commitments originally at odds with authorities.”²⁵⁰

Tucker utilizes Cover to argue in favor of a more pervasive role of narrative in legal decision-making. He suggests—as we have seen in other attempts to apply Cover to *halakha*—that extra-legal material can, and *must*, be incorporated into *halakha*.²⁵¹ Tucker’s use of narrative is named as “aggadah,” which he defines both narrowly as “genuine Jewish narrative,” and also the “personal and compelling

²⁴⁵ *Id.* at 21 (citing COVER, *supra* note 142, at 148).

²⁴⁶ *Id.* at 20.

²⁴⁷ *Id.* at 21.

²⁴⁸ *Id.* at 22.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 28.

stories of Jewish gays and lesbians.” Tucker—again, informed by Cover—sees both of these forms of Aggadah as “source[s] that can claim status within a halakhic method.”²⁵² He interestingly then attempts to root the stories and lived experiences of gay and lesbian Jews in “classical *aggadah*,” offering dynamic interpretations of rabbinic texts.²⁵³ Here, Tucker departs slightly from Cover’s definition of narrative, perhaps giving excessive authority to canon over lived experience, or perhaps simply attempting to “root those stories in the soil of classical *aggadah*.”²⁵⁴

With this, rabbinic *midrash* becomes a legislating force, along with lived experiences of gay and lesbian Jews. Tucker writes:

It is apparently true that our legal precedents, limited as they are to the actualities of legal history, cannot accommodate, in this area, the basic theological axiom that we are called upon to follow God’s lead as depicted in this *midrash aggadah* . . . These *aggadot*, and others, as well as the more recent compelling personal narratives of Jewish gays and lesbians must be called together to provide an authentic reading of the Torah and our tradition that will enable us to approximate even more closely the will and the image of our compassionate God.²⁵⁵

Much of the *aggadah* that Tucker cites in his paper is textual; he brings Torah verses and rabbinic *midrash* to ground the argument of narrative as a driving source.²⁵⁶ This narrative, though, does not primarily emerge from the perspectives and interpretations of the people about whose lives and relationships he attempts to legislate.

Tucker incorporates personal narrative, “scientific” evidence, and what he sees as a shared motivation to “normalize” gay and lesbian Jews as core material that source the arguments of his paper.²⁵⁷ He notes that while these considerations lie “outside” the system, they need not be. Armed with Cover’s work, Tucker urges us to consider

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 29.

²⁵⁶ *Id.* at 28-29.

²⁵⁷ *Id.* at 4.

what is “in” and what is “out” of the system.²⁵⁸ While he concludes that information and data from “outside” should be allowed “in,” others may argue that this material may have always been “in.”²⁵⁹ Frymer-Kensky would suggest that this outward-facing move is a fundamentally halakhic move: *puk hazi*, “go out and see,” being a primary halakhic principle that she turns to as evidence for the democratically driven system.²⁶⁰ Washofsky might also suggest that Tucker’s incorporation of these testimonies and broader cultural milieus into his ruling is precisely what *halakha* has done and must always do, and why a rigid application of objective formula will inevitably leave us without a fulfillment of an authentic *halakha* for our people.²⁶¹

Both Washofsky and Tucker draw strength from Cover as they push back against notions of “method” within the halakhic process. While Washofsky hopes to do away with the notion of methods that attempt to be objective altogether and move into a redefinition of *halakha* as fundamentally at odds with formulaic methods, Tucker attempts to *add new material* into the halakhic process for Conservative Jews, adding new methodologies into the Conservative *posek’s* “toolbox.”²⁶² Both are confronted with the limitations of “method” in the halakhic treatments of their contemporaries; furthermore, both find themselves making a broad appeal to reject notions of rigidity in hopes of reigniting a compassionate *halakha* that speaks with authenticity and compassion in the language of their “own” communities.²⁶³

What distinguishes Tucker from Adler and Frymer-Kensky is his positionality vis-à-vis his paper “topic.” Adler’s reliance on Cover is shaped by her identity and experience as a feminist; her discussion of *halakha* moves beyond a rights-based argument and into the realm of broad systemic change that would “engender” a new feminist jurisprudence with Cover at the center, providing a core—if not the—map for the path forward.²⁶⁴ For Adler, feminism leverages the critique, and Cover enables feminism to shape the solution. For

²⁵⁸ *Id.*

²⁵⁹ Washofsky, *supra* note 83, at 39.

²⁶⁰ FRYMER-KENSKY, *supra* note 82, at 276.

²⁶¹ Washofsky, *supra* note 83, at 56.

²⁶² *Id.* at 57; TUCKER, *supra* note 84, at 30.

²⁶³ Washofsky, *supra* note 83, at 55; TUCKER, *supra* note 84, at 30-31.

²⁶⁴ Adler, *supra* note 81, at 41.

Tucker, it is not queerness that has leveraged the critique, but the general persistence of suffering at the hands of the CJLS.²⁶⁵ While Tucker's work addresses the rights and "status" of gay and lesbian Jews, it does not similarly use these experiences and identities—and the ideologies that accompany them—as the source from which to articulate these new paradigms; they are the case study, not the approach.²⁶⁶ Queerness and queer theories as elements of *nomos* are strikingly absent. He notes in the paper's conclusion:

This is, therefore, not just a *teshuvah* about Jewish gays and lesbians. It is also not a plan for dismantling the normal and normative methods of doing halakhah. It is, rather, a plea that our 'toolbox' not be so circumscribed that we are unable to see that hard cases can call out to us to listen courageously to our hitherto orphaned aggadic texts. Although we continue to believe that God speaks to us through halakhah, the compassion of God that we are commanded to imitate is still greater than any particular halakhic method. And if courageous innovation in law in order to pursue *imitatio dei* unsettles, or even frightens us, we do well to remember that religion is, in the end, still about faith.²⁶⁷

To be sure, Tucker's paper provides a way "in" for queer approaches to life and "normalization" of gay and lesbian monogamous relationships in Conservative halakhic communities, but the broader analysis and reconstruction of *halakha* shaped by queer values and ideologies has yet to be fully articulated.

VI. TOWARD A LIBERATORY HETERODOX *HALAKHA*: (DIS)LOCATING AUTHORITY & EXPERTISE

As we have seen, each of these *poskim* and scholars—Adler, Frymer-Kensky, Washofsky, and Tucker—draw inspiration from Cover that enables them to tap into the creative, justice-driven, world-building power of *halakha*. As they each face a seemingly insurmountable challenge leveraged against Jewish law composed of

²⁶⁵ TUCKER, *supra* note 84, at 3-4, 29.

²⁶⁶ *Id.* at 30.

²⁶⁷ *Id.*

political, theological, and sociological elements, they ground themselves in Cover, most specifically “*Nomos* and Narrative,” and forge a new path forward.²⁶⁸ Cover’s frameworks have therefore enabled halakhic transformation toward inclusion, expansion, and liberation. How might we further nurture these frameworks offered by feminist halakhists, by progressive *psak*, and by new attempts for compassionate methodologies to use Cover’s jurisprudence as the bridge to a broader popular movement of Heterodox *halakha* that sees and relates to *halakha* as aspirational, creative, dynamic, democratic, and liberatory?

Our task as Heterodox halakhists, as those seeking to deepen the halakhic countercurrent, is to expand these analyses and continue to explore their further application as we cultivate a halakhic discourse that engenders liberatory frameworks at the heart of Jewish law. We see the further expansions and employment of a heterodox *halakha* that reflects Cover’s methods and approach to lawmaking as limitless.

How might these approaches to *halakha* invite us to consider ethical consumption in the face of climate devastation that reflects a scale of destruction unimaginable to our ancestors? How might we develop an approach to reparations in the United States for the legacy of slavery and pervasive systemic anti-Black racism that both incorporates and transcends halakhic language we have been given? What might a *halakha* shaped by queer, trans, and disabled bodies look like that takes seriously the unique embodied wisdom that these identities have to offer to the halakhic system and the world?

The elaborations and applications of Cover—and the resulting frameworks by Adler, Frymer-Kensky, Washofsky, and Tucker—help us begin to address, respond to, and engage with these realities in the language of *halakha*. Adopting and building on these analyses additionally encourages a revisiting and reexamination of core halakhic principles that, through these frameworks, can come to life in new ways. There are numerous core halakhic principles that originate in the Talmud and other sources of rabbinic literature that undergird and reinforce these ways of thinking about jurisprudence.²⁶⁹ Several

²⁶⁸ Adler, *supra* note 81; FRYMER-KENSKY, *supra* note 82; Washofsky, *supra* note 83; TUCKER, *supra* note 84.

²⁶⁹ See MOSHE ZEMER, *EVOLVING HALAKHAH: A PROGRESSIVE APPROACH TO TRADITIONAL JEWISH LAW* (1999); 11 *RE-EXAMINING PROGRESSIVE HALAKHAH* (Walter Jacob & Moshe Zemer eds., Berghahn Books 2002); Irshai, Ronit, *Public*

were introduced to us in the analysis of Adler, Frymer-Kensky, Washofsky, and Tucker—one notable example being that of Frymer-Kensky's use of *puk hazi* ("go out and see"),²⁷⁰ a rabbinic injunction that ascribes halakhic significance to the behaviors of any given community when attempting to figure out a particular practice or halakhic norm, reflecting the elevation of *minhag*, custom. These principles are fertile ground for developing new articulations of democratically driven, justice-seeking halakhic frameworks. Other striking examples include: the preservation of multiplicity and codification of dissenting views (*eilu ve'eilu*),²⁷¹ the ability of later generations to create new rulings (*hilkhata ke'batrai*),²⁷² the notion that interpretation of Torah is a subjective human endeavor (*lo bashamayim hi*),²⁷³ the emphasis on establishing norms and rulings beyond "the letter of the law" (*lifnim meshurat ha'din*),²⁷⁴ the requirement for legal rulings to be pleasant and peaceful (*derakheha darkhei noam*).²⁷⁵ Each of these reflect the ethos and approaches that we have seen thus far from Heterodox halakhists incorporating Cover into new, or perhaps restored, methods and theories, and they can be extended even further.

and Private Rulings in Jewish Law (Halakhah): Flexibility, Concealment, and Feminist Jurisprudence, 3 J.L. RELIGION & STATE 25-50 (2014).

²⁷⁰ See, e.g., Babylonian Talmud, Berakhot 45b; Babylonian Talmud, Eruvin 15b; Babylonian Talmud, Menachot 7a. This principle is discussed in Robert Gordis, *A Dynamic Halakhah: Principles and Procedures of Jewish Law*, 28 JUDAISM 263-64 (1979) and Burton M. Leiser, *Custom and Law in Talmudic Jurisprudence*, 20 JUDAISM 397-98 (1971).

²⁷¹ Babylonian Talmud, Eruvin 13b. See AVI SAGI, *THE OPEN CANON: ON THE MEANING OF HALAKHIC DISCOURSE* (Batya Stein trans., Continuum 2007).

²⁷² MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 1345-57 (Bernard Auerbach & Melvin J. Sykes trans., 1978); ISRAEL TA-SHEMA, 'SHIQLIM PILOSOFI'IM BE-HAKHRA'ATHA-HALAKHAH BE-SEFARAD' 99-110 (1985).

²⁷³ Babylonian Talmud, Bava Metzia 59b. This Talmudic story has served as the foundation for many reflections on the nature of *halakha* as well as law more broadly. See ELIEZER BERKOVITS, *NOT IN HEAVEN: THE NATURE AND FUNCTION OF JEWISH LAW* (Shalem Press 2010); see also Daniel Greenwood, *AKHNAI*, 1997 UTAH L. REV. 309, 352 (1997).

²⁷⁴ Babylonian Talmud, Bava Metzia 30b; Babylonian Talmud, Berakhot 7a. See MOSHE ZEMER & WALTER JACOB, *BEYOND THE LETTER OF THE LAW: ESSAYS ON DIVERSITY IN THE HALAKHAH IN HONOR OF MOSHE ZEMER* (Walter Jacob ed., Rodef Shalom Press 2004).

²⁷⁵ Babylonian Talmud, Gittin 59b; see Daniel Sperber, "Friendly" *Halakha and The "Friendly" Poseq*, 5 EDAH J. 1, 2-14 (2006).

Our work in this final section explores two principles that can be enlivened by the analyses brought forth from these thinkers who root themselves in Cover. Our specific principles elevate the notion of expertise and authority—who has it, where it comes from, and how it is to be used—within the frame of *halakha*. We see this area as a unique additional contribution to the discourse, since Heterodox scholars have not fully explored the realm of authority and expertise as it relates to Cover and the shaping of a heterodox halakhic discourse. We will then present a case study of a current endeavor in the field of Heterodox *halakha* that aims to embody an approach to *halakha* as we have defined it as an example for how we might continue to create communities that democratically drive the halakhic process with full intention and self-awareness.

A. “A Judge Has Only What His Eyes See”

One striking example here is the principle “a judge has only what his eyes see,” a phrase which like many halakhic precedents reflect its patriarchal origin at the same time as it manifests liberatory potential. Emerging from a creative rereading of a verse in II Chronicles which describes the process of appointing judges in Jerusalem,²⁷⁶ the phrase becomes a widely referenced dictum about the nature of judging itself. A “judge” here, of course, refers to one who is adjudicating cases, but in the absence of a rabbinic legislating body—among other motivations—is read by later generations within the rabbinic timeline as a halakhic authority, a *posek*. Three times in the Talmud the principle “a judge has only what his eyes see” is found, implying that a *posek*’s encounter with any question, dilemma, or new reality must be rooted in their subjectivity.²⁷⁷ This principle is beautifully narrated in an exchange between Rava, a leading Babylonian rabbinic sage, and his student:

Rava said to [his students] Rav Pappa and to Rav Huna, son of Rav Yehoshua: When a legal ruling of mine comes before you and you perceive a refutation of it, do

²⁷⁶ II Chronicles 19:6.

²⁷⁷ For a careful treatment of this principle, see JOEL ROTH, THE HALAKHIC PROCESS: A SYSTEMIC ANALYSIS, THE JEWISH THEOLOGICAL SEMINARY OF AMERICA 81-113 (1986) and DAVID ELLENSON, THE CHALLENGES OF HALAKHAH, 38 JUDAISM 358 (1989),

not tear it up until you come before me to discuss it. If I have valid explanation, I will tell you, and if not, I will retract my ruling. If a ruling of mine comes before you after my death, when you can no longer discuss it with me, do not tear it up, but do not learn from it either, i.e., do not rule in accordance with it. Do not tear it up, as had I been there, perhaps I would have told you a valid explanation that you would have accepted; but do not learn from it either, as a judge *has only what his eyes see . . .*.²⁷⁸

In this text, Rava instructs his students to avoid replicating his decisions when they observe a potential challenge, encouraging them to instead approach him to uncover his reasoning; should he find his reasoning was flawed, he would retract the ruling.²⁷⁹ Additionally, Rava warns his students to avoid replicating his rulings after his death—a time when he would be unable to adapt the ruling to new circumstances—invoking the injunction, “the judge has only what his eyes see.”²⁸⁰

In a careful treatment of this phrase across rabbinic literature, Yuval Sinai attributes this understanding of the dictum to the Babylonian sages exclusively.²⁸¹ This phrase first appears in the Tosefta,²⁸² coming not as an inspiring note on the subjectivity of legal rulings, but as an attempt to alleviate the potential stress or anxiety felt by judges that might dissuade them from judging in the first place.²⁸³ In order to provide a sense of insurance and assurance, the Tosefta presents this expression, derived from the notion that God sits with judges in the midst of their judgment.²⁸⁴ In Palestinian sources, Sinai argues, this phrase discussed “post factum dispensation from punishment for a mistaken ruling granted to the judge who has only what he can see to rely on in judging.”²⁸⁵ In contrast, Babylonian

²⁷⁸ Babylonian Talmud, Bava Batra 130b-131a (emphasis added).

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Yuval Sinai, *The Religious Perspective of the Judge's Role in Talmudic Law*, 25 J.L. & RELIGION 357, 376 (2009).

²⁸² See *Tosefta*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Tosefta> (last visited Feb. 9, 2022) (defining *tosefta* as “addition”).

²⁸³ Tosefta 1:4.

²⁸⁴ *Id.*; Sinai, *supra* note 281, at 368.

²⁸⁵ Sinai, *supra* note 281, at 367.

sources—the appearance of this phrase in the Babylonian Talmud—“invoked this dictum to emphasize the judge’s duty to rely on his own discretion even when it contradicts the view of his teacher-rabbi or other sources.”²⁸⁶ This origin story makes the Babylonian account all the more radical. When refracted through the Talmud—and, in particular this specific narrative—this phrase is given a whole new set of meanings. We might even say that the law is recast in a new narrative through the stories, and interpretations of a new committed community. In this narrative, the phrase is about the need for individual judges to rely on the information in front of them, to utilize their own reasoning(s) rather than simply follow the rulings of their teacher.

Gershom ben Yehuda (“Rabeinu Gershom”), a halakhist in the tenth and eleventh centuries, comments on this story in the following way: “This is to say, according to what I have seen in this minute that I offered a ruling, lest in another time it would have appeared to me in another way.”²⁸⁷ In other words, a ruling is non-transferrable; the conclusion made about this case in this particular instance was unique to that instance, and perhaps another moment—or another experience—would have led to a different conclusion.²⁸⁸ Samu’el ben Meir (“Rashbam”) suggests in his commentary to this passage that Rava’s instructions additionally apply to “a matter of judgment based on logical reasoning (*sevara*) as well, in which the judge must be guided by the dictates of his mind (*mah she-libbo ro’ehu*).”²⁸⁹ This interpretation expands the Talmudic dictum to include the emotional, moral realities of both the judge and the case itself.²⁹⁰ The principle, “the judge has only what his eyes see,” as it has been understood captures the need to contextualize *psak* within a specific story or experience, recognizing that these contextual factors both contribute to a specific outcome and give that outcome a specific meaning. This is a radical force within *halakha* that honors context, specificity, story, and relationship as central to law-making.

Perhaps, though, Cover can offer an additional expansion of the parameters of this foundational *psak*-principle. Cover’s theories

²⁸⁶ *Id.* at 368.

²⁸⁷ Bava Batra 130b-131a. (*construed in Rabeinu Gershom’s Commentary*).

²⁸⁸ *See also*, Bava Batra 130b; Deuteronomy 17:11.

²⁸⁹ Rashbam, Commentary, Bava Batra 131a (using a translation from ROTH, *supra* note 277, at 84).

²⁹⁰ *Id.*

remind us that the law is situated within the narratives and interpretations of communities that imbue it with meaning. This meaning is—at its best—creative inasmuch as it drives and shapes the building of new worlds and that it is aspirational as it is animated not by what is but by what should be. If these attributes are present in the process of making, shaping, and living law, what the judge must see is not simply what is in front of her.²⁹¹ Instead, she must see all of what Cover argues that is happening in law—the fullness of the real, the aspirational, the creative, the new worlds to be shaped in this moment of halakhic praxis and lived law.²⁹² Cover presents a path forward to those with firm ideological commitments that, for now, sit outside of what has been deemed halakhic: the material that shapes the interpretive community, who then shape how law is understood, is now read into the *halakha*. The previously unnamed and unrecognized feminist sensibilities, political ideologies, or specific commitments to liberation are essential lenses through which any community is interpreting and embodying the law.²⁹³ This is perhaps one of the most prominent examples of Cover's predilection to see ordinary people or citizens as legal meaning-makers.²⁹⁴ As such, Cover offers an invitation to Heterodox halakhists to demonstrate—rather than hide—our ideological commitments. Self-consciously doing this would honor the narratives that others might deem “extra-legal” as *a central part of the legal process* and move us toward a fulfillment of the law as it is intended to be lived out and interpreted.

This is, at least in part, we believe can shift *psak* from an imperial force of world-maintaining into a flourishing, creative source for world-building.²⁹⁵ The Heterodox halakhist does not ask the positivist questions of her peers: Can this be done? Can I find this in the existing language of the past? Instead, she is equipped with a new set of questions to ask: What response is needed from me to nurture the liberated, sacred world that *halakha* aims to engender? How can I use frameworks that are meaningful to the community I serve as I respond to the case in front of me? What realities, stories, and ideologies do I need to understand in order to fully see this case?

²⁹¹ *Id.*

²⁹² This assertion draws on our analysis of Cover, as well as Rashbam's interpretation of this phrase.

²⁹³ See Washofsky, *supra* note 83, at 40 (referencing Cover, *supra* note 102, at 4-5).

²⁹⁴ Cover, *supra* note 102.

²⁹⁵ See Adler, *supra* note 81, at 41.

A new set of data is honored: the lived experiences and practiced discourse of the community. For Heterodox Jews, who actively and with self-awareness pursue epistemologies, methodologies, and ideologies beyond what has been deemed the halakhic canon, this expanded principle provides a path towards honoring their lived realities. These ways of knowing are not extra-halakhic, but are instead an essential part of our *halakha*. This is not a novel theory, but one that has been forgotten among many who hold halakhic authority. Halakhic process has always unfolded as *poskim* and communities locate paradigms or principles from the rabbinic sages in order to apply them to new contexts. Through this process, such paradigms and principles are expanded and imbued with new subjective meanings over time as they incorporate new contexts and stories. Cover helps us to restore this approach, providing validation and inspiration for those seeking to move beyond *halakha* as a closed system with a set of fixed data.²⁹⁶

We might use this principle to help ourselves consider the following: What might it look like to authentically see our communities as embodying legal truths that *poskim* are not merely responsible for ordaining through positivist claims? What epistemologies and political commitments are we missing—or, perhaps even hiding—from our *psak* in favor of erroneously devised attempts to enact formulaic ruling? Were we to take these approaches seriously as the foundation of new halakhic paradigms? What might an authentic democratization of *halakha* look like?

One could further argue that this principle demands *poskim* are in and of the community themselves. That they see not only the case in front of them, but also the lived reality that it represents. With such a principle at the core of *psak halakha*, we may wonder what this says about the necessary positionality of *poskim*. Perhaps, one cannot offer *psak* about that which they have not truly seen, understood, or personally experienced for themselves. This would, necessarily, remove any instance of objectifying individuals, experiences, or lived realities in *halakha*; there would be then no instance of human “objects,” only subjects and actors.

²⁹⁶ TUCKER, *supra* note 84, at 19.

B. The Heart Alone Knows Its Bitterness

A Heterodox *halakha* informed by Cover therefore requires new approaches to *psak halakha*. As we have seen, such an approach would center the community being addressed, incorporate “extra-legal” material, and honor subjectivity and deeply held epistemologies as legitimate and essential to the halakhic process.²⁹⁷ In this frame, the questions of authority and expertise are paramount. For an exploration of these realms, we turn to a second principle that emerges as a refrain in the Babylonian Talmud and, over time, has become a driving principle within the halakhic system that directly tackles the question of expertise, and where it is located.²⁹⁸ In the midst of a discussion regarding the prohibition to eat on Yom Kippur, the Mishnah—the earliest rabbinic legal code—discusses several exceptions to these prohibitions, including the following case: “With regard to a sick person on Yom Kippur, they feed him according to experts (*beki'in*). If there are no experts present, they feed him according to himself until he states he has been sufficiently fed.”²⁹⁹ The ruling of the Mishnah seems clear: one who is ill on the holy day of Yom Kippur is permitted to eat, ideally under the supervision and guidance of a group of experts.³⁰⁰

In a robust analysis of this phrase and its halakhic implications, Ayelet Hoffman Libson suggests that the Mishnah’s commitment to elevating the expertise of rabbinic sages is in line with the self-interest of the rabbis who assembled the text, who “often emphasized the authority of experts in determining the law.”³⁰¹ This characteristic of mishnaic emphasis on expertise that enables the rabbis to claim a knowledge-based authority; their scholastic system placed knowledge

²⁹⁷ See Washofsky, *supra* note 83, at 39; TUCKER, *supra* note 84, at 20-21.

²⁹⁸ Babylonian Talmud, Yoma 82a, 83a.

²⁹⁹ *Id.*

³⁰⁰ Mishnah Yoma 8:5. While the term “experts” here at first glance may seem ambiguous, this specific phrase refers to those who have legal expertise within the rabbinic system. See Ayelet Hoffmann Libson, “The Heart Knows its Own Bitterness”: Authority, Self, and the Origins of Patient Autonomy in Early Jewish Law, 56 AM. J. LEGAL HIST. 303, 309 (2016). For examples of other instances when this term refers to a self-contained spectrum of rabbinic legal knowledge, see Babylonian Talmud, Berakhot 43b; Babylonian Talmud, Megillah 4b; Babylonian Talmud, Rosh Hashanah 29b; Babylonian Talmud, Sanhedrin 94b; Babylonian Talmud, Yevamot 48b.

³⁰¹ Hoffman Libson, *supra* note 300, at 309, 314.

of the law as the locus of authority, enabling them to “present their legal expertise as indispensable to navigating the complex web of *halakhah*, or Jewish law.”³⁰² Thus, rabbinic expertise reigns supreme in this Mishnah, as it is only in the absence of external rabbinic expertise that an individual can exempt herself from the prohibition against eating on Yom Kippur.³⁰³

Later layers of rabbinic discourse within the Talmud elaborate and deconstruct elements of the Mishnah’s claim, complicating the role of experts and expertise in relation to individual agency and self-knowledge.³⁰⁴ First, the early analytic layers of the Talmud substitute the term “expert” with *rofeh*, a doctor, an interpretive choice that dislocates the previously asserted legal expertise and subsequent of the rabbi.³⁰⁵ As a result of this language shift, this Talmudic layer shifts the locus of expertise from knowledge of the law to knowledge in the broad categories of health and wellness.³⁰⁶ The Talmud then presents a new scenario in which to play out this tension between individuals and external experts.³⁰⁷ If an individual claims that they need to eat on Yom Kippur and a doctor claims that eating is not necessary in this case, the Talmud—through the voice of an early amoraic sage Rabbi Yanai—declares that the individual is to be listened to, and is permitted to eat on Yom Kippur.³⁰⁸ The later editorial voice of the Talmud introduces an explanation for this ruling that bases itself in a verse from the book of Proverbs, “the heart alone knows its bitterness” (“*lev yodea marat nafsho*”).³⁰⁹ This verse, like our previous dictum, “the judge has only what his eyes see,” becomes a refrain throughout the Talmudic text. When placed into this context, this verse is utilized by the authors of Talmudic text to claim that individuals are the experts of their own experiences, as they put forth the notion that people know—and

³⁰² *Id.* at 309. Hoffman Libson’s work directly establishes the connection between this work and Robert Cover’s treatment of authority, both in this essay and in AYELET HOFFMANN LIBSON, *LAW AND SELF-KNOWLEDGE IN THE TALMUD* (Cambridge Univ. Press ed., 2018).

³⁰³ Mishnah Yoma 8:5.

³⁰⁴ Hoffman Libson, *supra* note 300, at 316-17.

³⁰⁵ *Id.* at 309; Babylonian Talmud, Yoma 83a.

³⁰⁶ Hoffman Libson, *supra* note 300 at 309; Babylonian Talmud, Yoma 83a.

³⁰⁷ Hoffman Libson, *supra* note 300 at 309; Babylonian Talmud, Yoma 83a.

³⁰⁸ Hoffman Libson, *supra* note 300 at 309; Babylonian Talmud, Yoma 83a.

³⁰⁹ Babylonian Talmud, Yoma 83a (citing Proverbs 14:10).

therefore, should have agency over—their behaviors and the judgements that implicate their bodies within the legal system.³¹⁰

The *stamma*, the editorial voice of the Talmud, does not stop here, but instead further elaborates on and elevates this refrain.³¹¹ With this verse in hand, the Talmud offers a radical rewriting of the Mishnah at the conclusion of our *sugya*:

This is what the Mishnah [should be read to] say: In what case is this statement [that one follows the opinion of the experts] said? When the one says “It is not necessary [that I eat].” But if he said “It is necessary,” there are no experts at all; they feed him according to himself, as it is stated: “The heart alone knows its bitterness.”³¹²

In this re-written version of this Mishnah, which originally prioritized the perspectives of outside experts, what was previously considered expertise is fully undermined in a case of stated, affirmative need from the individual. Hoffman Libson summarizes the evolution of this statement: “According to the Mishnah’s authoritative conception, religious choice must be determined by external specialists. According to a later conception, however, religious choice is an internal matter, placed in the individual’s hands; hence, only the individual can weigh the germane evidence and make the final decision.”³¹³

Here, we see echoes of Cover’s location of authority in the community of interpreters, utilized, and expanded upon by Tucker’s analysis. Those who are most directly implicated or impacted by a law or set of laws are understood as experts—legal expertise is not where

³¹⁰ Babylonian Talmud, Yoma 83a; Hoffman Libson, *supra* note 300, at 314-15. Hoffman Libson points to the way in which this verse from Proverbs may additionally carry connotations of guilt, suggesting that the patient is not only the only person capable of understanding their medical need, but also that they are “the only person capable of assessing the full physiological and religious consequences of her action, and therefore it is she who can make the decision to eat.” Hoffman Libson, *supra* note 300, at 315.

³¹¹ Babylonian Talmud, Yoma 83a.

³¹² *Id.*

³¹³ Hoffman Libson, *supra* note 300, at 315.

power must be located.³¹⁴ Instead, communities must give shape to the law through their behaviors and interpretation(s). This Talmudic dictum demands that we honor this process and understand the dislocation of expertise that it necessitates.³¹⁵

In this text, we find an emerging principle that elevates self-knowledge and individual agency, dislocating expertise first from scholarly judges to medical professionals, and then from both external groups to the individual agent.³¹⁶ As a result, expertise is now located in the individual as the halakhic actor and self-as-judge.³¹⁷ Rather than downplaying the radical nature of this text, later commentators and *poskim* expand this text in tremendous ways, as with our previous example.³¹⁸ Shlomi Yitzhaki (“Rashi”), the famed eleventh-century French commentator, furthers the dislocation of expertise, by arguing that when the Talmud text declares that in an instance when an individual requests that they be fed according to their own self-determined need “there are no experts at all” (*ein beki’utan klum*), which is to say that “their expertise is nothing.”³¹⁹ In other words, the category of legal expertise has been redefined and subverted entirely. As we have seen, Rashi and the Talmudic sages centered the expertise that is found within the person. In this text, authority is reclaimed from those who would seek to create *halakha* “About Us Without Us,” and agency is redirected to those directly impacted by the *halakha* itself to write the story.³²⁰

To some who would read this text more conservatively, this argument would seem to allow self-determination only in the context of a life-saving measure.³²¹ The notion of superseding a clear Torah

³¹⁴ TUCKER, *supra* note 84, at 19; Cover, *supra* note 102, at 4-5.

³¹⁵ Babylonian Talmud 83a. See Hoffman Libson, *supra* note 300, at 325.

³¹⁶ Babylonian Talmud 83a. See Hoffman Libson, *supra* note 300, at 325.

³¹⁷ Babylonian Talmud 83a. See Hoffman Libson, *supra* note 300, at 325.

³¹⁸ See Rabbeinu Tam as cited in Beit Yosef, Orach Chaim, Siman 618:1, who directly refers to those who are ill as “experts”; Teshuvot HaRadbaz 4:1138 (expanding this case to apply to medical needs beyond eating, including atypical medical solutions).

³¹⁹ Rashi, Commentary, Yoma 83a.

³²⁰ For the origin of this dictum, see ENCYCLOPEDIA OF DISABILITY “NOTHING ABOUT US WITHOUT US” (SAGE Publ’n, Inc. ed., 2021).

³²¹ See discussion in Arba’ah Turim, Orach Chaim 618:1; Hoffman Libson, *supra* note 300, at 307-08.

prohibition is well-established, and the conversation that asserts and codifies this principle, is merely inches away from this text on the same page of Talmud.³²² Lest we imagine that “the heart alone knows its bitterness” is a principle to be evoked only in a life-or-death situation, various halakhic codes explain why this is not the case.³²³ First, Yaakov ben Asher codifies in the *Arba'ah Turim*, a major medieval Spanish halakhic code, that the permission to eat on Yom Kippur need not be offered only when someone is on the brink of death.³²⁴ Rabeinu Tam, a prominent authority among the Tosafists in twelfth-century France, similarly disputes those who claim that this principle should be activated only in a life-or-death situation, introducing a powerful phrase:

[Rabeinu Tam] taught that the halakha le'ma'aseh to permit, and since holim are prophets or experts, since the patient knows that it is Yom Kippur or Shabbat, and he says “I need, and I cannot endure from my sickness,” they feed him even if the patients think they are not in [great life-threatening] danger.³²⁵

Several of these commentators and others follow the Talmudic text to its logical conclusion, extending the notion of individual agency regarding eating on Yom Kippur to pursuing broad forms of healing when they might conflict with other principles or prohibitions.³²⁶ When tracing this concept throughout history, we see the refrain “the heart alone knows its bitterness” restated in almost all of the later sources.³²⁷ This perhaps culminates in a sixteenth-century *teshuva*

³²² See, e.g., Babylonian Talmud, Yoma 83a. Mishnah Yoma, 8, 6-7, which appears on this same page under discussion, addresses life-saving measures that may be taken on Shabbat.

³²³ See, e.g., Tur, Orach Chaim 618:1; Beit Yosef, Orach Chaim 618:1.

³²⁴ Tur, Orach Chaim 618:1 (“A patient that needs to eat [on Yom Kippur], if there is an expert doctor who says If they do not give him food, it is possible his sickness will worsen for him and he will be put in danger, they feed him on the mouth [i.e. the account] of the doctor.” And it is not necessary that he should say perhaps he will die.”).

³²⁵ Beit Yosef, Orach Chaim 618:1.

³²⁶ For example, causing one to do a forbidden labor of Shabbat, see Teshuvot HaRadbaz 4:1138.

³²⁷ See, e.g., Perush HaRa'n, Commentary, Yoma 83a; Tur, Orach Chaim 618:1; Beit Yosef, Orach Chaim, Siman 618:1; Teshuvot HaRadbaz 4:1138.

from Rabbi David ben Solomon ibn Zimra (“Radbaz”) that uses the principle of “the heart alone knows its bitterness” to argue the permissibility of a specific case in which a doctor disagrees with a course of treatment requested by an individual.³²⁸ The *teshuvah* argues that in such a case, even if the course of treatment is somewhat irregular within the doctor's framework or if it is possible that the treatment could create some temporary physical harm, we must still follow the stated needs of the individual.³²⁹ “The heart alone knows its bitterness” is not simply a mantra about the essential power of individuals to dictate their medical needs when confronted with a disputing party. This statement, as we have seen, becomes an interpretive principle that we can utilize to articulate a truth at the center of a vision of a liberatory Heterodox *halakha* that attempts to center the needs, realities, experiences, and expertise of the community from which it emerges. When analyzed with Cover in mind, we can read this as an exemplary of the way in which *halakha* can be a world-building endeavor that emphasizes self-determination, agency, consent, and the necessity for *the* people to function as halakhic actors. This presents a fundamental transformation of the nature of authority and dislocating expertise from legal scholars, and specific law-makers to the community. The connections to Cover’s legal theory are numerous and bring Cover to life in new ways through this halakhic principle, including: a relocation of law-making to the community of interpreters, an incorporation of lived experience, centralization of story, and a narrative in which the law is given meaning.

C. Nothing About Us Without Us

Both of these applications take root in Cover’s framing and understanding of law and build on the fertile ground tilled by the previously-explored scholars: Rachel Adler, Tikva Frymer-Kensky, Mark Washofsky, and Gordon Tucker. These new applications add elements to the Heterodox halakhic discourse that are inspired by

³²⁸ Teshuvot HaRadbaz 4:1138.

³²⁹ *Id.* (“The general rule that arises from these words is that the heart alone knows its bitterness (lev yodea marat nafsho) is relevant whether it is a matter of eating, or it is a matter of medicine, but there is a division as to whether he said ‘I need to eat’ even if the doctor said that the food will cause him damage, they listen to the patient, for the heart alone knows its bitterness (lev yodea marat nafsho).”).

Cover, which we believe will continue to facilitate the growth of these approaches into a framework that is driven not only by scholars but also by the committed communities directly.³³⁰ We have read our first principle, “the judge has only what his eyes see,” as demanding that a judge must have a full understanding of any given situation or experience in order to rule including narrative, context, lived experiences, and ideological commitments, leading us to erase objectivity and center subjective, relational, and contextual law-making. We have interpreted our second dictum, “the heart alone knows its bitterness,” as requiring us to locate expertise in the individual. This places agency, autonomy, and knowledge in the hands of the individual as an actor who determines their own reality rather than being subjected to the ruling of an expert on-high. Such a shift in the location leads us to uplift, elevate, and illuminate the expertise (*beki'ut*) that comes with an individual's own lived reality.

It is in the intersection of these perspectives that we come to see the ways in which *halakha* may embody the refrain “nothing about us without us,” a core principle that animates disability justice organizers and activists that speaks to the ways in which a *nomos* must be shaped by those who are most impacted.³³¹ *Psak* becomes an enterprise that can live into this dictum, with no halakhic reality being shaped through objectifying means. *Halakha*, when read through Cover by Adler, Frymer-Kensky, Washofsky, Tucker, and us, becomes a community-driven discourse. It requires law makers-and-shapers to be of the community itself; therefore, it visibilizes and uplifts the existing practices and commitments of the community as serious legal material while it incorporates the stories, commitments, and realities of the community. This reflects a core rethinking and restoration of *halakha* in which *nothing about us* can take place without *us*—the language and lives of the people are central, and those who are most directly impacted and implicated by *halakha* become halakhic actors.

This is not to say that there is no room for authorities, but it might instead cultivate a sensibility within communities that *halakha* is a collaborative process—one shaped by groups working together to reveal truths, experiences, and lived realities. “Judges” are those who are of and among the community; the role of the *posek* is transformed.

³³⁰ Cover, *supra* note 102, at 34.

³³¹ See JAMES I. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* (Univ. Cal. Press, 2000).

Instead of simply offering instruction—albeit with sensitivity, compassion, and openness in an ideal case—religious leaders and scholars must see their responsibility, not to regulate, but to empower. Poskim must demonstrate knowledge, supporting community members with the frameworks and pathways that would enable them to reach their own conclusions. With this frame, a scholar would never consider authoring a *teshuva* about an experience which they had not personally lived and would instead see their role as one of solidarity with those who have lived such an experience, as well as offer the tools, resources, and frameworks to empower individuals to construct a *teshuva*.

D. Case Study: Trans Halakha Project

These theories and ideologies—however compelling we may find them—live only in the realm of narrative until they are fully brought to life through the world-building endeavors of a community. The approaches to Heterodox *halakha* that we have described thus far are the ideologies that ground the *Trans Halakha Project*, a recent initiative that “aims to curate existing resources that have been developed for trans Jews and by trans Jews, identify new areas of *halakha* that have yet to be developed, and finally to create opportunities for developing new halakhic literature and practice guides that speak directly to these areas of need.”³³²

In their own words, co-founders of the *Trans Halakha Project*, articulate the need for this project as follows:

As a trans rabbi with over a decade of experience supporting LGBTQ identified Jews directly and by working for a more celebratory Jewish community, I am excited by the possibility of providing concrete resources to our community. Trans Jews want to know how their lived experience can reflect the best of the Jewish tradition, how that tradition can be used to bring meaning into their lives. Addressing their questions directly in a way that is grounded in tradition and my own lived experience as a trans person is the best way to provide affirming and joyful pathways into Jewish

³³² *Trans Halakha Project*, *supra* note 23.

expression. This work is necessary in continuing the work of building a Jewish community and tradition that celebrates all Jews, regardless of their gender.³³³

A cross between a community-organizing endeavor and a halakhic think-tank, this project aims to specifically uplift the lived experiences, stories, and interpretive commitments of trans Jews through three main focus areas: (1) elevate and disseminate *minhag* by compiling current practices, liturgy, and customs that trans Jews have developed and shared and increase access to these resources; (2) develop *she'eilot u'teshuvot* which identify core questions that trans Jews are asking about Jewish ritual and practice, assemble a team of trans responsa-writers, and collectively respond to these questions from their lived experiences; and (3) articulate new meta-halakhic frameworks by creating opportunities for trans students, and scholars to engage in explicit world-building endeavors.³³⁴

Each of these focus areas are built on the premises articulated throughout this essay, and particularly the principles elaborated upon in the earlier parts of this section. Most primarily and noteworthy is the fact that all the individuals involved in the project—including those who are compiling resources for the project, those who are codifying *minhag*, those who will author *teshuvot*, those who ask the questions being addressed in *teshuvot*—are trans and non-binary individuals; therefore, the community itself drives all aspects of the contours of the project.³³⁵ While several have endeavored to create halakhic pathways for trans individuals, often their approaches are driven by a sense of “solving problems”—locating the areas in which trans bodies and realities do not fit the status quo.³³⁶ Such questions are often asked—and answered—*about us* and *without us*, and overwhelmingly reflect

³³³ *Id.*

³³⁴ Becky Silverstein, *Hot Off the Shtender: The Trans Halakha Project: Moving Us Toward the Next Unrecognizable Future*, SVARA: TRADITIONALLY RADICAL YESHIVA (2021), <https://svara.org/hot-off-the-shtender-the-trans-halakha-project-moving-us-toward-the-next-unrecognizable-future>.

³³⁵ Laynie Soloman & Becky Silverstein, *Euphoric Halakha for and by Trans Jews*, LILITH MAG. (2021), <https://lilith.org/2021/05/trans-halakha-project-an-interview-with-rabbi-becky-silverstein-and-laynie-soloman>.

³³⁶ Laynie Soloman, *Hot Off the Shtender: Towards Halakhic Euphoria*, SVARA: TRADITIONALLY RADICAL YESHIVA (2020), <https://svara.org/hot-off-the-shtender-towards-halakhic-euphoria>.

the language, assumptions, ideologies, and experiences of cisgender people about trans and non-binary people.³³⁷

Emphasizing the ways in which lived experience is essential to give *halakha* shape, meaning, and trusting the expertise of the people this project attempts to serve, the *Trans Halakha Project* concerns itself with the explicit questions being asked by transgender and non-binary Jews of other transgender and non-binary Jews.³³⁸ After a public launch in the early months of 2021, the *Trans Halakha Project* distributed a survey to be filled out by trans and non-binary Jews to gather information about the practices, ideologies, assumptions, and commitments that trans Jews held—about *halakha* specifically and about Jewish life, and practice more broadly—from their specific gendered and embodied experiences.³³⁹ These questions form the basis of the material to be addressed through the *she'eilot u'teshuvot* that will be answered by a team of trans Jews of wide-ranging backgrounds who are passionate about expanding and shaping halakhic discourse.³⁴⁰ Additionally, this project provides pathways for those who previously did not identify as orienting toward *halakha* in their Jewish life and practice.³⁴¹

The potential of this project, though still in its early stages, not only creates pathways to *halakha* that are shaped for and by transgender and non-binary Jews, but *also* models new ways of halakhic world-building that can be applied more broadly across identity groups and communities. New forms of liberatory Heterodox *halakha* may, in future moments, see this model as a worthwhile endeavor inasmuch as it: appreciates and uplifts *minhag* as a community-driven way of shaping *halakha*, develops *teshuvot* for and by trans people, and articulates new narratives that help give shape to *halakha* born out of and deeply reflecting trans ways of being, thinking, and living. Each of these attributes of the *Trans Halakha*

³³⁷ *Id.*

³³⁸ Laynie Soloman & Becky Silverstein, *Becky Silverstein, Laynie Soloman: Judaism Unbound Episode 273 - Trans & Jewish World-Building*, JUDAISM UNBOUND (2021), <https://www.judaismunbound.com/podcast/episode-273-becky-silverstein-laynie-soloman>.

³³⁹ Soloman & Silverstein, *supra* note 335.

³⁴⁰ Laynie Soloman, *Hot Off the Shtender: Revealing and Transforming Torah*, SVARA: TRADITIONALLY RADICAL YESHIVA (2021), <https://svara.org/revealing-and-transforming-torah>.

³⁴¹ Soloman & Silverstein, *supra* note 335.

Project all attempt to model the ways in which we might create and tend to communities that take on a liberatory approach to Heterodox *halakha*. Through our appreciation of this model, we do not intend to convey that *halakha* must be exclusively shaped by affinity groups with shared identities. We understand and expect that communities can and do engage in halakhic processes with mixed identity groups that must include significant input from participants who are members of the impacted identity.

VII. CONCLUSION

Robert Cover offers an antidote to halakhic discourse that has been an expert-driven, imperial discourse that aims to maintain, preserve, and transmit. With Cover in hand, Heterodox halakhists—along with those beyond the Heterodox world who are moved to incorporate Cover’s analysis into their communal discourse—can ground themselves in a vision of *halakha* that is creative, pluralistic, democratic, aspirational, and communitarian. Cover’s anti-authoritarian, world-building halakhic paradigms create pathways for those who seek to dislocate halakhic authority as it has been understood and enable communities to claim authority and agency over their own ability to create and shape halakhic discourse.

As we have seen, Cover’s impact on Heterodox *halakha* has already been significant. Rachel Adler, Tikva Frymer-Kensky, Mark Washofsky, and Gordon Tucker have invoked Cover as a source in which to ground their transformations and adaptations of halakhic life and discourse. They each offer reflections of an approach to *halakha* as it could be, imagining alternative approaches to Jewish law-making. Building on these analyses, we offer two halakhic principles, reimagined and restored through Cover’s jurisprudence — “the judge has only what his eyes see,” and “the heart alone knows its bitterness”—which, when taken together, dislocate notions of authority and expertise in law-making, and embody a commitment to the popular refrain “nothing about us without us.”