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Zadoff on Kwall: A Historian's Critique

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ZADOFF ON K WALL: A HISTORIAN’S CRITIQUE

*Ethan Zadoff**

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INTRODUCTION

The relationship between law and culture is a complex, dynamic, variegated, and multifaceted accord, an entanglement that belies the traditional dynamic of categorical distinction that, many posit, lies at the center of the two amorphous terms. Increasingly over the last decade and a half, scholars, particularly legal scholars, have started to reconsider the complexities of the legal in social and cultural environs, partially as a result of interdisciplinary methods of cultural theory, which have permeated the guarded borders of legal studies. Roberta Kwall’s article titled “The Cultural Analysis Paradigm: Women and Synagogue Ritual as a Case Study” in the December 2012 issue of the *Cardozo Law Review* follows in this general trend and offers a perspective and road map for identifying the relationship between Jewish law and culture—while weaving through elements of legal theory.¹ Over the coming pages, I seek to offer a number of thoughts concerning Kwall’s methodologies, theoretical constructs, fact structures, and perspectives concerning the utility of a law and culture approach. Ultimately, I propose ways to better refine the methodologies for transformative utility for use in particular historical circumstances.

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¹ Roberta Kwall, *The Cultural Analysis Paradigm: Women and Synagogue Ritual as a Case Study*, 34 *CARDOZO L. REV.* 609 (2012).

I. KWALL'S ARGUMENT AND ITS THEORETICAL BACKGROUND

As her point of departure, Kwall frames the issues around the reinvigorated and transformative discussions on cultural analysis and law. She suggests, in similar fashion to a host of contemporary scholars writing in the context of various genres of law, that Jewish law and Jewish culture cannot be understood as separate or distinct entities.² Culture inevitably influences the formation and interpretation of law and law invariably influences the culture from which it has been produced. Kwall proposes to study the “synergies” between law, culture, and tradition by undertaking an analysis of the development of laws concerning women’s participation in the ritual synagogue service, particularly the Torah reading service. She argues that exclusion of women from participation in the service and the almost unanimous claims by Halakhists against women’s role are the results of entrenched cultural sensibilities—not from a clear-cut or unambiguous construction of legal parameters. Notably, significant ambiguities in the legal constructs persisted from late antiquity through the late middle ages, at which time a consensus developed in favor of banning women from receiving *aliyot*. This example demonstrates one instance of how the legal reality formed as a response to culture influences.

To better understand the development of these laws—and the issues of how a cultural tradition can maintain authenticity within a conceptual framework wider than the regnant formalistic construction of Jewish law—Kwall suggests building an analytical model of the legal process based on a cultural analysis paradigm of law. To these ends, the cultural analysis framework can be useful not only for understanding laws concerning women and public Torah reading, but also for unpacking the ways the relationship between law and culture can inform contemporary normative applications of laws where tensions may exist between modern sensibilities and practices steeped in alternative cultural perspectives. In this regard, Kwall’s analysis purports to offer elements of classical historicism and aims to achieve concrete, normative ends through the framework of an alternative historical jurisprudence.

Kwall raises important methodological issues that have been discussed at length by a whole host of scholars—although not within the strict context of Jewish law—whom she acknowledges throughout the article. She poses some of the basic questions of a law and culture approach, positing and unpacking perhaps the most important question of cultural analysis, namely “how to talk about and interpret law in cultural terms.”³ To construct her theoretical and methodological base and to devise a theory of law and culture, Kwall draws on the work of some of the most important thinkers and their contributions on the topic, including Naomi Mezey, Austin Sarat, Paul Kahn, Robert Cover, and Robert Post. The essential features of Kwall’s approach, indeed any approach to law and culture, must be situated within these historical and theoretical studies, which themselves draw on a long line of both cultural and legal theory.

A brief review of one of the works cited by Kwall, an article titled *New Directions: Law,*

² See *id.* at 612; see also Balazs Fekete, *Cultural Comparative Law?*, in LEGAL AND POLITICAL THEORY IN THE POST-NATIONAL AGE 40–51 (Péter Cserne & Miklós Könczöl eds., 2011) (discussing the influences of the contemporary renaissance, specifically classic romanticism, the work of Savigny, and early twentieth century scholars Kohler and Vinogradoff, but not distinguishing between nineteenth and early twentieth century views of culture and new models and theories of the relationship between law and culture).

³ See Kwall, *supra* note 1, at 619.

Culture and Cultural Appropriation by Sally Engle Merry, provides a short excursus into the broader methods of law and culture that underlie Kwall's approach. Merry raises a number of fundamental theoretical and methodological issues concerning law and culture and uses them as springboard to analyze the historical developments of legal and cultural systems of the nineteenth century colonial project of the Hawaiian Islands.⁴ While many of the early anthropological perspectives of law were built on a theory of culture that was understood as "integrated, stable, consensual, bounded, and distinctive,"⁵ Merry points out that over the last two decades, the meaning of culture has come under intense scrutiny. Instead of a reified notion of a fixed and stable set of beliefs, values, and institutions, culture is now understood as a flexible repertoire of practices and discourses created through historical processes of contestation over signs and meanings. In fact, culture is produced continuously and reproduced at particular historical times and places within both global and local movements. Merry illustrates this by arguing that the Hawaiian Islands of the nineteenth century were not the site of isolated cultural systems, but "lay at the crossroads of a dizzying array of peoples engaged in the expansion of capitalism and European imperial power."⁶ In order to portray this negotiation of power, Merry uses the example of legal transplantation and the appropriation of alien legal systems, most notably Protestant and Anglo-American law, in nineteenth century Hawaii as way of understanding social transformation that is attentive to agency, competing cultural logics, and the complexity of social fields. The case of legal transplantation in nineteenth century Hawaii shows that culture is contested and historically changing—subject to redefinition in various and multiple social spheres. Merry sketches an in-depth picture of the specific historical circumstances of a nineteenth century imperialistic moment. More importantly, however, she successfully delineates, or at least describes, the complex relationship between law and culture through a historically specific context.

I mention Merry's article not as an indiscriminate distraction to the article under analysis, but rather as a useful point of departure and, more importantly, as a constructive comparative foil to Kwall's methods and goals. Kwall attempts to address the development of a specific legal practice, namely women's participation in the Torah reading service, and the complexities of law making and judicial deliberation by framing the legal parameters within a cultural, some would say historical, analysis framework. The process of identifying the formation and implementation of law in culturally specific contexts is a messy, necessary, and, some would even say, self-evident venture. And yet, where Merry succeeds in establishing a historical and theoretical basis for analyzing the complex interplay among law, legal systems, and cultural values, Kwall ultimately falls short.

Let me state at the outset of my critique that on the whole, I agree with Kwall that a cultural analysis of law is necessary in order to move beyond the regnant formalism that defines much of the discourse of both interpreters and shapers of Jewish law and Jewish legal culture. In this light, the criticisms presented in this Article should not be taken as an unsympathetic or hostile evaluation of Kwall's broader perspective, but rather as suggestions of ways to better and to improve a law and culture approach to Jewish legal history.

I offer two related lines of criticism. The first relates to the methodology that Kwall constructs as the underlying essence of the argument. In Section II, I seek to problematize

⁴ Sally Engle Merry, *New Directions: Law, Culture and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 576–78 (1998).

⁵ *Id.* at 576.

⁶ *Id.* at 578.

Kwall's assessment and reading of the terms "culture" and "law and culture" and argue that both concepts need to be better defined and explicated in order to conceive of a clear and useable law and culture construct. The lack of a clear assessment of terms is considered further in Section III where I argue that in order to make an argument about the contextual nature of law and culture it is necessary to delineate specific contextual frameworks and understand the development of the legal in these specific contexts. The second related criticism concerns the overall construction of the argument and the article's presentation of the facts. In addressing Kwall's goal of substantive change in the process of determining acceptable legal practice, I suggest that in order to perceive the contextualization of the legal in specific cultural circumstances, the object of inquiry must be the text itself and its association with various modes of cultural circumstance. The point of my critique is not to question the broader goal of better understanding the relationship between law and culture and how this informs the normative application of laws; rather, my hope is that they can assist in refining the basis of analysis.

II. THE MEANING OF CULTURE

James Clifford's frequently cited expression of the indefinite dimensions of culture that "[c]ulture is a deeply compromised idea I cannot yet do without," undoubtedly gives credence to the notion that culture means different things to different people.⁷ There are many ways to examine culture and many ways to put it to work. To be sure, discussions and interpretations surrounding the nature of culture are not twentieth century phenomena; culture as an analytic topic has been described, questioned, deconstructed, assumed, and challenged since the middle of the nineteenth century. But over the last two decades, as Merry points out, culture has been redefined as a flexible repertoire of practices, pushing aside meanings that signify coherence or singular structures. In order to discuss culture and to expound on its vast reaches, one has to assume and be proficient in at least a modicum of competency in the *basis of the inquiry*. This is not a semantic point; definition and explication of terms are important particularly when describing somewhat amorphous concepts. Culture, and its constituent elements, can be described without having to resort to antiquated formalistic constructs that emanate rigidity on the one hand or represent the totality of lived experiences on the other. Kwall's analysis does make clear that she is familiar with the fundamental elements of cultural studies. But, she eschews an opportunity to define, describe, or detail the broader array of elements that characterize the cultural or to understand it in historically bounded circumstances.

Culture is described, as "fluid and deeply comprised," echoing Clifford's remark, nay warning, about the nature of understating the meaning of culture.⁸ However, a framework beyond generalities for perceiving the cultural is necessary in order to define the parameters with which to understand the fact structures as well as the somewhat vague notion of cultural analysis. In order to perceive the cultural within the Jewish and particularly within the Halakhic framework, a number of critical points must be addressed, including: the space that

⁷ JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH CENTURY ETHNOGRAPHIC, LITERATURE, AND ART* 10 (1988).

⁸ "Although the classic view of culture understood culture as coherent and self-contained, cultural studies experts today understand culture as fluid and deeply comprised." *Kwall, supra* note 1, at 619.

culture occupies as either an external or internal nature—and thus either a comparative foil or a correlated element that falls along the broader spectrum—or someplace in between relative to the worldview of Halakha; the possibility of Halakha establishing its own cultural forms and meanings; the interplay of various and fluid form of culture within a singular legal system; the relative homogeneity of culture under specific circumstances; the contours of culture, meaning where does culture begin and end?⁹ Ultimately, Kwall leaves many of these points unaddressed. The multiplicity of values, meanings, and significations that characterize the cultural, all of which are negotiated from both external and internal perspectives in non-uniform ways, is lost in Kwall's assessment through her rhetoric of classifying the cultural as something external to the law. Simply put, culture does not work in linear forms and progressions; the exploration and exploitation of the cultural must extend beyond formal or even conscious borders.¹⁰

A definition or description of culture or the cultural, beyond its rather inconsequential efficacy as something dynamic and evolving, whether it stands at the center of the analysis or is used as a peripheral category, can always benefit from engaging with established theories and prior attempts to analyze its constitutive nature. Naomi Mezey takes culture to mean the “porous array of intersecting practices and processes that emerge from within and beyond its borders” and goes on to say that the “heterogeneous workings of culture . . . derive from differences of age, gender, class, race, and sexual orientation.”¹¹ Pierre Legrand identifies culture as referring to the “framework of intangibles within which ascertainable interpretive communities operate and which have normative force for these communities even though not coherently and completely instantiated.”¹² Legrand acknowledges that definitions of culture are unsatisfactory and his description of the cultural and its relationship to law requires a good deal of explication. For Legrand, culture is a category which allows one to point to the posited law not only in terms of its materiality but also its level of meaning. This understanding for Legrand, is created at the individual level. The site for cultural exploration is not an external perspective, but one very much internalized and negotiated through the individual actor. Nevertheless, he also acknowledges the difficulties in assessing the cultural and asks an important question of how does cultural work, while delineating the relationship between the individual, society, and cultural persuasions, both past and present. Legrand acknowledges the difficulties but attempts to analyze them. The cultural, as an interpretive device, becomes operative as the individual acts as the agent of the cultural and it is at this point that the cultural can be realized. Indeed, engaging with theories, definitions, descriptions, and analysis can help delineate a conceptual grounding which is useful in fashioning a baseline perspective for identifying the nature and operative elements of the cultural, without necessarily resorting by default to deflated gestures and ideas.

⁹ A number of chapters in *Cultures of the Jews*, for example, imply the claim that there were many Jewish cultures and each one was more closely tied to its geographic and chronological cultural context than to Jewish culture in the past or the present. See *CULTURES OF THE JEWS: A NEW HISTORY* (David Biale ed., 2002).

¹⁰ See Pierre Legrand, *Comparative Legal Studies and the Matter of Authenticity*, 1 *J. COMPARATIVE L.* 365, 376 (2006).

¹¹ See Naomi Mezey, *Law as Culture*, 13 *YALE J.L. & HUMAN.* 35, 43 (2001).

¹² Legrand, *supra* note 10, at 374.

III. LAW AND CULTURE RECONSIDERED

The substantive and theoretical foundation of Kwall's approach is a welcomed site for sore eyes studying Halakhic maxims and interpretations within the overly formalistic cognitive framework of Jewish law. Kwall, at the outset of Section I, readily acknowledges that a "law and culture analysis . . . is varied and no unified cultural analysis approach to the law exists."¹³ She then proceeds to identify concerns that permeate the relationship between law and culture. Kwall considers five basic elements of a "cultural analysis paradigm": power relationships; contextualization; contestation; multiplicity of values; and the interrelationship between law and culture. Certainly, these five elements cited represent core and foundational perspectives of a law and culture paradigm. But as the conceptual bases of a theory, each of these elements needs to be refined and constructed in specific contexts in order to be developed for a workable or useable paradigm. One cannot simply combine or describe constitutive elements or characteristics of a law and culture approach and render it a usable (or complete) paradigm. Each element under analysis requires explication within broader contexts. Whether these contexts are historical, sociological, political, legal, or a combination, their meanings alter based on the theoretical context. Pierre Legrand, for instance, writes that "law-as-culture" is the "framework of intangibles within which an ascertainable legal community . . . operate[d] and which organize[d] . . . the identity of such legal community as [a] legal community."¹⁴ Mezey eschews the notion of a relationship between law and culture and instead takes an approach she identifies as "law as culture" fashioned on the constitutive theory of law.¹⁵ Merry, in the example cited above, looks at cultural contestation of law and seeks to understand the politics and power relations underlying the transplantation of American law to the Kingdom of Hawaii and its negotiation with other social and cultural categories.¹⁶

Kwall highlights a number of these elements and identifies the ways the complex relationship between these notions plays out. For instance, she discusses the deep contextualization of law and this concept seems to stand at the center of her approach.¹⁷ And yet, the paucity of attributive directions among Kwall's five categories is an obstacle to clearly articulate a comprehensive theory of law and culture. In Section I, Kwall describes elements of a law and culture approach, citing the constitutive nature of law as a medium that encompasses, instantiates and establishes culture while simultaneously raising Mezey's law as culture approach.¹⁸ But it is not clear whether this is what Kwall believes to be the underlying direction of a law and culture approach. Mezey questions the very notion of a "relationship" between law and culture, instead focusing on the symbiosis, the proverbial circular loop between law and culture. It is unclear whether the approach constructed by Kwall similarly questions the conceptual significance of a relationship between law and culture. Is law, as a constitutive element of culture, reflective, refractive, or possibly even disengaged with popular cultural norms? The article's perspective seems to reject the formalistic enterprise, thus discarding the disengaged capacity of the legal. But the question

¹³ Kwall, *supra* note 1, at 619.

¹⁴ Legrand, *supra* note 10, at 374.

¹⁵ Mezey, *supra* note 11, at 46–47.

¹⁶ Merry, *supra* note 4, at 588–99.

¹⁷ Kwall, *supra* note 1, at 635–38.

¹⁸ *Id.* at 624–26.

remains, how is the relationship construed and drawn out. In this context, Kwall refers often to a cultural analysis, but the contours of this analysis remain veiled throughout her article.

If a law and culture approach is deemed useful for explicating the development of legal phenomenon, and its contours can be devised into a cohesive and usable construct, an important methodological hurdle still remains. Namely, if law is indeed culturally construed, contextualized, and in negotiation with specific times and places, what is the methodological value in developing a broad paradigm of law and culture that spans hundreds, if not thousands of years of historical circumstance?¹⁹ In light of my aforementioned comments, an important methodological question should be posed: can one successfully develop a theory of law and culture that is so broad that it can span hundreds, if not thousands of years of historical circumstance? A more useful paradigm will focus on law and the legal as it relates to a specific culture or cultural circumstances in order to construe elements on a micro-historical level. Indeed, a cultural analysis of law requires the explication of the cultural and historical circumstance underlying the legal categories, opinions, and arguments. Culture is non-uniform and non-linear—it changes and can be construed through various social and cognitive structures, whether through the community or, as Legrand points out, through the context of individual agency:

the individual mind, although shaped by culture, is itself the principle agent of dissemination of cultural models . . . In other terms, culture exists as result of there being cognitive and affective apparatus within the individual, which is similar for a number of individuals who engage in sustained social interaction and communication amongst themselves.²⁰

Framed within Legrand's conception, and even within structures of the community, culture is malleable through specific situations. And yet for Kwall, the broad cultural premises with which the legal negotiates and interacts remains a constant and coherent structure—as she argued in regards to the dissociation of women and the relative gender inequality throughout history.

IV. LAW AND ITS CONTEXTS

Despite framing the argument of cultural analysis in contextual terms, Kwall demonstrates a constancy of cultural meaning within a *longue durée* of historical circumstance. Changes within the makeup of the cultural or broader elements outside of the immediate confines of “Jewish culture” are not considered. This omission renders the unfortunate consequence of Kwall fundamentally accepting the argument of cultural similitude, despite outlining the need, nay necessity, of viewing and understanding the cultural in specific contexts. In short, Kwall's article fails to recognize historical transformation prior the twentieth century, or differences and disparities in cultural perspectives, despite her calls for viewing change and context as necessary categories in the broader analysis. To cite Kwall,

[a]lthough the Jewish tradition's [] resistance to feminist religious claims can readily be explained by the greater social culture of bygone eras, the present day

¹⁹ *Id.* at 626.

²⁰ Legrand, *supra* note 10, at 386.

situation is more complex. The themes of contextualization and contestation prominent in this cultural analysis paradigm are very much intertwined with that of power relationships. Cultural analysis sees law as a product of the human condition, grounded in specific historical contexts, rather than as an objectively neutral system. Significantly, the inevitable exercise of human judgment in the application of Jewish law produces the need for contextualization and the reality of contestation. The increased degree of contestation reflects the range of issues that are capable of being debated in modernity. *Prior to the Enlightenment, the Jewish community manifested a degree of insularity that minimized to some degree the nature and level of contested discourse. American Jews in particular have demonstrated that enhanced opportunities for participation in the broader culture also create a greater likelihood of assimilation. Moreover, Jews are not alone in being influenced by the more liberal, socially democratic discourse that characterizes the modern worldview. This worldview is markedly different from that of the classical Jewish tradition. It is no wonder, then, that the overall context of currently contested issues looks very different in modernity than in any previous era of Jewish history*²¹

While Kwall is correct in describing the nature of the cultural as part of specific contexts, it is precisely these contexts that are missing from the article's broader argument—both in describing specific historical contexts and in allowing those contexts to illuminate the details of the legal discussions. As a result, by framing the argument in these terms, the article offers the reader a number of questionable premises. First, the article reduces historical and cultural development to singularities that echo over time without substantial or substantive change. Second, as a result, Kwall fails to qualify her reading and analysis of the development of legal perspectives though unique historical, cultural, and social circumstances, which have varying effects on the nature of the legal. Third, and finally, Kwall fails to integrate a deepening historiographical perspective detailing the development of Jewish communities as part of and engaged within varying and different cultural and social contexts. The insularity that Kwall claims defined the nature of the “classical Jewish tradition,” which minimized its negotiation and its reception of influence, is simply a false narrative.

Kwall posits a reductionist perspective concerning the nature of the “social culture of bygone eras” and the consequential nature of the relationship between law and the cultural. By claiming that Judaism asserted a deep resistance to feminist religious claims, Kwall also consolidates varying perspectives and historical difference into a hegemonic dominant discourse. Kwall broadly acknowledges the necessity of historical context, but the conversation stops there. In order to effectuate the relationship between law and culture, the cultural and the meaning of culture at a certain time and place needs to be identified and explicated in detail, and this is precisely the nuance that Kwall's article lacks.

For example, the cultural milieu of fifth century Sassanian Babylonia was different from the culture context of thirteenth century Germany. To answer the question of why the Babylonian Talmud posits a certain legal perspective requires researchers to identify not simply the internal legal culture and logic of the Talmud, but also to draw and analyze its interaction with and within the complicated nature of Sassanian Zoroastrian law and culture, as well as other cultural circumstances.²²

²¹ Kwall, *supra* note 1, at 646–47 (emphasis added).

²² The dynamic relationship between the Bavli and its Persian milieu has been noted by Yaakov Elman in a number of

To cite a more pointed example, in order to understand the differences in opinion of *Meir of Rothenberg* and *Rashba* one has to understand the differences in legal, social, and cultural hermeneutics that shaped thirteenth and fourteenth century Germany and Spain and their distinct specific legal contexts. An integral part of understanding the reasons why Maharam and Rashba developed their perspectives concerning women's participation in the prayer service must be part of a more pointed effort of conceptualizing the social and cultural roles women played in thirteenth century Germany and Spain. To be sure, *Maharam* and *Rashba's* positions concerning women reading the torah and receiving *aliyot* does not represent the totality of legal, social, and cultural circumstances of medieval women or their relative "position" within Jewish and non-Jewish society.

A fairly substantial historiography has developed around the question of women's lives in the middle ages. Indeed much has been written concerning the relative position of medieval women generally, Jewish women in particular, and the changing legal and cultural perspectives from the tenth to fifteenth centuries.²³ Elka Klein for instance, pointed to the various ways Jewish women in thirteenth century Catalonia acted in public spaces.²⁴ Elisheva Baumgarten challenges the common historical questions of "were women treated well?" and

studies as well as by a number of his students. See, e.g., Yaakov Elman, *Why Is There No Zoroastrian Central Temple?: A Thought Experiment*, in *THE TEMPLE OF JERUSALEM* 151 (Steve Fine ed., 2011); Yaakov Elman, *Babylonian Jews at the Intersection of the Iranian Economy and Sasanian Law*, in *THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS* 545 (Aaron Levine ed., 2010); Yaakov Elman, *Toward an Intellectual History of Sasanian Law: An Intergenerational Dispute in "Herbedestan" 9 and its Rabbinic and Roman Parallels*, in *THE TALMUD IN ITS IRANIAN CONTEXT* 21 (2010); Yaakov Elman, *Middle Persian Culture and Babylonian Sages: Accommodation and Resistance in the Shaping of Rabbinic Legal Tradition*, in *THE CAMBRIDGE COMPANION TO THE TALMUD AND RABBINIC LITERATURE* 165 (Charlotte Elisheva Fonrobert & Martin S. Jaffee eds., 2007); see also Shai Secunda, *The Construction, Composition and Idealization of the Female Body in Rabbinic Literature and Parallel Iranian Texts: Three Excursuses*, 23 *NASHIM* 60 (2012); Shai Secunda, *Reading the Bavli in Iran*, 100 *JEWISH QUARTERLY REVIEW* 310 (2010). Recently, a number of scholars have also attempted to identify the broader range of rabbinic literature in its immediate and broader cultural contexts. See Christine Hayes, *Palestinian Rabbinic Attitudes to Inter-marriage in Historical and Cultural Context*, in *JEWISH CULTURE AND SOCIETY UNDER THE CHRISTIAN ROMAN EMPIRE* 11 (Richard Lee Kalmin & Seth R. Schwartz eds., 2003); JEFFREY L. RUBENSTEIN, *THE CULTURE OF THE BABYLONIAN TALMUD* (2003).

²³ For the most recent studies in English, see Renée Levine Melammed, *The Jewish Woman in Medieval Iberia*, in *THE JEW IN MEDIEVAL IBERIA* 257 (Jonathan Ray ed., 2012); Sylvie-Anne Goldberg, *Is Time a Gendered Affair?: Category and Concept—"Women" and "Mitzvah"*, in *TOV ELEM—MEMORY, COMMUNITY AND GENDER IN MEDIEVAL AND EARLY MODERN JEWISH SOCIETIES; ESSAYS IN HONOR OF ROBERT BONFIL* 15 (Elisheva Baumgarten, Amnon Raz-Krakotzkin & Roni Weinstein eds., 2011); Avshalom Westreich, *Divorce on Demand: The History, Dogmatics and Hermeneutics of the Wife's Right to Divorce in Jewish Law*, 62 *J. JEWISH STUD.* 340 (2011); Judith Baskin, *Jewish Women in Ashkenaz: Renegotiating Jewish Gender Roles in Northern Europe*, in *LATE MEDIEVAL JEWISH IDENTITIES* 79 (Carmen Caballero-Navas & Esperanza Alfonso eds., 2010); Asunción Blasco Martínez, *Queen For a Day: The Exclusion of Jewish Women From Public Life in the Middle Ages*, in *LATE MEDIEVAL JEWISH IDENTITIES* 91 (Carmen Caballero-Navas & Esperanza Alfonso eds., 2010); Sharon Koren, *The Menstruant as "Other" in Medieval Judaism and Christianity*, 17 *NASHIM* 33 (2009); Victoria Hoyle, *The Bonds That Bind: Money Lending Between Anglo-Jewish and Christian Women in the Plea Rolls of the Exchequer of the Jews, 1218–1280*, 34 *J. MEDIEVAL HIST.* 119 (2008); Charlotte Newman Goldy, *A Thirteenth-Century Anglo-Jewish Woman Crossing Boundaries: Visible and Invisible*, 34 *J. MEDIEVAL HIST.* 130 (2008); AVRAHAM GROSSMAN, *PIOUS AND REBELLIOUS: JEWISH WOMEN IN MEDIEVAL EUROPE* (2004); Elisheva Baumgarten, *"A Separate People"?: Some Directions for Comparative Research on Medieval Women*, 34 *J. MEDIEVAL HIST.* 212 (2008); ELISHEVA BAUMGARTEN, *MOTHERS AND CHILDREN: JEWISH FAMILY LIFE IN MEDIEVAL EUROPE* (2004).

²⁴ Klein offers a telling perspective regarding women in medieval Spain:

A better way to understand what women's activities meant is to concentrate on well-documented cases which reveal patterns of behavior. Doing so underlines the inadequacy of the dichotomies of public versus private, or of women's will versus rabbinic expectations, and points towards other factors which must be considered. All forms of public activity were not equal; the private sphere of the home was not always inferior; and women could use as well as fight the limitations imposed by their status.

Elka Klein, *Public Activities of Catalan Jewish Women*, 21 *MEDIEVAL ENCOUNTERS* 48 (2006).

“was it good for women?” by introducing the concept of gender—the differences between the sexes that result from social conventions rather than biology—as a key analytical tool. Baumgarten challenges the functionalist approach, which holds that the gender hierarchy served an adaptive purpose. Baumgarten shows how the “traditional” and “established” underwent significant change over time. Her approach suggests that such social arrangements were the result of negotiation and even struggle and that change was a permanent feature of “traditional society.” So, for example, Baumgarten describes that women were primary participants in brit milah ceremonies (even as circumcisers), attended synagogue services regularly, and occasionally observed the mitzvot of talit and tefilin. From the period of Rabbi Meir of Rothenberg (thirteenth century), however, in parallel to Christian society, Jewish women’s ritual role was diminished and a stricter attitude was taken toward such women’s issues as parturient purity and the possibility of a nursing-divorcee remarrying. Baumgarten argues that the new restrictions on Jewish women reflect broader religious, economic, and social changes. Despite providing a more nuanced picture of women and their participation in a gendered sphere than simply delineating their role in the torah reading service this contextualization remains outside of the articles purview.

But, as Baumgarten notes, a Jewish historical context cannot be the only interpretative prism through which to perceive cultural and legal perceptions of women. One must look beyond the immediate circumstances of the Jewish community to their broader surroundings. Most recently, Megan McLaughlin has pointed to recent research of women and family life in Northern France during the eleventh and early twelfth centuries which has made it abundantly clear that public business was conducted within the confines of the household with women and other members of the family serving as active participants with agency and voice.²⁵ Scholars, including Jo-Ann McNamara, Pauline Stafford, Elizabeth Haluska-Rausch, and others have documented the regular participation of wives of kings, nobles, officials, and other powerful figures in the business of government, war, and feudal relations.²⁶ Indeed, women had direct access to political life and exercised influence and power.

Taking these perspectives into consideration, the researcher cannot construct a single or uniform perspective to represent the totality of views concerning a law or set of laws, particularly when the very nature of “the legal” dictates that it is shaped through interactions with immediate and broader cultures. Kwall’s article makes little effort to acknowledge specific moments of changing historical circumstances—or broader historical contexts of female participation in ritual services—and does not explain how to take these perspectives into account in order to build a law and culture framework. Understanding the complexities of women’s active participation in, for example, the circumcision ceremony during the high middle ages requires a law and culture approach founded on specific historical circumstances, taking into account the complexities of particular cultural and historical moments. Jewish law, and its interaction with and creation of culture, is complex and variegated. Halakah’s views of both men and women and the charges required of both vary in different historical circumstances. Positing a “social culture of the bygone era” that is resistant to feminist claims without differentiating cultural circumstance while suggesting a present day situation that is more complex is an evasive pretense to draw the past as a uniform, stagnant structure.

²⁵ See MEGAN MCLAUGHLIN, *SEX, GENDER, AND EPISCOPAL AUTHORITY IN THE AGE OF REFORM, 1000–1122* 4–5 (2010).

²⁶ See *id.* at 4 n.15.

As a corollary to the above discussion concerning the need to take into account different historical circumstances concerning women's participation in ritual and religious life in order to construe a law and culture paradigm, it is also necessary to understand the integration and negotiation of Jewish life and Jewish law within more general contexts. Kwall claims that modernity (defined in ambiguous ways) can assert a greater claim of contestation and debate between the cultural and Jewish law. As the argument is constructed, prior to the Enlightenment (not defined in any specific way)²⁷ the Jewish community—widely defined to encompass the totality of Jewry—manifested insularity that minimized the level of contested discourse. Jews and Jewish communities only negotiated with the “outside” contexts at certain undefined periods. Leaving aside the somewhat inconsistent tone of positing that “Jewish tradition resistance to religious claims can be explained by reference to bygone eras” and then asserting the historical insularity of the Jewish community, Kwall ignores the vast literature which studies the negotiation of lived Jewish experience in historical contexts, whether it be Jewish life under Roman, Islamic, Persian, or Christian contexts. Numerous studies have highlighted, in descript detail the ways Jews and Jewish communities engaged with and within their immediate and broader social and cultural circumstance and cast doubt that there was real isolation. While scholars of the previous generations emphasized elements of insularity concerning various facets of medieval Jewish life, they also acknowledged the ways in which negotiations occurred, particularly in the context of Halakah. Scholars, over the last two decades, have pushed these issues further, positing that Jews of Christian Europe internalized and appropriated the language, textual traditions, and religious practices of their surrounding culture, yielding a new way to appreciate the character of the Jewish community.²⁸ The general historiographical trend of the last two decades has focused less on the acts or periods of violence as a defining feature of the middle ages and more on the varying social, cultural, economic, and even intellectual borrowings and interactions. This is, of course, not to mention the numerous studies of Jewish life in the medieval Islamic world,

²⁷ On the varying perspectives and definition of the Enlightenment, see DAVID SORKIN, *THE RELIGIOUS ENLIGHTENMENT: PROTESTANTS, JEWS, & CATHOLICS FROM LONDON TO VIENNA* 1–23 (2008).

²⁸ For discussions in English of the ways medieval Jewish communities, particularly in Ashkenaz, interacted with and within their Christian cultural milieu, see BAUMGARTEN, *MOTHERS AND CHILDREN*, *supra* note 23; Elisheva Baumgarten, *Shared Stories and Religious Rhetoric: R. Judah the Pious, Peter the Chanter and a Drought*, 18 *MEDIEVAL ENCOUNTERS* 36 (2012); Elisheva Baumgarten, *Seeking Signs?: Jews, Christians, and Proof by Fire in Medieval Germany and Northern France*, in *NEW PERSPECTIVES ON JEWISH-CHRISTIAN RELATIONS* 205–25 (Elisheva Carlebach & Jacob J. Schacter eds., 2012); David M. Freidenreich, *Fusion Cooking in an Islamic Milieu: Jewish and Christian Jurists on Food Associated with Foreigners*, in *BEYOND RELIGIOUS BORDERS: INTERACTION AND INTELLECTUAL EXCHANGE IN THE MEDIEVAL ISLAMIC WORLD* 144–60 (David M. Freidenreich & Miriam Goldstein eds., 2012); Gad Freudenthal, *Arabic into Hebrew: The Emergence of the Translation Movement in Twelfth-Century Provence and Jewish-Christian Polemic*, in *BEYOND RELIGIOUS BORDERS: INTERACTION AND INTELLECTUAL EXCHANGE IN THE MEDIEVAL ISLAMIC WORLD* 124–43 (David M. Freidenreich & Miriam Goldstein eds., 2012); Marie Thérèse Champagne, *Walking in the Shadows of the Past: The Jewish Experience of Rome in the Twelfth Century*, 17 *MEDIEVAL ENCOUNTERS* 464 (2011); Jonathan Ray, *Whose Golden Age?: Some Thoughts on Jewish-Christian Relations in Medieval Iberia*, 6 *STUD. CHRISTIAN-JEWISH RELATIONS* 1 (2011); JONATHAN ELUKIN, *LIVING TOGETHER, LIVING APART: RETHINKING JEWISH-CHRISTIAN RELATIONS IN THE MIDDLE AGES* (2007); ISRAEL JACOB YUVAL, *TWO NATIONS IN YOUR WOMB: PERCEPTIONS OF JEWS AND CHRISTIANS IN LATE ANTIQUITY AND THE MIDDLE AGES* (2006); IVAN G. MARCUS, *RITUALS OF CHILDHOOD: JEWISH ACCULTURATION IN MEDIEVAL EUROPE* (1996); JEREMY COHEN, *SANCTIFYING THE NAME OF GOD: JEWISH MARTYRS AND JEWISH MEMORIES OF THE FIRST CRUSADE* (2004); ROBERT CHAZAN, *REASSESSING JEWISH LIFE IN MEDIEVAL EUROPE* (2010); Elliot Horowitz, *The Jews and the Cross in the Middle Ages: Towards a Reappraisal*, in *PHILOSEMITISM, ANTISEMITISM AND ‘THE JEWS’: PERSPECTIVES FROM THE MIDDLE AGES TO THE TWENTIETH CENTURY* 114–31 (Tony Kushner & Nadia Valman eds., 2004); Ora Limor, *Christian Sanctity—Jewish Authority*, 80 *CATHEDRA* 31, 31–62 (1997). For a recent re-examination of Jewish life under Byzantium, see *JEWS IN BYZANTIUM: DIALECTICS OF MINORITY AND MAJORITY CULTURES* (Robert Bonfil et al. eds., 2012).

which is ripe with instances of negotiation, eschewing insularity.²⁹ Furthermore, as a number of scholars have shown, contestation and negotiation between medieval Jews in Ashkenaz and their internal and external communities and cultural norms elicited varied responses and reactions from a whole host of medieval rabbinic scholars.³⁰ Jewish “engagement” with and within their cultural and social milieu was certainly operative during the early modern period as well.³¹ These studies make clear that social and cultural negotiation occurred, though sometimes through unconscious means, between Jews and “the other” and among Jews themselves.

The worldview of ‘classical Jewish tradition’ that Kwall utilizes is at its core deeply compromised. True, modernity presents various challenges and moments of contestation. But these challenges and areas of contestation are *different and unique* compared to the late antique or medieval experiences. They are not, however, completely innovative or new by presenting challenges to Jewish culture or allowing Jewish culture to interrogate and integrate unfamiliar cultural constructs. The medieval experience, or that of late antiquity, was defined not by insularity but by negotiation between Jews and the other. Jewish life, prior to the Enlightenment was not one of insularity, closed off to the rest of the world. This, I would argue, is a critical flaw in Kwall’s wide-ranging argument. If Jewish culture prior to the late eighteenth and nineteenth centuries is dynamic and fluid, then it must be studied as a situated cultural and legal construct and understood through the contexts of its historical time, place, and circumstance. Studying the development of Jewish law without these important cultural contexts reveals a problematic lack of understanding in the developmental progression of Jewish Studies scholarship. To claim a singularity in a cultural perspective and a singularity within Jewish law is to eschew the way Halakha has negotiated with different and changing cultural circumstances over the course of two millennia.

V. THE OBJECT OF INQUIRY

A cultural analysis of law must focus primarily on the substantive text of the law itself, its meaning, and the perception construed by those who shaped, questioned, and crafted the law. Kwall chooses in her article to focus less on an analysis of the primary sources itself, and more on an explication of the ways contemporary scholars understand the legal perspectives and their historical development. To be fair, the manner in which Kwall lays out the contemporary perspectives towards the nature of law and women’s participation in the synagogue service and the argument for a necessary change within the immediate cultural and legal framework, is a useful exercise and indeed, a highlight, of the article. The approach furthers one of the stated goals of the article: to lobby for a change in the conscious perspectives of contemporary jurists and to argue for necessary shifts in twenty-first century Jewish jurisprudence, specifically concerning women’s participation in orthodox ritual.

²⁹ One only has to mention S.D. Goitein’s magisterial five-volume work on Jewish communities in the medieval Mediterranean world. See 1–5 S.D. GOITEIN, *A MEDITERRANEAN SOCIETY: THE JEWISH COMMUNITIES OF THE ARAB WORLD AS PORTRAYED IN THE DOCUMENTS OF THE CAIRO GENIZA* (2000).

³⁰ See Ephraim Kanarfogel, *Rabbinic Attitudes Toward Nonobservance in the Medieval Period*, in *JEWISH TRADITION AND THE NON-TRADITIONAL JEW* 3–35 (1992).

³¹ Recent studies that chart this trend include ROBERT LIBERLES, *Jews Welcome Coffee: Tradition and Innovation in Early Modern Germany* (2012); DAVID RUDERMAN, *Early Modern Jewry: A New Cultural History* (2011); see also ROBERT BONFIL, *Jewish Life in Renaissance Italy* (1994).

But, in order to build a cohesive and convincing argument about the nature of a specific set of laws, particularly laws that developed over a period of time, the texts of the law, rather than the perception and analysis of contemporary scholars, need to be the center of the analysis. In using and developing a cultural analysis, context is key; not only the broader cultural currents, but the immediate literary context of the text itself. The cultural effect of the law differs if the legal discussion is constructed as a response to real circumstances or a set of theoretical constructs. For instance, Kwall's article cites the discussions of *Maharam* and *Rashba* concerning the relevance of the congregation's dignity concerning whether women could receive *aliyot* in a city in which all men were Kohanim.³² The immediate literary context of the text is important to identify—does the cultural affect the law differently if the law is constructed as a response to a “lived question of circumstance” or is the discussion somewhat more theoretical? The question that *Maharam* and *Rashba* debated is spurned from the Talmudic discussion of whether in a city filled with Kohanim, could two Kohanim receive *aliyot*, one after the other, taking into account the possibility of generating doubt of the validity of the second Kohen receiving the aliyah. According to Kwall, this discussion relates directly to *Maharam* and *Rashba*'s interpretations of the legality of women receiving *aliyot* in the synagogue. *Maharam*, “clearly interpreted the law to be sufficiently flexible to allow women to receive aliyot” despite the fact that he was not overly progressive concerning women and synagogue ritual.³³ For the *Rashba*, on the other hand, women cannot receive *aliyot*, and in the case at hand, the Kohanim would receive successive *aliyot*. Throughout this discussion, Kwall relies on Michael Broyde's interpretation and analysis of the sources; she fails to wade into an investigation of the texts themselves, cite the primary sources or relevant secondary sources on the legal strategies and hermeneutics of *Maharam* and *Rashba*, or discuss the immediate textual context of the discussions.³⁴ Both Kwall and Broyde posit that the expressed opinions of *Maharam* and *Rashba* wielded practical relevance. It remains to be seen whether this is in fact true or whether *Maharam* and *Rashba* were forced by an interpretative hermeneutic that must take into account the immediacy and meaning of the local text. These questions and the discussions of these issues are absent from Kwall's work. Indeed, these are a theoretical and fundamental set of questions that must be addressed.

The justification Kwall provides for a cultural analysis of a specified set of legal matters—that this subject exemplifies the utility of cultural analysis because no substantial legal barriers prevent a change in the law—is founded on the notion that rabbinic prohibitions are responding to a set of cultural realities. But the exact nature of these cultural realities remains unclear. If Kwall takes for granted the cultural bias against women, then she must identify how this bias is manifest in Halakhic discussions of both past and present, beyond this specific instantiation of women's ritual participation. She also must explain through what contemporary cultural means can and should this be addressed today. To presume and assume a cultural bias does little to explicate the relationship between law and culture. The

³² Kwall, *supra* note 1, at 635–38.

³³ *Id.* at 637.

³⁴ In a blog post titled “Women Receiving *Aliyot*?, a precursor to the full text that will appear,” Broyde acknowledges that the “primary dispute between *Rashba* and *Maharam* is about whether pegam to a kohen is objectively determined by the abstract halakha, or subjectively determined by the knowledge of the people at this particular Torah reading.” *Id.* at 637–38. Kwall acknowledges this caveat in the article, but both Broyde and Kwall seem to assume the question held at least a modicum of practical relevancy. *Id.*

relationship needs to be studied on case-by-case basis in particular legal and cultural contexts. Indeed, Kwall takes for granted the cultural bias, but the way these biases are manifest in Halakhic discourses should be part of the object of inquiry in order for the article to achieve its goal.

CONCLUSION

Kwall's attempt at crafting a law and culture approach for the study of Halakah is the first step in what will be a long road towards better situating the development of Jewish law in cultural, social, and historical contexts. What is needed in the future, however, are not overgeneralizations about the methods of a cultural analysis paradigm or musings on the cultural life of law and laws function as a cultural artifact. Rather, what is needed, and what should be expected, are focused studies that examine particular historical periods and contexts in order to explicate the relationship between law and culture so as to begin to understand the dizzying quandary of why law develops the way it does. Kwall has provided a baseline for future studies, detailing some of the broad methodological questions and issues concerning a law and culture analysis. However, it is up to future studies to take up these questions in more detail and to understand the situated nature of law as a manifestation of particular cultural contexts.