REINVENTION WITH AUTHENTICITY: A NEW JOURNEY ON A FAMILIAR ROAD

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I. INTRODUCTION

If someone were to peruse the scholarship listed on my curriculum vitae ("CV"), a shift would be readily noticeable beginning in 2006, more than twenty years after I began teaching law. Until this time the majority of my publications explored various facets of intellectual property ("IP") law and in some instances real property law. However, in 2006 I published an article entitled Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul. To those familiar with my prior work on the IP doctrine of moral rights, which protects the noneconomic interests of an author in her work such as attribution and maintenance of a work's integrity in the face of unauthorized changes, this article was a natural extension of my earlier work. It explored the impetus for human creativity from the standpoint of intrinsic motivations such as the desire for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author.

Throughout *Inspirations and Innovation*, I used the terms "spiritual" or "inspirational" as shorthand designations for a particular type of relationship an author maintains with her creations. Before beginning to write this article, I spent a delightful summer reading a tome by historian Daniel Boorstin entitled *The Creators*, which explores heroes of the imagination throughout the centuries.² In this book, Boorstin refers to the Creation narratives in Genesis, the first book of the Torah, and notes that the language stating that "God created man in His image..." furnishes a path leading man to regard himself as a potential creator, thus underscoring an unprecedented parallel

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¹ Roberta Rosenthal Kwall, Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul, 81 NOTRE DAME L. REV. 1945 (2006).

² Daniel J. Boorstin, The Creators (1992).

³ See Genesis 1:27.

between God and humanity.⁴ I confess that although I had read these narratives in Genesis so many times, I had never thought about their implications for what motivates humans to create. After experiencing this "eureka" moment, I decided that my article would be best served by mining the depths of the Jewish tradition to learn what it can teach us about *why* humans create.

This decision, while representing a new scholarly journey, was nonetheless not entirely out of character. One of the greatest gifts that my parents, particularly my father, gave me was-in his words—"a good Jewish education." My father was from a very large Orthodox family and his parents were born in Russia. Although he was more "vicariously" rather than personally observant as an adult, he frequently spoke in glowing terms about his mother, Rebecca, for whom I was named. He claimed his mother knew more than the rabbi's wife and was a model of all things Jewish. These remarks made a deep impression on his only child. Indeed, for some inexplicable reason, I had always been drawn to Judaism. I was one of those rare children who loved Hebrew school, decided on her own to keep kosher at the age of twelve, and was intrigued by the moral lessons of the aggadah (narrative) of the Jewish tradition. As a teenager, I davened (prayed) three times a day, did not go out on Shabbat (the Jewish Sabbath) and refrained from watching television or doing any work on Shabbat. I also took off from school on all the Jewish holidays, including those that are religiously significant but not necessarily as recognizable to the general public as Rosh Hashanah and Yom Kippur. As a public rather than Jewish day school student, these practices put me at odds with most of my contemporaries. But I was happy and extremely connected to and involved with my Conservative synagogue.

I was the first person in my family to have the privilege of an Ivy League education. When I went off to Brown University, my goal was to teach at a college level. Although I loved my dual major in Religion and American Civilization, I did not see myself getting a PhD in either of these fields. Going to law school seemed like the best way to land a job in academia and I decided early on that this was the path I would take. Had it been possible for a woman to become a rabbi in the Conservative movement at this time, I might have gone that route. I did think briefly about becoming a cantor, but in all honesty, I didn't think my pleasant but untrained voice was up to the task. So law school it was.

⁴ BOORSTIN, *supra* note 2, at 41.

Along the way came my wonderful husband and three terrific—even at times challenging—daughters. When my eldest daughter was born I found myself in the typical working mother's time crunch that made it difficult for me to adhere to some of my earlier practices, especially such a strict observance of *Shabbat*. So although we sent our daughters to Hebrew school, Jewish summer camp, synagogue every *Shabbat* morning, and raised them in a kosher home, Jewish ritual was not as much of a focus at this time as in my youth. And making time for Jewish study—while trying to establish myself as an IP scholar—was completely outside the scope of my framework during these years.

Around the time I encountered Daniel Boorstin's book, I had begun to reconnect with Jewish learning. Boorstin's observation about the creation narratives in Genesis gave me precisely the impetus I needed to begin reconnecting in a serious and meaningful way with Judaism, both academically and personally. The first part of my Inspiration and Innovation article is an original exegesis of the Creation narratives that led me to study parts of Talmud and later commentaries. This was a stretch for me, especially because my Biblical Hebrew was barely functional at that time. But I persisted and ultimately crafted one of my most creative articles which became the basis for my book on moral rights: The Soul of Creativity: Forging a Moral Rights Law for the United States. This article was also the impetus for my forging a completely new research and teaching agenda affording me an exhilarating "second phase" of my academic career. My current scholarly agenda, explained more fully below, focuses on the Jewish tradition's meaning for human existence, including the connections between Judaism and IP, as well as creativity theory, feminist theory, and cultural analysis theory.

II. JUDAISM AND HUMAN CREATIVITY

In *Inspiration and Innovation*, I argued that the Creation narratives in Genesis reveal a set of shared societal norms that reflect Western society's understanding of human creative enterprise. Therefore, they serve as a significant primary source for an examination of the inspirational motivations for creativity in cultures such as the United States which has been influenced substantially by the values of the Judeo-Christian tradition. These narratives, recounted in the Torah and interpreted through the rabbinic tradition, reflect an intrinsic dimension of creativity that is rooted in spiritual motivations. According to this perspective,

man creates in response to Divine command; it is man's obligation to partner with God in completing the world and its environment. An important lesson from these narratives is that an author who labors toward even a physical or material end can be empowered through a sense of practical spirituality in much the same way as the human prototypes in the Torah are instructed to dominate the earth by ruling the fish, the birds, the cattle, and the whole earth.⁵

Moreover, the God-like notion of creation found in the Torah provides the basis for the parental metaphor of authorship that is so commonly discussed in secular artistic circles. The creation narratives, and the interpretative rabbinic tradition, are highly significant sources reflecting man's inclination to view himself as a creator with the potential for possessing a parental connection to his work. In this sense, man mirrors the Divine.

Torah actually contains two distinct Creation narratives that appear consecutively. The second narrative⁶ contains the following language: God blew into man's "nostrils the breath of life, and man became a living being."7 After Adam and Eve partake of the forbidden fruit, God admonishes man, "For dust you are, And to dust you shall return."8 Classical Jewish interpretations of this narrative support the view that man's creativity derives from an intrinsic drive that, although endowed by an external source, enables man to suppress his ego and focus on the emergence of his work. Moreover, by emphasizing a cyclical view of creativity, this narrative illuminates the creator's role as the guardian of her work's meaning for a defined period of time. These themes reinforce creativity as inherent in the task itself, rather than the product of a quest for monetary reward.

My work on the Jewish tradition's view of human creativity served as an important impetus for the creation of a group of scholars concerned with the relationship between IP and religion. When this group initially coalesced, there was much surprise in the greater legal academy that such an intersection even existed. Over the past few years however, this group has grown both in number and influence, and there have been several conferences devoted to the topic. An article I wrote for one of these conferences explored the connection between the laws of *Shabbat* and human creativity. As noted above, man is commanded to mirror God by creating, but also to mirror God's rest on the seventh day by

⁵ See Genesis 1:26.

⁶ The second account of Creation begins at *Genesis* 2:4.

⁷ See Genesis 2:7.

⁸ See Genesis 3:19.

refraining from creating on *Shabbat*. The Torah depicts the seventh day as the culmination of God's creation, thus differentiating Divine creativity from *cessation* of Divine creativity. A reference to *Shabbat* appears numerous times in the Torah, including the two recitations of the Decalogue (the Ten Commandments) that incorporate the injunction to observe Shabbat in the Fourth Commandment.⁹

The laws of *Shabbat* are extraordinarily complex but their essence can be stated simply and effectively: Shabbat is set aside as a day in which ordinary, workday activities are suspended. It is a day designed for prayer, singing, festive meals, contemplation, Torah studying, and spending time with family and friends without distractions. Beginning in the twentieth century however, researchers examining creativity theory began to focus on the relationship between a break period and enhanced creativity. The reasons for this relationship are still being explored, but many interesting theories are being discussed and advanced in scientific literature about the importance of a break period and why this period has the effect of enhancing human creativity. My article on this topic, 10 a version of which was subsequently reprinted as a chapter in a book about Diversity in IP,11 has peaked interest not only among academics but also among the lay Jewish communities whom I have taught over the past several years.

Although my initial foray into Jewish law and tradition began by studying the relationship between the Jewish tradition and creativity theory, my Jewish law work over the past several years has extended significantly beyond this connection. As I discuss below, my work on moral rights and creativity theory served as a prelude to a substantial project exploring the roles of law, legal theory, and culture in Jewish tradition.

III. CULTURAL ANALYSIS OF JEWISH LAW

IP is one of the most active areas of the legal academy and it seems as though there is an IP conference virtually every week. During the time I was writing *The Soul of Creativity*, I had been attending numerous conferences and speaking with many IP colleagues on a regular basis. One offshoot of IP also gaining

⁹ See Exodus 20:8–11; Deuteronomy 5:12.

¹⁰ Roberta Rosenthal Kwall, Remember the Sabbath Day and Enhance Your Creativity!, 10 U. St. Thomas L.J. 820 (2013).

Diversity in Intellectual Property: Identities, Interests and Intersections (Irene Calboli & Srividhya Ragavan, eds., 2015).

prominence during this time was cultural heritage; the late Professor Keith Aoki was very active in both IP and cultural heritage. During one of our conversations, I asked Professor Aoki whether anyone had ever looked at religion—specifically the Jewish religion—from a cultural heritage standpoint. He responded "not to my knowledge, but this is a perfect area for you, Kwall!" His answer surprised me a bit but it paved the way for an entirely new venue for my work on Jewish law.

The ultimate inquiry driving my work on moral rights and creativity theory was how much can a work be modified (without the author's permission) and still embody the author's meaning and message. At base, this is an inquiry that focuses on authenticity. Specifically, how much unauthorized modification ought to be allowed before a given work loses its essential character and becomes something other than what the original author intended? Given my work on these topics, I am also familiar with the popular academic view that the original author's intent should be irrelevant once a work is created or enters the public domain. In other words, when art is placed into public discourse, it becomes fair game for all to enjoy and even change. In a post-modern age where it is expected that the audience will interpret texts and forge new meaning, these concerns are especially significant.

At the time of my conversation with Keith Aoki, it had already occurred to me that similar questions could be asked with respect to the Jewish tradition. Beginning in the 1980s, protection of cultural rights was increasingly understood as including not only tangibles, but also intangibles such as modes of life, human rights, and beliefs. According to this perspective, cultural heritage provides groups of people "with a sense of identity and continuity." Moreover, cultural property rights are increasingly

¹² The United Nations Educational, Scientific, and Cultural Organization (UNESCO) was created in order to protect cultural heritage. A 2003 Convention for the Safeguarding of Intangible Cultural Heritage is of particular significance in that it defines intangible cultural heritage as being "transmitted from generation to generation" and "is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history." UNESCO, Convention for the Safeguarding of Intangible Cultural Heritage: Text of the Convention, 4 (2007), http://unesdoc.unesco.org/images/0015/001543/154391eo.pdf (Art. (2)(1) defining Intangible Cultural Heritage [hereinafter ICH].).

¹³ Id. The 2003 Convention further provides that social practices, rituals, and festive events gather their meaning by reaffirming the identity of their

seen within the framework of international human rights. 14 In the human rights arena, rights emerging in cultural terms have particular relevance for traditions whose historic or present survival is in jeopardy. 15 As human rights continue to evolve and expand, there has been a growing trend to augment human rights protections to include groups rather than just individuals. 16 This expansionist tendency parallels the concern of cultural analysis with how the law reaffirms the composition of groups, individual identities, and values. 17 Under this framework, preservation of cultural tradition is seen as a positive value because it is a vital source of basic human identity and "[t]he preservation of that identity can be of crucial importance to well-being and self-respect." 18

Yet, this reality necessitates grappling with the ultimate questions of whether and how preservation of cultural tradition aligns with modern sensibilities. Specifically, cultural dissent and evolution of the cultural tradition in pockets of the community, particularly absent a link to the tradition, can compromise traditional values and result in the loss of something perceived as valuable by other segments of the community. ¹⁹ Thus, cultural

community or group, whether performed privately or publicly. Id. (Art. 2(2)); see Practices, Ritual andFestiveEvents,UNESCO.ORG, http://www.unesco.org/culture/ich/index.php?pg=55 (last visited Feb. 7, 2012). The most recent UNESCO Convention addressing intangible cultural heritage is the Convention on the Protection and Promotion of the Diversity of Cultural 20, Expressions, Oct. 2005. 45 I.L.M. 269, availablehttp://unesdoc.unesco.org/images/0014/001495/149502e.pdf.

- $_{14}$ See Peter K. Yu, Reconceptualizing Intellectual Property Interests in a Human Rights Framework, 40 U.C. DAVIS L. REV. 1039, 1075 (2007) (noting the increasing focus on "human rights implications for IP rights").
- 15 See Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence 225–38 (2002) (discussing self-determination).
- Peter Yu notes that despite the fact that the drafters of documents of the core human rights framework may not have foreseen the extension of these instruments to traditional communities or other groups of individuals, they may still be so construed. *See* Yu, *supra* note 14, at 1145–48.
- 17 See, e.g., Graham Dutfield, TRIPS-Related Aspects of Traditional Knowledge, 33 CASE W. RES. J. INT'L L. 233, 240, 242–43 (2001); Asbjørn Eide, Cultural Rights as Individual Human Rights, in Economic, Social and Cultural Rights 290 (Asbjørn Eide et al. eds., 2d rev. ed. 2001).
 - 18 *Id.* at 289, 291.
- $_{19}$ A cultural product or tradition is authentic only if it "maintains a legitimate link to the community." Susan Scafidi, Who Owns Culture?

traditions continually negotiate between preservation and modernity and between evolution and authenticity. This concern with loss of value and dilution of the tradition's authenticity justifies a cultural analysis perspective that embraces a degree of selectivity with respect to implementing changes in the tradition.

In order to address these issues of authenticity and change in the context of the Jewish tradition, it is necessary to understand the fundamental issue of how Jewish lawmaking works, both from a procedural and substantive standpoint. I was able to explore this particular issue initially when I was asked to write a book review of No Law: IP in the Image of an Absolute First Amendment by David Lange and Jefferson Powell. Neither of these highly regarded professors had any idea that I would use their constitutional and IP legal theories as a basis for comparing lawmaking between the Orthodox and Conservative movements of Judaism but they were so appreciative of this unique take on their work.20 I am eternally grateful to these gentlemen and fine scholars for providing me with an opportunity to begin my scholarship on these matters, which resulted in numerous subsequent articles and my book, The Myth of the Cultural Jew: Culture and Law in Jewish Tradition, which was published in 2015 by Oxford University Press.²¹

In my book, I argue against the well-known myth that Jews can embrace the cultural components of Judaism without appreciating the legal aspects of the Jewish tradition. This myth suggests that law and culture are independent of one another. In reality, however, much of Jewish culture has a basis in Jewish law. Similarly, Jewish law produces Jewish culture. I developed a cultural analysis paradigm that provides a useful way of understanding the Jewish tradition as the product of both legal precepts and cultural elements. This paradigm sees law and culture as inextricably intertwined and historically specific. This perspective also emphasizes the human element of law's composition and the role of existing power dynamics in shaping Jewish law.

Appropriation and Authenticity in American Law $54\ (2005)$ (discussing cultural products).

²⁰ Roberta Rosenthal Kwall, *IP Law and Jewish Law: A Comparative Perspective on Absolutism*, 22 Yale J.L. & Human. 143, 154–56 (2010) (reviewing DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: IP IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT) (2009)).

 $^{^{21}\,}$ Roberta Rosenthal Kwall, The Myth of the Cultural Jew (Oxford University Press 2015).

A cultural analysis model understands the Jewish tradition as a cultural product composed of law, wisdom, and narrative, all of which have been shaped by social forces over the centuries. Indeed, the Jewish tradition can be understood as a work of authorship. More precisely, it is a "joint work" given its many human authors as well as its Divine origin. The issue of how much change and evolution it can tolerate and yet retain its authenticity is one that has occupied much of the discourse in certain circles of Jewish thought since the inception of the Enlightenment. This discourse also has focused on the issue of who can legitimately claim the ability to make these interpretative decisions. Cultural analysis reminds us that there is something inherently special about cultural particularity that deserves preservation even if the mechanics and details of this process constitute a messy enterprise.

At the outset of the seven years I worked on *The Myth of* the Cultural Jew, I enrolled in a Master's degree program in Jewish Studies in order to acquire a more formal measure of Jewish learning. As of this writing, I have just one course left in order to complete my degree. To anyone who is familiar with the theory of Jewish law that I advocate, it is clear that my thinking has been influenced by the positive, historical approach that characterizes the development of Jewish law in most academic circles as well as in the Conservative movement. Although I did not necessarily appreciate the nuance of this perspective as a child growing up in the Conservative movement, I came to see the wisdom and inherent logic of this approach as an adult when I returned to a deeper understanding of the Jewish tradition through my formal, and informal, studies in Jewish law and culture. Still, I believe it was the exposure to the Jewish tradition that I received as a child that ignited the passion that ultimately fueled this project. And it was my desire to transmit this passion to my children that served as the impetus for its completion.

Before *The Myth of the Cultural Jew* was published, I wrote a law review article applying the cultural analysis paradigm I was developing in the book to a particular area of Jewish law. The topic that I chose to introduce my cultural analysis theory to the legal academic world involved a specific area of Jewish law that had always been important to me. This area—the ability of women to read publicly from the Torah during a traditional prayer service—is a particular illustration of the larger topics of law and culture and law and gender.

IV. FEMINIST THEORY

The day of my Bat Mitzvah, May, 17, 1968, was tremendously significant for me. My Bat Mitzvah was on a Friday evening since young women at that time did not celebrate this occasion on *Shabbat* morning. In those days, women were not allowed to read publicly from the Torah. However, I was permitted to lead parts of the evening service, known as *Kabbalat Shabbat* (welcoming of the Sabbath), and to chant the *Haftorah* (reading from the Prophets) portion for that week as part of the service. Given that neither the Torah nor the *Haftorah* are read on Friday evenings, allowing me to chant the week's *Haftorah* portion as an addition to the service did not pose a perceived ritual problem for my synagogue. As a result, I never learned how to read the Torah until I was well into my adult years.

The public Torah reading represents a vital aspect of traditional synagogue observance and can be extremely spiritually satisfying for worshipers, particularly those who understand the Hebrew language or are familiar with the texts. For those who actually perform the reading, however, the spirituality can be magnified because the reader is able to connect with the narratives and history of her people in a visceral, compelling manner, as the ancient text comes alive through the Hebrew words with the traditional accompanying musical tropes. However, according to the normative Jewish religious law (known as halakhah), women are not eligible to read publicly from the Torah during a traditional service. This is still the practice in nearly every Orthodox synagogue today throughout the world. In contrast, most non-Orthodox synagogues no longer adhere to the traditional practice, and allow greater female participation in the service to varying degrees.22

Significantly, the topic of women publicly reading from the Torah is the first area in the realm of gender and synagogue ritual to be subjected to a serious academic discourse among observant Jews.²³ For this reason, it seemed like the ideal area to introduce

In 2002, the lawmaking body of the Conservative Movement voted that women may count in a *minyan* (prayer quorum) and lead the prayer service. *See* DAVID J. FINE, COMM. ON JEWISH LAW AND STANDARDS OF THE RABBINICAL ASSEMBLY, WOMEN AND THE MINYAN (2002), *available at* http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/oh_55_1_2002.pdf. (The vast majority of Conservative congregations allow women to participate in this manner.).

²³ Chaim Trachtman, Editor's Preface to Rabbi Daniel Sperber et al.,

my work on cultural analysis to the legal academy. When I wrote *The Cultural Analysis Paradigm: Women and Synagogue Ritual as a Case Study (Women and Ritual)*,²⁴ I approached the topic from the standpoint of both the traditional Jewish sources on the subject as well as the relevant cultural influences. I was very gratified that a mainstream law review published this article, which could have easily been seen as dealing with an issue of relevance to only a small part of the population (namely, a segment of Jewish women who desire to read publicly from the Torah but are not permitted to by virtue of their religious affiliation). The reality, however, is that the importance of this issue and the methodology I invoked to analyze the problem extends well beyond Torah reading and this segment of Jewish women.

The story of women and public Torah reading provides the ideal subject for exploring the synergies between law, culture, and tradition and how my cultural analysis paradigm can illuminate these synergies. My article argues that Orthodoxy's exclusion of women with respect to public Torah reading is more the result of cultural sensibilities than unalterable law, a point that is not widely acknowledged in most Orthodox circles. The analysis demonstrates that the unanimity within Orthodoxy concerning women's inability to participate in public Torah reading exists despite significant ambiguity in the strictly legal realm of the tradition on this issue up until the Middle Ages. Given this ambiguity and the process of change within Jewish law, the current legal reality is best understood as a response to cultural influences. Thus, the introduction of greater female participation in synagogue ritual should be seen as a natural development in Jewish law based on the current understandings of the role and character of women in today's cultural milieu rather than as a "major reform" necessitating a substantial departure from tradition.

At base, the debate illuminated in both *Women and Ritual* as well as *The Myth of the Cultural Jew* is about legal process. Specifically, should Jewish law, which according to the tradition is binding upon Jews, be understood as a closed, objectively neutral system or one that admits of social issues and circumstances? This debate is extraordinarily important and complex, with far-

Women and Men in Communal Prayer: Halakhic Perspectives (Chaim Trachtman ed., 2010) [hereinafter Communal Prayer].

²⁴ Roberta Rosenthal Kwall, The Cultural Analysis Paradigm: Women and Synagogue Ritual as a Case Study, 34 CARDOZO L. REV. 609 (2012).

reaching ramifications concerning not only the application of Jewish law, but also other legal systems that are the product of cultural traditions. My work demonstrates that an analytical model based on cultural analysis can be an invaluable resource in addressing the fundamental issue of how cultural traditions can maintain authenticity while being applied in a more inclusive framework. The analysis has significant implications for understanding the general relationship between law and culture and how this relationship should inform the normative application of areas of the law in which tensions exist between modern sensibilities and traditional practices steeped in cultural perspectives from other times.²⁵

V. CONCLUSION

The more I learn about Judaism and the Jewish tradition, the more I am convinced of its inherent beauty and application to human existence. I feel so privileged to be in a position not only to write about these issues, but also to teach my students about Jewish law and culture. I developed a course entitled *Women and Jewish Law*, which I have now taught three times at DePaul University College of Law. My students include men and women, Jews and non-Jews. They provide me with much inspiration for further exploration and I hope that this class does the same for them, regardless of their particular religious tradition or lack thereof.

Reinvention with authenticity requires time and effort. It cannot be achieved quickly and one must make one's way in the present with deference to the past. This is my view of the Jewish tradition generally and specifically, with respect to my own development as a scholar working in this area. For me, deference to the past means not just the tradition in the aggregate, but also

²⁵ The issue of the appropriate boundaries of female ritualistic participation is currently the subject of a parallel debate within sectors of Christianity and Islam. See, e.g., Ahmed Elewa & Laury Silvers, I Am One of the People: A Survey and Analysis of Legal Arguments on Women-Led Prayer in Islam, 26 Hamline J.L. & Religion 141, 141 (2011) ("[O]nly men have the unrestricted right to lead the prayer, give the sermon, or even ask the community to serve God through the call to prayer."); Cheryl Y. Haskins, Gender Bias in the Roman Catholic Church: Why Can't Women Be Priests, 3 Margins: Md. L.J. Race, Religion, Gender, & Class 99, 110 (2003) (explaining that modern societal changes create a conflict as to whether women should be ordained in the Catholic Church).

 $\,$ my personal past in the form of my parents' encouragement and exposure. And for all of this, I remain ever grateful.