

# A Response to Rabbi Joel Roth

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*On November 7, 1984, a motion was passed by a vote of thirteen in favor and two opposed (13-2) to publish this paper without discussion or vote of approval. Voting in favor: Rabbis Kassel Abelson, Isidoro Aizenberg, David M. Feldman, Morris Feldman, David H. Lincoln, Judah Nadich, Mayer E. Rabinowitz, Barry S. Rosen, Joel Roth, Morris M. Shapiro, David Wolf Silverman, Henry A. Sosland and Alan J. Yuter. Voting against: Rabbis Phillip Sigal and Gordon Tucker.*

Although the current practice of the Committee on Jewish Law and Standards is to “discuss” reactions to papers presented, Rabbi Roth has chosen to formulate and distribute his response to my paper “On the Ordination of Women” in writing [see below, pp. 790-793—ed.]. In fairness to the members of the Committee who will be asked to discuss and vote on our papers, I am compelled to respond to Rabbi Roth’s approach to halakhah in writing. I will concentrate on the differences in halakhic theory and will leave the discussion of specific points for the Committee meetings when our positions can be thoroughly examined and discussed.

Rabbi Roth assumes that *ברכת התנים* involves a shaliah tzibbur. He says: “If it is clear that for those rituals listed in a single source which require some type of public recitation the reciter serves as the shaliah tzibbur, the *prima facie* assumption must be that the reciter serves in that capacity for all the rituals that require some type of public recitation.”

However, a careful study of the text (Mishnah Megillah 4:3) shows that the only fact explicitly stated is that *ברכת התנים* requires a minyan. Even though there is some form of public recitation, there is no clear indication that a shaliah tzibbur is required. In fact, in some of the other examples mentioned, it is clear that a shaliah tzibbur is *not* involved. One example is *עמדו יקרים עמודו* during the funeral procession, one person says *עמדו ומושב*. This too is a case of public recitation, but no one suggests that it involves a shaliah tzibbur. Similarly *ברכת התנים* recited publicly does not require a shaliah tzibbur, nor does the priestly blessing. The person who reads the Torah and haftarah, though recited publicly and requiring a minyan is not functioning as a shaliah tzibbur either. Therefore, Rabbi Roth’s assumption that the reciter of these public rituals mentioned in one source is a shaliah

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tzibbur, is certainly not delineated in the text and remains, at best, a questionable assumption.

Rabbi Roth makes a similar assumption in claiming that when the term *עשרה גדולים ובני חורין* is used by the Rambam in *Hilkhot Tefillah* and *Hilkhot Ishut*, it implies a shaliah tzibbur. Once again there is no basis for that assumption. The Rambam simply states that a minyan is required for *ברכת התנים* and *תפילה בציבור* and that the minyan be constituted in a certain way. But the Rambam does not say or imply that a shaliah tzibbur is involved. While it is true that the function of the shaliah tzibbur requires a minyan, it is also clear that the concept of a minyan does not necessarily involve a shaliah tzibbur.

A third problem that I see with Rabbi Roth's approach concerns the centrality of midrash halakhah to his halakhic decisions. Rabbi Roth arbitrarily states that the peshat of a verse is "halakhically irrelevant" and that to use the peshat is to "undermine the halakhic relevance of midrash almost entirely."

In many cases it is clear that the midrash halakhah is only an *attempt* to attach an accepted law to a biblical text, and does not serve as the *source* of the law. In fact, in the time of Rabbi Akiva and his disciples, laws derived by midrash, if they were not the only interpretation of the verse, were considered rabbinic and not biblical. As long as the peshat was not identical to the midrash halakhah, biblical status was not conferred upon the law.<sup>1</sup> The function of the midrash in many cases is to serve a mnemotechnical purpose alone, for a law which is already accepted. The midrash did not serve as the origin of the law. In fact, many laws preceded the midrash. And so where the peshat and the midrash halakhah differ, it indicates that the midrash is merely serving to tie an existing and accepted law to a biblical verse. In such cases biblical status cannot always be conferred on the law simply because of the midrash.

In his discussion concerning those qualified to be included in a minyan, Rabbi Roth claims that *חיוב* is the necessary condition for inclusion in a minyan. However, nowhere in his paper or in any other source has this claim actually been proven. And yet Rabbi Roth accepts the "unproven" as a fact. This leads him to the conclusion that Rabbi Mordecai Yaffe's statement specifying *חיוב*<sup>2</sup> is "making explicit, what was in fact, implicit in the Talmud." Once again Rabbi Roth has elevated an assumption to the status of "fact." It is just as likely that Rabbi Yaffe was simply stating what the custom and its rationale were in his own time, and not that which is implicit in the Talmud. If Rabbi Roth believes that the Talmud requires *hiyyuv* as a necessary prerequisite for inclusion in a minyan, then it is a case of *העיקר חסר מן הספר*.

Rabbi Roth states that "... the midrash halakhah, gemara and all posekim from at least the Rambam on, all agree that the prohibition (against women

witnesses) is biblical." He also accepts as fact that a law based on a *gezerah shavah* is biblical. Once again these are assumptions which the following seem to refute:

1. The Tur and the SeMag (both of whom lived after the Rambam) do *not* consider the prohibition biblical. In fact, the Tur does not mention women in his list of unfit witnesses.

2. As seen before, midrash halakhah is not necessarily the origin of a law. Rather it is an attempt to tie an accepted existing law to a biblical verse.

3. There are those among the rabbi who claim that laws derived by means of a *gezerah shavah* are rabbinic.<sup>3</sup>

4. מן התורה does not necessarily mean biblical.<sup>4</sup>

5. The very fact that the gemara quotes three different midrashim on the question of עדות, and that the Rambam rejects them, and feels the need to use a different proof for the prohibition of women, indicates that none of these is the definitive basis for the law. Rather, each is an attempt to tie the law to biblical verse.

6. A *gezerah shavah* can be used to support a known law *לקיים תלמודו*, thus its use does not necessarily confer upon the law the status of being biblical.

7. Midrash halakhah that seem to imply biblical status is sometimes reduced to rabbinic status by amoraim.<sup>5</sup>

8. While the terms *de'oraita* and *derabbanan* refer to two distinct categories of mitzvot, the Rabbis have disagreed on the question of certain mitzvot and the categories into which they fall. The existence of different lists of the 613 commandments clearly demonstrate this uncertainty. In fact, the Rambam and the Ramban disagree on the question of *de'oraita*, even when biblical verses are cited.<sup>6</sup>

## NOTES

1. E. Urbach, *ההלכה מקורותיה והתפתחותה*, Yad Latalmud 1984, page 80. In addition one of the verses used to prove the minyan requirement is used elsewhere to prove that kiddush hashem requires a public (TB Sanhedrin 74a).

2. Levush Hatekhelet 55:4.

3. Rashi TB Gittin 33A s.v. בעילת זנות.

4. See for example TP shevi'ith 10, 2 (39c) where מן התורה is used in connection with prozbul. The conclusion of the Palestinian Talmud there is that it is an *asmakhta*.

5. Urbach op. cit. p. 83.

6. Rambam, *Sefer Hamitzvot*, principle 2 and the Rambam's glosses *ad hoc*.