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A Response to Rabbi Mayer Rabinowitz

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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.

My dear friend and colleague, Rabbi Mayer Rabinowitz, has submitted to the Law Committee his paper entitled, "On the Ordination of Women." This is the paper which he submitted to the faculty of the Seminary in the Fall of 1983. Since his paper was written several years after my own, I have had no opportunity to respond to him in a public way.

Though we clearly come to some identical conclusions, it is equally clear that we arrive at them in very different ways. On certain points of halakhic theory we differ significantly.

It is the purpose of this paper to respond to a few of his specific points and to highlight where we differ on halakhic theory.

In most instances it is preferable that halakhah (and law in general) evolve organically, that is, by invoking the fewest possible changes in norms or practices of long-standing precedent, and by seeking to invoke the fewest possible changes in accepted definitions. Thus, for example, if the Mishnah (Meg. 4:3) lists ten rituals that require the presence of a minyan, the *prima facie* assumption must be that the minyan requirement for all of them is the same. Whatever the term minyan means, that ought to be assumed to be its meaning for all of them. If a text or posek employs the identical phrase or idiom in two different contexts, the *prima facie* assumption must be that the phrase or idiom means the same thing in both contexts. 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 tzib-

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bur, the *prima facie* assumption must be that the reciter serves in that capacity for all of the rituals that require some type of public recitation.

In his treatment of the issue of a mesadder(et) kiddushin, Rabbi Rabinowitz, in my opinion, rejects these *prima facie* assumptions without adequate evidence. Thus, for whatever reason the Mishnah in Megillah (4:3) requires a minyan for ברכת חתנים, the minyan is to be constituted identically with the minyan required for any of the other rituals listed there; and, for whatever reason the Rambam employs the term עשרה גדולים ובני חורין in the two contexts of Hilkhot Ishut and Hilkhot Tefillah, the phrase has the same implications in both, that the reciter serves as a shaliah tzibbur. Finally, it is very clear that the term ברכת חתנים refers throughout the Talmud and the posekim to שבע ברכות, and not to ברכת אירוסין. The Tosafot to which Rabbi Rabinowitz refers (Ket. 7b, s.v., שנאמר), is an attempt to reconcile a discrepancy between the Bavli and Massekhet Kallah, and bears no significance for the meaning of the term ברכת חתנים throughout the Talmud and the posekim. Thus, even if Rabbi Rabinowitz had actually proved that the reciter of ברכת אירוסין is not a shaliah tzibbur, his proof would not cover the recitation of שבע ברכות. And, though he would be technically correct (because it is the one who recites ברכת אירוסין who is called the mesadder [et] kiddushin), it would be misleading since it is exceptionally common for the rabbi to recite both ברכת אירוסין *and* ברכת חתנים, and a woman would still be disqualified from the latter. Indeed, all but one of the passages Rabbi Rabinowitz refers to which prove that the ḥatan can be the reciter, refer explicitly only to ברכת אירוסין, not to שבע ברכות.

In the section dealing with the nature and constitution of a minyan, Rabbi Rabinowitz considers it critical that the peshat of several verses is not as they are interpreted by the two-fold gezerah shavah transmitted in the name of Rabbi Yoḥanan (Meg. 23b). Rabbi Rabinowitz prefers the peshat to the midrash both for, "That I may be sanctified in the midst of the Israelite people (Lev. 22:32)," and for, "Stand back from the midst of the community (Num. 16:21)." He is correct in his claim that the explanation of the gezerah shavah is not the peshat of the verses. But, that fact is *halakhically irrelevant*. Many, probably most, halakhic midrashim do not reflect the peshat of the verses they interpret or explain. To argue that the peshat supercedes the midrash halakhically is to undermine the halakhic relevance of midrash almost entirely. It is no more reasonable than to invalidate Constitutional interpretations of the American courts on the grounds that their interpretations are not the peshat of the Constitution.

Rabbi Rabinowitz continues by asserting that the criterion probably responsible for the exclusion of women from a minyan by the early codi-

fiers was the fact, based on their sociological reality, that they were not "citizens of legal standing . . . [not] independent, responsible adults with legal rights." That claim seems to me to be open to serious question. Nobody could assert that the legal rights of women were equal to the legal rights of men, but that does not prove at all that they lacked legal standing in most regards. Women were as legally responsible as men for the fulfillment of the law in general, they were equally punishable for violations of the law, they could (with restrictions) sue and be sued, incur debts, buy and sell goods and property, etc. Minors, on the other hand, truly were not citizens of legal standing: they were not legally responsible or punishable, they could not sue or be sued, incur valid debts, buy and sell goods (under most circumstances) or property. It does not seem overly convincing to argue that women were excluded from a minyan because of a lack of legal standing in general. Indeed, unmarried women above the age of majority had none of the legal restrictions of married women, yet they, too, were not counted toward a minyan.

Finally, regarding the minyan requirement, Rabbi Rabinowitz discounts the statements of Caro and the Levush because they are late. Even assuming that these are the earliest sources that stipulate that a minyan is comprised of males, or of obligated individuals,[1] precedent of over three hundred years is not easily dismissed as late. Besides that, it seems quite plausible that these posekim were simply making explicit what was, in fact, implicit in the Talmud all along.

I have responded to Section III of Rabbi Rabinowitz's paper, dealing with the shaliah tzibbur, in note #69 of my paper. [Above, pp. 777–778.]

In the last section of his paper, on עדות, Rabbi Rabinowitz and I disagree about the same issue as we disagree concerning one aspect of his treatment of minyan. When the midrash halakhah and the gemara and all posekim from at least the Rambam on all agree that the prohibition is biblical, it seems far from certain to claim that the prohibition may not be biblical. To the best of my knowledge, there is nobody who claims that the derivation from the verse may be merely an asmakhta. Similarly, I think it not particularly strong to claim the gezerah shavah as a case of אדם דן גזירה שוה לקיים תלמודו, without any supportive evidence. And, even if it were such a case, it would still have to be proved that such a gezerah shavah is not considered biblical, with all that the status of a biblical prohibition implies. Indeed, the Nimmukei Yosef quotes Rabbi Aharon ha-Levi to the effect that אדם דן גזירה שוה לקיים תלמודו applies to cases where one has a tradition that the matter is learned by gezerah shavah, but has no tradition about what the actual gezerah shavah is (see Nimmukei Yosef, Rif to Bava Kama, 30a, s.v., הקהו).

NOTE

1. In note #32 of his paper, Rabbi Rabinowitz deals with the question of חיוב as a requirement for being counted toward a *minyan*. Since I consider that requirement critical, it is important to respond to the specifics he raises.

a) His reference to the fact that a מנודה does not count toward a minyan even though he is obligated to pray is correct, but not relevant. Rabbi Rabinowitz confuses necessity with sufficiency. It is a necessary condition of being counted toward a minyan that one be obligated, but it is not a sufficient condition. Not everyone who is obligated is to be counted, but those who are not obligated may not be counted.

b) The claim of the Kol Bo that those who have completed their prayers can be counted toward another minyan for the sake of one who has not yet completed his prayers also probably has no bearing on the issue of חיוב as a requirement for minyan. First of all, the continuation of that very passage in the Kol Bo (#11, Lemberg edition p. 8c, bottom) attempts to define why they can be counted, and couches one of his explanations in terms of חיוב itself and the other in terms of the fondness of Jews to participate in these doxologies. Secondly, it seems clear to me that the term "obligated" means "one to whom the term 'obligation' applies."

c) It seems unlikely to claim that those who permit minors to become סניפים לעשרה do so because they feel that the element of חיוב is not applicable to minyan. The claim of the Me'iri is much more probable (Bet ha-Behirah to Berakhot 48a, Dickman edition, p. 179): "In any case, [women and slaves] cannot be included in a minyan, even as סניפים לעשרה. And even though [male] minors can be so included on occasion, they are in a different category since they are destined to become obligated (אתו לכלל חיוב)."