

EH 26:7.2020b

A Dissent to "Egalitarian Kiddushin and Ketubbah," by Rabbi Pamela Barmash (EH 26:7.2020a)

*Rabbi Gail Labovitz*

Although this response will be framed as a dissent to Rabbi Barmash's teshuvah, anyone who examines the vote tally on that work will observe that I have not voted against it. While I have felt a strong inclination to vote "no" on this teshuvah, I have ultimately decided not to do so; rather I have abstained in order to forestall a mistaken conclusion about my position. It is not that I find Rabbi Barmash's teshuvah halakhically invalid, or more specifically that I find her proposal forbidden under halakhah. I do not. But neither can I comfortably vote "yes," and it is explaining why I have come to that conclusion that will form the rest of this dissent.

While there is no halakhic impediment to using the ceremony Rabbi Barmash has outlined, it is my conclusion that neither is there any significant egalitarian outcome that actually results from doing so. Moreover, I disagree with a central argument she makes to reach her conclusion. I will briefly address the latter of these first, before turning to the former, which is my most substantial concern.

I feel that Rabbi Barmash's discussion about whether the language of acquisition used in Mishnah Kiddushin 1:1 to describe betrothal should in fact be understood as a "purchase" (pp. 14-20) is incomplete. While she briefly acknowledges *kinyan* as "metaphor employed to signal that at a specific point in time, a change in relationship has taken place," I would argue that the full import of this metaphor goes far deeper. As advances in cognitive metaphor theory have demonstrated over the last thirty-plus years, metaphor is no less powerful for not expressing exact identity between the items connected in a metaphorical expression (for example, that women are "literally" property); rather, metaphor and metaphorical thinking is essential to human thought and thus can be shown to have deeply impactful effects in culture, law, and material practices. This topic – cognitive metaphor theory as it relates to rabbinic constructions of marriage and gender – is, in fact, the subject of my book *Marriage and Metaphor: Constructions of Gender in Rabbinic Literature*, in which I amply document there that "marriage is ownership"/"women are ownable" is a thoroughgoing cognitive metaphor in rabbinic literature, and hence the dominant model by which rabbis structure marriage culturally, homiletically, and most importantly, legally. *Kinyan* is only one linguistic expression of this metaphor, which also manifests in terms such as *ba'al* for husband and *mekah ta'ut*, a faulty sale, for a marriage entered into under improper assumptions; rabbinic literature moreover abounds with variants of the metaphor that reason halakhically and beyond about women as (and marriage as ownership of) property such as houses, fields, and slaves. The detrimental legal effects for women, not to mention the incompatibility of this framing with modern egalitarian sensibilities, are in no way lessened by dismissing it as "merely" a metaphor.

The objection that truly underlies my vote, however, is my conclusion that this proposal simply does not achieve the (admirable) aim it seeks. First, my concern is that Rabbi Barmash has attempted to create an egalitarian ceremony, which is fundamentally different from creating an egalitarian marriage, i.e., an egalitarian on-going legal bond between the couple (instead of what currently formally applies, an on-going legal claim of the husband upon the wife). To be sure, this blurring of the ceremony that creates a marriage and the legal basis of the marriage itself – which can be found well beyond this teshuvah – abides in the word "*kiddushin*" itself, which is used not only for the act that takes place under the huppah to initiate a marriage (the giving of the ring and the statement of the betrothal formula), but also for the state of legally binding marriage that endures thereafter. Based on this

common confusion of categories, this teshuvah clearly addresses the ceremonial, but is not forthcoming on what the subsequent impact of such a ceremony would be.

What follows, therefore, is a crucial gap in information that makes it impossible for me to evaluate the actual effect of this teshuvah, or to vote in favor of it. As Rabbi Barmash notes in the teshuvah, a double ring ceremony, including even the woman reciting the traditional formula to the man, has actually already been permitted in the Conservative/Masorti Movement in a *p'sak* of Rabbi Isaac Klein:

Some authorities object to this practice...especially if the formula used by the bride is the same as the one used by the groom. Legally, however, there can be no objection. Once the traditional formula has been recited the betrothal is binding, and whatever is added *is of no legal significance*. (*Guide to Jewish Religious Practice*, 396; emphasis added)

Rabbi Barmash correctly notes that “holding that the bride’s statement after the groom has made his is permitted because her words are of no value is dismissive to the bride” (p. 21). The question that follows, however, would be: how do we know/measure that the bride’s words “are of no value”?

My answer would be that we measure the import of the bride’s words by the legal effect they have regarding the *on-going* halakhic bond between spouses (that is, the marriage, rather than the ceremony) – and that in turn is measured by what is necessary to undo that legal bond. As I have written elsewhere:

It is, after all, the legally binding nature of the initial act that makes a legal process of severing necessary, and, conversely, it is the necessity of a severance process that attests to the initially binding nature of the relationship. (“With Righteousness and With Justice’: To Create Equitable Jewish Divorce, Create Equitable Jewish Marriage,” *Nashim* 31, 2017, p. 104)

Rabbi Barmash states in her teshuvah that: “the egalitarian reconceptualization of *ketubbah* and *kiddushin* has consequences for Jewish divorce” (24), but asks the reader to await another teshuvah to spell out what those consequences are. Yet without Rabbi Barmash’s teshuvah on divorce, one cannot know if divorce/*get* will cease to be unilateral or if there is any need for or method of undoing the bride’s “*kiddushin*” of the groom – or, hence, whether her “*kiddushin*” has any legal force at all. Without knowing the implications of Rabbi Barmash’s proposal beyond the moment of the ceremony, I am not yet prepared to give it my endorsement. Indeed, I remain concerned that the underlying legal basis of Jewish divorce (*get*) will remain fundamentally unilateral; this would be so even if ceremonial but not legal effective elements were added for the woman in the process.

In addition, although this is at most a minor point both to Rabbi Barmash’s teshuvah and my dissent, I also must register my objections to her suggestion that one may adapt one of the central element of Dr. Rachel Adler’s *Brit Ahuvim* ceremony (outlined in her book, *Engendering Judaism: An Inclusive Theology and Ethics*; see particularly Chap. 5, “*Brit Ahuvim*: A Marriage Between Subjects”) into a ceremony based on *kiddushin*. As Rabbi Barmash writes:

3. A new element may be incorporated into the ceremony. The presentation of rings and the bundling of them together in a cloth shows that the bride and groom are creating a shared household. The officiating rabbi in consultation with the couple may decide whether to include this.” (p. 24).

While I would not be so audacious as to attempt to speak for Dr. Adler, nonetheless having known her as a mentor and friend for a number of years and having deeply immersed myself in her scholarship for even longer, I feel relatively confident in the assumption that incorporating this ritual gesture into a ceremony of *kiddushin* is directly inimical to Dr. Adler's intent and purpose. Dr. Adler quite clearly proposed this act to be a legal act instead of *kiddushin*, to create marriage on an entirely different halakhic basis (that is, a binding *shutafut*/partnership), and furthermore expressed forcefully her critique of even a mutualized *kiddushin* in her work:

“The problem with marital *kinyan* is not simply that it is unilateral, but that it commodifies human beings. The groom's commodification and acquisition of the bride is not rectified by the bride's retaliation in kind...The vocabulary and constitutive assumptions of *kiddushin* cannot be made to reflect a partnership of equals.” (*Engendering Judaism*, 191)

One need not agree with Dr. Adler's characterization of *kiddushin* to nevertheless reasonably conclude that she herself would object strenuously to her innovation being used in this manner.

Finally, and in sum: I am far more skeptical than Rabbi Barmash appears to be that *kiddushin*, in its fullest meanings, can be reconfigured on egalitarian grounds, particularly so long as the uni-directional *get* process remains in place as the means of dissolving a marriage. Based on my work and research on this topic, I have written a teshuvah using a Conservative/Masorti halakhic approach to provide alternatives to *kiddushin* from within halakhic sources (including Dr. Adler's *Brit Ahuvim*). These constitute means to enact a truly mutual and also halakhically valid and binding marriage for a Jewish man and Jewish woman (or indeed any two Jews) who wish to enter such a relationship with each other. Moreover, such legal bonds, because they are not built on *kiddushin* and metaphors of acquisition, can also be severed without the *get* procedure (though a different halakhic procedure would be required). This teshuvah has been adopted as a minority opinion of the CJLS, and will be available on the committee web-site.