

A Concurrence with Rabbi Pamela Barmash's Teshuvah

The Use of Principles in Jewish Law

YD 246:6.2014g

Elliot N. Dorff

This paper was submitted, in May 2014, as a concurrence on "Women and Mitzvot" by Rabbi Pamela Barmash. Dissenting and Concurring papers are not official positions of the CJLS.

I happily voted for Rabbi Barmash's responsum declaring that women and men are equally obligated in all matters of Jewish law except for laws governing specific features of male or female anatomy (e.g., circumcision, menstrual period rules). I see this, as I said during the discussion, as *a statement of principle* that has emerged over the last number of decades as the Conservative/Masorti Movement, and, in many ways, Western society as a whole have equalized the duties and privileges of both sexes. This is the kind of evolution that we see in the Mishnah, in which it announces a number of specific laws and then asserts, *zeh ha-klal*, "This is the general rule." The Babylonian Talmud did not like such generalizations, and so each time that formula occurs the Talmud interprets it not as a general rule, but rather a specific ruling governing yet another case.¹ That, however, is not the plain meaning of the Mishnah, which is rather that once we have some experience with specific issues, it becomes possible to enunciate a general principle. I am glad to say that, given our many steps in this direction ever since girls

¹ See Jacob Eliyahu Efrati, *Tekufat Hasaboriam V'Sifrutah* (Petah Tikvah: Agudat Benai Asher [New York: Philipp Feldheim, Inc., distributors], 1973), Part II, 157-278 (Hebrew), who demonstrates this with regard to the 85 unrepeated instances in the Mishnah where this expression occurs and who claims that these discussions, limited to the Babylonian Talmud, are Saboraic in origin (i.e., from 500-689 C.E. I am indebted to my former colleague at the University of Judaism, Dr. Eliezer Slomovic, z"l, for this reference. Moreover, the Babylonian Talmud in *Eruvin* 27a and *Kiddushin* 34a expressly objects to treating the Mishnah's general rules as inviolable principles.

and women began sitting in the same classes and learning the same material as boys and men did and ever since men and women sat together in prayer – well over a century ago – we have now come to the point of being able to adopt a general principle that has guided our thinking in the past and continues to guide it today. It is indeed an occasion to say *Barukh She-he-hiyanu*.

The Talmud’s reticence to apply general principles to specific cases, though, has considerable merit. It is born out of the realization that life is not easily categorized in general principles, that even though we might do a given thing in an overwhelming array of cases, there will always be some situations that do not fit that schema – or do so only by misrepresenting reality or causing practical harm . In this way Jewish law, like Anglo-American law, is a case-based system rather than a rule-based system such as exists on the European Continent (the Prussian Code in Germany, the Napoleonic Code in France, the 1913 Code in Italy). In the latter, every case comes under the rubric of a general rule, and the disposition of an earlier case has no authority over how a new case should be decided, even if it is remarkably similar or almost the same. Judges instead go back to the principle and determine each case under the rule. Jewish and Anglo-American law, however, have not followed that kind of deductive reasoning; those two legal systems have instead instructed judges to determine each case on its own, making analogies to, or drawing distinctions from, earlier cases, to be sure, but ultimately deciding the case in front of them in all its singularity and complexity. Some general rules may evolve from such adjudication, but they never have the authority to determine the judgment of a given case. In fact, American courts have announced and used a whole host of *conflicting* rules on how to interpret statutes.² I often like to put it this way: Continental law prefers systematic consistency

² Karl Llewellyn, *The Common Law Tradition* (Boston: Little, Brown, 1960), Appendix C, has a list of 28 such rules announced by American courts that he designates “Thrust” and 28 opposite rules, also announced by American courts, that he designates “Parry.” The list is reprinted in

over the details of life, while Jewish law and Anglo-American law (and philosophy, by the way) prefer truth to consistency.

In our case, what does this mean? While I think that *in principle* Jewish men and women should see themselves as equally obligated under Jewish law, I also think that, following the Talmud's wise methodology, this general principle, like all others, must be applied with sensitivity and judgment to specific cases. Given our history as a Movement, I think that gender equality under Jewish law is a real principle that has many, many examples in our practice to demonstrate that we think and act in accordance with it, and so I voted for Rabbi Barmash's paper enthusiastically. At the same time, I would not want this principle to be seen or used as a wide brush to decide all cases.

In particular, I want to assert that equal does not mean same. Individuals are all unique, as M. *Sanhedrin* 4:5 and modern science of DNA make clear, if the point needs support. That said, men as a group are different from women as a group in some significant ways, as evidenced by a range of studies by, among others, Carol Gilligan, Deborah Tannen, and John Gray.³ As a result, I would like to apply Rabbi Barmash's principle with recognition that equal legal obligations in principle may play out differently in practice in light of gender differences that go beyond differences in genitalia.

Elliot N. Dorff and Arthur Rosett, *A Living Tree: The Roots and Growth of Jewish Law* (Albany: State University of New York Press, 1988), pp. 210-213.

³ Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982); Deborah Tannen, *You Just Don't Understand: Women and Men in Conversation* (New York: Harper, 2007); John Gray, *Men Are From Mars, Women Are From Venus* (New York: HarperCollins, 1992).

In addition, I want to take note of the role of evolving custom in these matters. In 1997, I published an article entitled, “Custom Drives Jewish Law on Women,”⁴ in which I argued that the reasons given in the tradition for exempting women from some *mitzvot* and making them ineligible for others (e.g., serving as witnesses, except in very limited cases) were not based on legal arguments that flow reasonably from an analysis of the text of the Torah but rather from the customs of the times in which these decisions were written. Justifications of these practices were then read back into the Torah to accord with the custom of the day. So, for example, the Rabbis and all subsequent medieval codes and response interpreted the word *edim* in Deuteronomy 17:6 and 19:15 as referring exclusively to men, leading to the rule that only men can serve as witnesses, even though the Hebrew plural does not require that limitation and there is no antecedent in those verses that requires such a reading either. I then distinguished among three cases: (1) In some areas Jewish law and/or custom is harmful to women, and in those cases we must actively change the law or custom; (2) in many cases the customs are appreciated by some but not by others, in which case I argue for tolerance of multiple practices; and (3) in our own time we should seek to enrich Jewish life with new customs, including those specifically involving women, as we already have done in creating *simhat bat* ceremonies, for example.

I would like to apply the same kind of evolutionary thinking to a few of the ways in which men and women commonly act in Jewish life. In a 1984 article, “Equality with Distinction,” I argued not so much for “separate but equal,” but, as our colleague, Rabbi Ben

⁴ “Custom Drives Jewish Law on Women,” *Conservative Judaism* 49:3 (Spring, 1997), pp. 3-21. Response to critics: *Conservative Judaism* 51:1 (Fall, 1998), pp. 6-73; reprinted in *Gender Issues in Jewish Law: Essays and Responsa*, Walter Jacob and Moshe Zemer, eds. (New York: Berghahn Books, 2001), pp. 82-106, and in Elliot N. Dorff, *For the Love of God and People: A Philosophy of Jewish Law* (Philadelphia: Jewish Publication Society, 2007), pp. 253-268.

Zion Bergman put it, “equal but *vive la difference!*” That is, I think it is perfectly fine on a principled level, and even desirable on a practical level, to hold men and women as equal under Jewish law but to express their differences in our ritual practices in some ways. As I stated then:

The feature of Judaism that most closely approximates what I advocate is not new at all. It is the traditional division of roles for lighting candles and for reciting Kiddush on Friday evening. Both these tasks are required of both men and women in Jewish law,⁵ but by custom it has become the practice that women light the candles and men recite the Kiddush. Both acts have more or less the same amount of attention given to them, although in some settings one is highlighted somewhat more than the other.⁶

Moreover, as I would add today, there is nothing essentially female in lighting candles or essentially male in reciting a prayer over wine. In the diverse families structures in which we now live, this kind of assignment of roles may not make sense, and in the end all adult Jews are legally obligated to light candles and recite Kiddush, either themselves or through an agent; but this will at least provide an example of an attempt to recognize differences among equals.

The same reasoning applies even more strongly, it seems to me, when some people do indeed see a particular ritual as gendered. I have been *mora d'atra* of the rabbinical program at the University of Judaism (now the American Jewish University) since its inception in 1971. Once women were admitted to rabbinical school in 1985, I did not insist that they wear *tefillin*. We do require that women rabbinical students demonstrate that they know how to put on *tefillin*, for as rabbis they will need to teach others how to do so. They, like the men, also need to learn some of the meanings associated with *tefillin* so that they can motivate Jews to use them in their worship. Moreover, I personally have encouraged women rabbinical students to use them

⁵ B. *Berakhot* 20b; B. *Shabbat* 31b; M.T. *Laws of Idolatry* 12:3; *Laws of the Sabbath* 5:3; S.A. *Orah Hayyim* 263:2, 3; 271:2.

⁶ Elliot N. Dorff, “Equality with Distinction,” in “Male and Female God Created Them” (Los Angeles: University of Judaism, March, 1984), *University Papers*, p. 22.

regularly, and other faculty members have as well. In the end, though, I need to recognize that for some women, particularly those who grew up in traditional homes, *tefillin* are a man's garb. A *tallit* is different, for it resembles a shawl that women sometimes wear just to keep warm or as part of their outfit, and many women, my wife and one of my daughters included, have created *tallitot* that, in their eyes, are distinctly feminine in style. *Tefillin*, though, are what they are, and they cannot be changed because they are classified as *halakhah l'moshe mi'sinai*.⁷ Their long history as being connected only to men has made it hard for some women to make them their own without undermining their identity as women. That, of course, is not a necessary reaction, for some women have adopted the practice of using *tefillin* in their worship without any such concerns about their femininity, but some have not been able to make this leap. As a result, I have left it to each woman rabbinical student to decide on her own whether *tefillin* will be part of her worship practice, all the time encouraging, but not requiring it to become so.

My colleague at the American Jewish University and on the CJLS, Rabbi Gail Labovitz, however, raises a good point. As she said at the meeting in which we voted on Rabbi Barmash's responsum, the vast majority of young men at Ramah and USY events will put on *tefillin* at services only because they are required to do so. Until we do the same with our young women – and all the more so our female rabbinical students – we will never have a substantial community of women who put on *tefillin* for daily worship. In that sense, this is, as she put it, “a chicken and egg problem.”

⁷ B. *Megillah* 24b. Back in the 1970s we lost a rabbinical student because he was a vegan and found no wiggle room to substitute anything but leather for the straps precisely because no reason is given in the sources that one might challenge today; using leather straps is simply the way it is done.

Her argument is a good one, and it undoubtedly is true that fewer women are using *tefillin* in their worship today than would otherwise be the case if we had made it mandatory decades ago. That, though, would come at the cost of alienating a number of women and, at least as important for me, of blurring lines that many (but certainly not all) women see between what is their identity as women and this particular practice traditionally done by men. So in recognition of the role of custom in Jewish law, and in respect for the gender differences as well as their equality, I would argue for affirming the basic principle of equality that Rabbi Barmash so eloquently justifies while at the same time allowing for women to find their own individual way with the particular *mitzvah* of *tefillin*. I would also argue, as I did in my 1984 paper, for exploring new ways in which we can all affirm both our equality and also our differing gender identities in Jewish ritual practice as we do in many other areas of life.