

Dissenting Opinion on Rabbi Barmash's Responsum on Women and Mitzvot

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

I am impressed by Rabbi Barmash's Teshuvah, and agree with its overall premise, that the status of Jewish women has changed, and continues to change over time, and that *halakha* must address that reality. This issue goes even beyond the rights of women. Judaism is strengthened by making each adult Jew, male or female, a fully appreciated member of the community, irrespective of gender. Indeed, within our communities we now see that women as a class participate fully in many mitzvot from which they were once considered exempt, as the criteria which may have once mandated those exemptions or exclusions no longer apply.

However, I felt compelled to abstain because of two concerns, one general, relating to *hiyyuv*, obligation, and one specific, relating to tefillin. In particular, I would note that there are strong grounds to consider tefillin differently from the other obligations and practices covered in Rabbi Barmash's teshuvah.

My general concern, shared with a number of my colleagues who have written responses, is that Rabbi Barmash's focus on obligation may miss the mark. I agree with Rabbi Kalmanofsky that, the language of *hiyyuv* itself does not adequately capture the way that many in our communities, female and male, approach their lives of religious observance. It is true that this committee has the ability to encourage and even impose new obligations. However, I wonder whether making a blanket declaration of obligation, whether under the rubric of *nishtanu hazmanim* (times and circumstances have changed) or even a *takkanah* (a declaration of new law) will have a great impact.

I happen to be a believer in the importance of *hiyyuv*, that rights are linked to responsibilities, but even within the realm of *hiyyuv*, I believe that the approach of the teshuvah errs on the side of being overly prescriptive, rather than descriptive. Previous legal analysis within our movement has seen women as taking on obligations voluntarily, whether as individuals, or as part of a general trend, and also noted that not all types of participation necessarily require a precisely equivalent obligation. Rabbi David Fine, in his 2002 teshuvah¹ argued that women should be seen as able to count in a minyan, and serve as *shelihot tzibbur* within a particular community, when they are widely accepted as having the corresponding specific obligations. He noted that in many of our communities, this change had come to pass, so that in those settings, women as a class could be accepted in these roles, even if not all Jewish women everywhere had accepted those obligations.

¹ David J. Fine, "[Women and the Minyan](#)" OH 55:1.2002

Fine's observations of a decade ago are even more true today. In most of our communities, daily worship is seen as equally relevant to men and women, and there are many women who proudly consider themselves as fully obligated participants in rituals from *minyan* to *lulav* to *shofar* to *tallit/tzitzit*. And yet, that change in approach to obligation has not come to apply equally to all practices, which brings me to my second concern, tefillin.

Despite 60 years of egalitarian evolution in our movement, tefillin have truly been the last frontier, even among many women who are committed to the general idea of equal *hiyyuv*. It is possible that with further time and education, tefillin will become the norm for women as well, but we should consider the possibility that perhaps there is something distinctive about this particular mitzvah which makes it gendered, either by virtue of the aesthetic and practical aspects of its observance, or by its inherent nature, and that imposing this obligation upon men and women equally is not appropriate.

My colleagues, Rabbis Dorff and Nevins, identify a number of factors that have led to the lack of adoption of tefillin among women, including aesthetic factors like the inflexibility of the appearance of these black boxes (as opposed to tallit which may vary in size, color and material), the relative absence of role models, the timing of when they are used and their lack of acceptance among many men as well, as well as specific social pressures and potential issues of modesty in dress.

Rabbi Dorff notes that there are other commandments, which though not inherently gendered, still retain a strong gender valence. A gender-equal practice need not be gender-blind. For example, Shabbat kiddush and candle-lighting are still widely regarded as male and female roles respectively. Even in a world in which men and women are truly valued equally, there could be some observances which would still retain a commonly-accepted masculine or feminine aspect. However, one might argue that aesthetics, or social pressure alone are also insufficient to override a true *hiyyuv*. A life of observance sometimes demands we go against the grain or do things that may make us socially uncomfortable. From a technical standpoint, a man may still light Shabbat candles, and a woman may still say Kiddush, and indeed, either must do so in the absence of another to do those things on his or her behalf.

Beyond aesthetics, is there something inherently gendered in the nature of tefillin that would lead us not to apply the *hiyyuv*, even in a generally egalitarian context where men and women observe many other positive, time-bound commandments without distinction.

Early rabbinic sources talk about issues of social status, of possible competing demands of family, or issues of hygiene. These criteria are later attempts to justify an already extant practice, and in any case, no longer apply specifically to women in our day. More recent sources, in many cases responding to a increased interest in tefillin on the part of women, offer other lines of reasoning, but these are all ex post facto.

What is the deepest reason for the original exemption? Perhaps even the connect of *mitzvoth aseh shehazeman garman* is not the answer. Rabbi Barmash cites the work of Elizabeth Shanks Alexander, who offers the theory that tefillin was the original seed for the concept of women being exempt from positive time bound commandments. The

exemption for tefillin came first, and then *mitzvot aseh shehazeman garman* was developed as a descriptive principle to group together other equivalent practices, even though in fact there were many exceptions. One might argue that tefillin is the “grandfather” of all such exemptions.

Rather, I would suggest that the answer is found within the tefillin themselves. The tefillin contain four paragraphs from the Torah. The text of each of these four paragraphs includes a reference to wearing a sign upon the head and on the arm. These passages also link the tefillin with two other clusters of commandments. One such cluster, based on the passages from Deuteronomy (which also make up the shema), includes recitation of the shema, Torah study, and mezuzah. It is widely assumed across surprisingly wide swaths of Jewish practice, and certainly in our own communities, that this first cluster of mitzvot is no longer gendered. Mezuzah has always applied to women. Observant Jewish women today are engaged in study and teaching of Torah, as well as regular recitation of the shema, and indeed consider themselves practically obligated to do so. If tefillin are linked to these commandments, and if one is to apply equal obligation to all non-gendered mitzvot, then the *hiyuv* should apply to women as well.

However, the other two biblical portions found in tefillin (Exodus 13:1-10,13:11-16) both speak of tefillin in the context of another cluster of mitzvot, focusing on specific modes of remembrance of the Exodus. Remembrance of the Exodus is a central aspect of Judaism, expressed through many different mitzvot, most of which have no connection to gender.² However, these two passages connect this remembrance specifically to the practice of setting aside or redeeming the first born, which is an explicitly gendered mitzvah. For example, Exodus 13:16, which speaks of placing a remembrance between the eyes and upon the hand, follows directly after a verse which describes the Mitzvah of redeeming the firstborn, applying only to firstborn males. It is true that today we would encourage parents to collaborate in carrying out this mitzvah together if both are present, or a mother to carry out this redemption on behalf of her son in the absence of a father capable of doing so. However, we have still reaffirmed that there is a gendered aspect to this mitzvah, in that it does not apply to a firstborn daughter.³

One may choose to see tefillin solely as an extension of Torah Study and the shema, and indeed, if one does so, one might be hard pressed to find a justification for exempting women from that obligation. However, what if tefillin is a gendered mitzvah, not merely by the aesthetics of its practice, but by virtue of the way its Biblical origin connects it with the Pidyon Haben a gender-specific mode of remembrance of the Exodus? It would still be appropriate for women to choose to do so voluntarily, but it could not be appropriate to impose a blanket obligation.

Our committee has moved over these past decades to eliminate many exemptions and exclusions that kept women from participating fully in the ritual life of the community.

² Some aspects of remembrance of the Exodus (eating Matzah, drinking the four cups) are non-gendered and indeed mandatory despite being time-bound, while others (eating of the paschal lamb, and bitter herb) were considered optional for women by the traditional sources.

³ Rabbi Gerald Skolnik, YD 305:1.1993

This process has been both prescriptive and descriptive. In some cases, we have encouraged nascent change. In others, we have recognized facts on the ground of observances and obligations that our communities have already endorsed. It is fair to assert that many of our communities have already embraced women's equality of ability and obligation in many areas. However, we wring our hands that tefillin have been a sticking point in this transition.

Perhaps the barriers to the acceptance of tefillin are merely sociological and aesthetic factors that will be overcome with continued time, education, and encouragement. Alternatively, perhaps there is something more to the situation. Tefillin were among the earliest of these gender exclusions to be explicated in halachic literature, and may have a source for their gendered status beyond sexism or issues of socially constructed status. It would be consistent with many other opinions of our committee to eliminate the socially constructed or exegetically generated components of a legal category (in this case, *mitzvot aseh shehazeman garman*), but leave the Biblical root intact. I would urge us to have the humility to recognize that the question of tefillin may defy immediate resolution, and consider that it may take another generation for the community of observant, egalitarian-minded Jews, who, "if not prophets, are at least children of prophets" to navigate this transition.

Even as we move towards a Judaism where men and women have equal opportunities and play equally valued roles, some mitzvot will continue to have a gender valence beyond mere biology, and sensitivity is required that new obligations be imposed at a pace that the community will find relevant and accept. Our synagogues, schools, and educational institutions should encourage both men and women to develop an appreciation of tefillin, but it is premature to impose new obligations to that effect.