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On the Ordination of Women as Rabbis

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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.

The question of the ordination of women can be analyzed halakhically either narrowly or broadly. A narrow analysis would confine itself to the issue of ordination per se, while a broad analysis would consider as well the ancillary issues which might be involved.

One who undertakes a broad analysis of the question must deal with two crucial ancillary issues: (1) the status of women vis-à-vis *mitzvot* from which they are legally exempt, and (2) the status of women as witnesses. These issues are crucial because they involve matters which are widely considered to be either necessary or common functions of the modern rabbinate. These two issues apply to all women, not only to those who might seek ordination.

This paper will be divided into four parts: (1) Women and *mitzvot;* (2) Women as witnesses; (3) Women and ordination per se; (4) Conclusions and recommendations to the Faculty of the Seminary.

SECTION ONE

There are many *mitzvot* from which women are halakhically (legally) exempt. Those *mitzvot* are generally categorized as "positive commandments which are time-bound" in that they have to be performed at a specific time of the day or on specific days of the year.[1] This categorization is, however, imperfect. There are positive time-bound commandments which women are obligated to observe,[2] as well as positive non-time-bound com-

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

mandments from which they are legally exempt.[3] The *gemara* itself was aware of the problems, and resolved it by recourse to the dictum of Rabbi Yohanan, *Ein lemeidin min hakelalot* – general principles are not to be understood as definitive.[4]

However, the imperfection of the principle is legally insignificant.[5] Even if one could demonstrate that the principle is totally insufficient to explain which *mitzvot* women must observe and from which they are exempt, each specific case, either for obligation or for exemption, has the clear weight of precedent to support it.

The *gemara* plausibly resolves the inconsistency between the stated principle and the actual law by pointing out that the literary style of the *mishnah* in which the principle appears dictates a phrasing which will be parallel to the other principles in that *mishnah,* which are accurate. To reverse either specific rabbinic decisions vis-à-vis certain *mitzvot* from which women are now exempt, or to abolish the principle in its entirety, requires a presentation in each case of the *legal grounds* and justification for overturning precedent. To do so solely on the basis of the imperfection of the principle would be totally insufficient, since the promulgators of the norms themselves recognized that the precedents they were setting were not absolutely consistent with the principle.

The affirmation that women are exempt from certain *mitzvot* necessitates analysis of four issues.

1. May women perform those *mitzvot* from which they are exempt, and may they recite the appropriate blessings? (These are two distinct questions. However, most of the sources which will be quoted deal with both questions at the same time. The two will therefore be treated as one question.)

2. If women may observe *mitzvot* from which they are exempt, is their observance of these *mitzvot* governed by the same rules as is the observance by men of those same *mitzvot?* Thus, men are permitted to violate some Sabbath prohibitions in order to observe certain *mitzvot* which are obligatory upon them but not upon women. Are women who observe such a *mitzvah,* though legally exempt from its observance, also entitled to violate that Sabbath prohibition?[6]

3. Can the voluntary observance of a *mitzvah* ever become in some significant sense religiously obligatory?

4. If it can, can that self-imposed obligation have the same legal status as the obligation of men which, legally speaking, is "other-imposed" either by the Torah or by rabbinic authority?

The most restrictive position regarding the right of women to observe *mitzvot* from which they are exempt is expressed by the Ravad (1125-1198).[7] The *Sifra* records a disagreement between Rabbi Yose and Rabbi Shimon, who allow women to lay their hands on the head of the burnt-offering,[8] and an anonymous view which forbids women to do so. The

Ravad attributes the anonymous view to Rabbi Meir and Rabbi Yehuda.[9] He states:

> In any case, the law is not according to Rabbi Yose. For Rabbi Meir and Rabbi Yehuda disagree with him, and the anonymous *mishnah* in Rosh Hashanah[10] reflects the view of Rabbi Meir and Rabbi Yehuda. The *mishnah* in Rosh Hashanah states: "We do not prevent children from blowing the *shofar.*"[11] This implies that we do prevent women from doing so – i.e., because to them the *shevut* of sounding the horn applies.[12] Therefore, we do not agree with Rabbi Yose. This opinion we also find in Erubin, chapter 10.[13] The *mishnah* in Sukkah[14] states: "A woman may accept [the *lulav*] from her son or her husband [and put it in water]." On this passage the *gemara* comments:[15] "Obviously! What might you have thought? [One might have thought that] since she is not obligated [to observe the *mitzvah* of pronouncing the blessing over the *lulav*], she should also be forbidden to carry it."[16] If we accepted the position of Rabbi Yose, she would be as entitled as men to use the *lulav* for its ritual function, and if she could be so entitled, there would be no grounds for the assumption that she should be forbidden to handle it. . . . Therefore we may deduce [on the basis of these sources that we accept the view of Rabbi Meir and Rabbi Yehuda [that a woman may not observe the *mitzvot* from which she is exempt]. As a result, it goes without saying that we would not permit women to wear a *tallit* the *tzitzit* [fringes] of which are made up of mixed species, even though men may, for this involves a biblically enjoined prohibition [Deuteronomy 22:11, Leviticus 19:19]. [Hence, women who wear such a *tallit* are violating a biblical commandment.] We also do not permit them [women] even to recite the benediction over the *lulav.* But sitting in the *sukkah* or holding the *lulav* are permitted to women since they involve neither chance or mishap [*kikul*] nor denigration of the *mitzvah* [*zizul mitzvah*].

The Ravad forbids women from performing any of the *mitzvot* from which they are exempt except those like sitting in the *sukkah* in which their physical presence itself is fulfillment of the *mitzvah.* The handling of the objects involved in the performance of *mitzvot* is not included in the prohibition, so long as she does not handle them for the sake of performing the *mitzvah.* Thus, she may not recite the benediction over the *lulav, esrog,* etc., while she holds them.

One step less stringent is the view codified by Maimonides. He wrote:[17]

> Women, slaves, and minors are exempt by the law of the Torah from *tzitzit.* . . . Women and slaves who wish to enwrap themselves in *tzitzit* [i.e., in a *tallit*] may do so without reciting the blessing. And similarly,

> all other positive commandments from which women are exempt may be performed by them, without blessings – and they should not be prevented from doing them [*ein memahin be-yadan*].

Maimonides allows the actual performance of the actions which constitute the *mitzvah,* but those actions must remain free of any intimation that the act is performed qua *mitzvah.* Since the act could not be described as compliance with a commandment without the recitation of the requisite blessings, forbidding the recitation of the blessings clearly indicates that women are not actually fulfilling *mitzvot,*[18] even though they may be performing acts which might otherwise be so interpreted.[19]

The passage which was quoted above from the tractate *Sukkah* is quoted, as well, by the *Or Zarua* (1200-1270). He interprets exactly as does the Ravad, but adds the following appendix:[20]

> Nonetheless, Rashi [1035-1104], consistent with his own view which forbids women to recite blessings, interprets this passage thus, as I have explained in *Hilkhot Rosh Ha-shanah.*[21] But Rabbenu Tam [ca. 1100-1171], who permits them to recite the blessings,[22] explains that passage thus: [The *gemara's* hypothesis is] that a woman, who is not obligated to perform the *mitzvah,* might be considered forbidden to handle the *lulav* except for her own need.[23] Therefore, the *mishnah* informs us that since she is entitled to handle it and recite the blessing, the *lulav* acquires for her the legal status of a vessel.[24] Nonetheless, the view of Rashi [which forbids women to recite the blessings] seems more plausible.

Two points raised by the *Or Zarua* are worthy of emphasis: (1) He affirms that the *sugya* in *Sukkah* provides no incontrovertible proof that women may not perform the *mitzvot,* even with blessings. Though he himself prefers the view of Rashi (which forbids women to recite the blessings), the *sugya* does not constitute a clear refutation of the view of Rabbenu Tam, who does permit them to recite the appropriate blessings. (2) He quotes Rashi as denying women the right to recite the blessings, thereby making Rashi's view the same as the view of Maimonides.

However, the following passage[25] indicates that the view that Rashi prohibited women from reciting blessings is not certain.[26]

> Rabbi Yitzhak Ha-levi has rendered a decision that women are not to be prevented from reciting the blessings on *sukkah* and *lulav.* For the statement[27] that women are exempt from all positive time-bound commandments is meant only to indicate that they are not obligated. But, if they wish to bring themselves under the yoke of the commandments, they are entitled to do so, and should not be prevented. For they are not to be more disadvantaged than "those who fulfill *mitzvot*

even though they are not commanded."[28] And if they wish to observe the *mitzvot*, it is impossible to do so without the blessing.[29]

Since the responsum includes no indication that Rashi disagreed with the decision of Rabbi Yitzhak Ha-levi, it would be fair to assume that he agreed. Thus, there are two attested, but contradictory, indications of Rashi's view on the subject. Be that as it may, this responsum deduces the right of women to observe the time-bound *mitzvot* from the very principle which the *mishnah* uses to designate the general category of *mitzvot* from which they are exempt. The principle implies exemption, not proscription. Given the class of "those who observe though not commanded," and the absence of any clear and explicit prohibition, there are no grounds for asserting that women may not observe *mitzvot* qua *mitzvot*. Furthermore, since the blessings are integral to the *mitzvot*, there can be no justification for denying them the right to recite the appropriate blessings as they perform the *mitzvot*.

Thus far, then, there are three positions: (1) Women are forbidden even to perform the time-bound *mitzvot*. (2) They are allowed to perform the *mitzvot*, but forbidden to recite the appropriate blessings. (3) They are allowed both the observance and the recitation of the blessings.

The dispute among *posekim* has persisted until modern times, with the division generally along Ashkenazi-Sephardi lines. The former usually adopt the third position, and the latter generally follow the second – the Maimonidean position. Thus, Caro (1488-1575) states in his code:[30] "Although women are exempt, they may blow the *shofar* . . . but may not recite the blessing." Isserles (1525-1572) added: "Our custom is for women to recite the blessings on positive time-bound commandments. In this case, too, then, they may recite the blessing for themselves."

A short responsum of the Rashba (ca. 1235 – 1310) epitomizes the view which seems most logical. He wrote:[31]

> You already know of the dispute among the *rishonim* and their proofs. I agree with those who claim that women may observe and recite the blessings on all the positive commandments, based upon the precedent of Michal bat Shaul,[32] who used to wear phylacteries, and the Sages did not stop her. Rather, she acted with their approval. And obviously [*ustama de-milleta*], if she put them on she recited the blessing.

That position has even "heavenly" approval. Rabbi Yaakov Ha-levi, in one of his *Teshuvot Min Ha-shamayim* ("Responsa from Heaven"),[33] wrote

> I asked concerning the women who recite the blessing over the *lulav*, and concerning those who recite the blessing over the sounding of the *shofar* for women, whether there is a transgression involved, and if it is a "purposeless benediction" since they are not obligated. And they

> answered . . . "Whatever Sarah says, obey her" [Genesis 21:12]. Go and say to them: "Return to your tents, and bless your Lord." . . . If they wish to recite the blessing over the *lulav* and the *shofar,* they may.

There is, therefore, ample halakhic precedent to allow women to observe positive time-bound commandments, and to recite the appropriate blessings.

The other theoretical problem involved in the recitation of the blessings by women is the appropriateness of their saying *ve-tzivvanu* ("and He commanded us"), which is integral to blessings recited before performing the *mitzvot.* If women are exempt, how can they be "commanded"? Both the Ritba (1250-1330) and the Ran (ca. 1310-1375) have dealt with this problem. Interestingly, each of them deals with it after having "disproved" all of the purported proofs of Rabbenu Tam that women may recite blessings.[34] Having done so, both the Ran and the Ritba nevertheless agree with him that they may recite the blessings, and each for the same reason, namely, that the assertion that "he who is commanded and performs *mitzvot* is greater than one who performs though not commanded"[35] implies only that the former class is greater than the latter. It does not imply that the latter class receives no reward for the observance of the *mitzvot.* It implies only that it receives a lesser one. The Ran then adds:[36]

> And do not say: "Since they were not commanded, how can they say *ve-tzivvanu?*" That is no problem. Since the men were commanded, and the women also receive "reward," they clearly may say *ve-tzivvanu.*

The Ritba puts it this way:[37]

> And they are entitled to say *ve-tzivvanu,* since they are included in the class of "Israel" which is commanded to perform [the *mitzvot*]. Therefore, to them, too, who have the right [to observe] and receive reward, *ve-tzivvanu* is applicable as members of the class of "Israel."

One further issue regarding the right of women to observe *mitzvot* from which they are exempt remains to be addressed. Admittedly, it is an infrequent occurrence. On occasion, the observance of one *mitzvah* involves the violation of another *mitzvah.* Sacrifices which are offered on Shabbat are one example. One might theoretically argue that the right to violate *mitzvah* A in the performance of another *mitzvah,* B, is restricted to those who are obligated to perform *mitzvah* B and does not extend to those whose observance of *mitzvah* B is voluntary.

A direct and unequivocal response to this question is found in the Yerushalmi.[38] "Rabbi Lazar said: 'The Paschal sacrifice by women is voluntary,[39] but takes precedence over Shabbat.'" Though women are legally exempt from the sacrifice, and though it may involve a violation of Shab-

bat, the sacrifice takes precedence over Shabbat even for women who choose voluntarily to observe it.

A similar response is found in the Ravad. He wrote:[40]

> There are those who claim that according to the view of Rabbi Yose and Rabbi Shimon [who claim that *nashim somekhot reshut* – "on a sacrifice brought during a festival women may lay their hands voluntarily"], even *semikhah gedolah* [the laying on of the hands in full force] is permissible to women.[41] [Since in this case] the Torah permits women voluntarily to observe in the same manner as men what men are obligated to observe, hence we may deduce that in regard to positive time-bound commandments women may observe them as do men even if it involves a violation of a biblical commandment. [This then would permit] a woman voluntarily to observe the *mitzvah* of *tzitzit* [the wearing of a *tallit*] even though the *tzitzit* violate the prohibition of *sha'atnez* [Deuteronomy 22:11-12).[42]

The Ravad seems here clearly to maintain that once the voluntary assumption of *mitzvot* by women is recognized as valid, no distinctions can be made between men and women regarding the nature of the observance. What is mandatory or permissible for men is permissible for women as well. To the extent that the mandatory observance of a man may either allow or dictate the violation of another *mitzvah* in the process, the voluntary observance of a woman similarly allows or dictates.

By and large, women have refrained from the observance of most of the *mitzvot* from which they are exempt. That tendency is particularly true of commandments which require daily observance, such as *tallit* and *tefillin.* The codes reflect the idea that women who choose to observe the *mitzvah* of *tallit* may be guilty of *yoharra,* "arrogance."[43] However, the sources quoted thus far indicate quite clearly that women who choose to observe *mitzvot* have ample, though not universal, support and ought not to be considered in violation of the law.

Mizvot which do not require daily observance are not in the same category as those which do. The frequent mention even in the sources quoted thus far of *mitzvot* like *lulav* and *shofar* offers testimony to the fact that women did observe those commandments, and in large enough numbers to warrant their being dealt with seriously by the *posekim.* As will become clear, the number of such *mitzvot* is not restricted to two. Furthermore, *mitzvot* of this category raise the question whether there can be any element of *hiyyuv* (obligation) applicable to women who voluntarily observe *mitzvot* from which they are exempt. This question also involves the question whether a state of obligation can in general be created by voluntary observance, even for men.

In the latter third of the seventeenth century the following comment appears in the writings of Rabbi Abraham ben Hayyim Ha-levi Gumbiner, the *Magen Avraham:*[44] "Women are exempt from counting the Omer, since it is a positive time-bound commandment. Nonetheless, they have already made it obligatory upon themselves [by having voluntarily decided to observe it]."

Almost two hundred years later, perhaps realizing the potential significance of the *Magen Avraham's* statement, Joseph Babad, the *Minhat Hinukh,* reacts with startled amazement. He wrote:[45]

> Women and slaves are exempt from this *mitzvah* [counting the Omer], since it is a positive time-bound commandment. Yet note that *Magen Avraham* has written that now they have made it obligatory upon themselves. That view, indeed, requires further investigation. The view that women, if they accept upon themselves to observe a commandment from which they are exempt, should be considered obligated by virtue of their having accepted it upon themselves as an obligation, is a *davar hadash* [novel view]. I have not seen such a claim made anywhere.[46] . . . Nor do I know the source of the view here expressed by the *Magen Avraham.*

In essence, Babad is claiming that the view of Gumbiner is unprecedented. But even if Babad were correct, the fact remains that Gumbiner is among the most widely recognized halakhic authorities. His view could itself set a precedent which later *posekim* might follow. However, Gumbiner's view is not without precedent. It can be traced back at least to the *Halakhot Gedolot,* which, in turn, attributes it to the *gemara* itself. The *Halakhot Gedolot* reads:[47]

> When an individual forgets to mention Rosh Hodesh during his recitation of the evening *amidah,* he should not repeat it, for Rav Anan said in the name of Rav:[48] "If one erred and did not mention Rosh Hodesh during the evening *amidah,* he should not repeat it, since the month must be consecrated during the day." But if one erred and forgot to mention either Shabbat or Yom Tov or Hol Ha-moed during his recitation of the evening *amidah,* we do make him repeat it. For even though we have clearly established that the evening *amidah* is voluntary,[49] that applies when one has decided not to recite it all. But if one has already made the effort and prayed and thus accepted the recitation of the evening *amidah* as an obligation, if then he has erred by forgetting to mention [the special occasion] he must pray it over again. For if it were not so, why was it necessary to offer the reason that the month must be consecrated during the day as the ground for not repeating the evening prayer on Rosh Hodesh? This could have been

> deduced from the fact that even Sabbaths and Yamim Tovim he should not repeat, since the evening prayer is voluntary. The obvious conclusion is that the statement that the evening prayer is voluntary refers to the option not to recite it at all. But, having recited it, he accepts it upon himself as obligatory, and we enjoin him to repeat it because he had forgotten to mention Shabbat or Yom Tov.

The thrust of the comment of the *Halakhot Gedolot* is quite clear. The recitation of the eveing *amidah* is *reshut,* "voluntary," the same as the status of a woman's observance of positive time-bound commandments. Yet, once one begins to recite it, one has changed its legal status from voluntary to obligatory, with whatever legal ramifications might result from the latter status. Even the fact that one does not repeat the evening *amidah* on Rosh Hodesh if he has forgotten *ya'aleh veyavo* (the special Rosh Hodesh insertion) does not disprove this conclusion, for that exemption from the requirement to repeat the *amidah* is contingent not on the voluntary nature of its recitation, but on a specific factor concerning Rosh Hodesh which makes the repetition unwarranted.[50]

The thesis of the *Halakhot Gedolot* was utilized in the late twelfth or early thirteenth century by Rabbi Eliezer ben Joel Ha-levi (Ravia) in the following passage:[51]

> In the second chapter of the tractate *Shabbat*[52] the question is raised whether or not mention of Hannukah must be made in the grace after meals. It is resolved to the effect that it need not be mentioned, but that if one wishes to mention it he may. The implication is that it is voluntary. Nonetheless, since *nehigei alma* [it is the widespread custom] to mention it, and one who is reciting the grace is therefore doing so with the intention of mentioning it, he accepts it as an obligation and must repeat. And my proof is from the *Halakhot Gedolot,* who decided that even according to the view which affirms that the evening *amidah* is voluntary, once one has begun to pray, he must repeat the prayer if he forgot to mention Rosh Hodesh,[53] since he has accepted it upon himself as obligatory. This case seems no different. That is my opinion.

The Ravia does here what *posekim* have always done. He applies the principle espoused by the *Halakhot Gedolot* to a case which he deems to be similar to the specific case stipulated in the earlier source. On that basis he makes his final judgment that the widespread custom of reciting *al ha-nissim* during *birkat ha-mazon* elevates its recitation from voluntary to obligatory, with whatever legal ramifications may result from that changed status.

Though one can offer no absolute proof that the *Magen Avraham* was aware of these precedents, it is at least plausible. But whether or not he

was aware of them, moderns are. Thus it is logical to posit that his claim vis-à-vis the widespread custom of women to count the Omer is no more than one further extension of the precedent already set up by both the *Halkhot Gedolot* and the Ravia. The widespread observance of the *mitzvah,* which, legally speaking, is voluntary, can effect a change in its legal status, elevating it to the level of obligation. For the *Halakhot Gedolot* and the Ravia this elevation of status had legal significance, dictating behaviors which would seem to be applicable only to matters which are halakhically obligatory.[54] Nor should the matter be taken lightly, for the re-recitation of either the *amidah* or *birkat ha-mazon* might entail recitation of blessings which, from a strict legal sense, were valid when recited the first time, and hence their re-recitation results in the "taking of God's name in vain."

Rabbi Shimshon bar Zadok, a student of Rabbi Meir of Rothenburg (ca. 1215-1293) also speaks of a type of obligation for *mitzvot* which are, in fact, voluntary. He wrote:[55]

> Women are exempt from both *tefillin* and *tzitzit,* for they are both positive time-bound commandments. . . . Nonetheless, they should not be prevented from wearing *tzitzit* and reciting the blessing, for they are allowed to obligate themselves as is demonstrated in *Kiddushin.*[56] However, they should not put on *tefillin,* since they do not know how to keep themselves" in purity.[57]

In the late sixteenth century, Isaac Di Molina (d.ca. 1580) wrote:[58]

> Women are exempt from the *musaf* prayer. For this service serves as a commemoration of the obligation to bring sacrifices, in which women did not participate, nor had they part in communal sacrifices. But they are already accustomed to pray everything, and "they have obligated themselves for all *mitzvot.*[59]

At the barest minimum, the statement of the *Magen Avraham,* and its historical antecedents in the *Halakhot Gedolot* and the Ravia, the Tashbetz and Di Molina, demonstrate two things: (1) The amazement of the *Minhat Hinukh* is not warranted.[60] (2) The term "obligation" is not totally inapplicable to self-imposed observance of *mitzvot.*[61]

Since it is certain that the laws of *aninut* ("mourning before burial") will be raised as potential counter-examples to the point which has been made, a slight digression to indicate the grounds for rejecting *aninut* as a counter-example is in order.

The primary source from which the counter-example might be derived can be found in the *baraita* quoted in the *gemara*[62] which stipulates that an *onen* should eat in as private a manner as his circumstances allow. One

gets the distinct impression that if it were but feasible the *baraita* would urge that he not eat at all. In any case, the *baraita* concludes:

> He need not recite *ha-motzi,* nor need he recite *birkat ha-mazon,* nor need others recite *ha-motzi* for him, nor can he be counted among the three required for *zimmun.*

This translation reflects the explanation of Rashi, ad locum. As the Tosafot note,[63] Rashi's explanation exempts the *onen* from these requirements, but does not prohibit him from observing them. Only the last category marks an exception to this principle, for Rashi implies that he cannot be counted toward a *zimmun* even, apparently, if he wished to be counted. That, seemingly, implies that even if he wished to obligate himself, he may not do so in a way which might be publicly understood as implying obligation. To strengthen the point even further, the Tosafot continue:

> Nonetheless, the Yerushalmi states[64] that even if he wants to be strict with himself, we pay him no heed. Therefore, it seems plausible to explain that he may not recite *ha-motzi.* And the Yerushalmi explains why he may not do so "because of the honor due to the dead" or, alternatively, because "there is no one who will carry his burden."

The very stringency which the Yerushalmi applies negates the possibility that the *onen* case could be a counter-example to our thesis. The *onen* is forbidden even voluntary acceptance of an obligation because there are other factors involved which make that inappropriate, not because people who are exempt cannot voluntarily accept obligation. The case of the *onen* is comparable to the claim of the *Halakhot Gedolot* regarding failure to mention Rosh Hodesh in the evening *amidah.*[65] Note, too, Maimonides' statement:[66] "Anyone who is exempt from reciting the Shema may be strict upon himself and recite it, so long as his mind is free enough to concentrate on it." If his mind is at ease, he may voluntarily accept the obligation.

Some *posekim* have extended the implication of the prohibition of counting an *onen* for a *zimmun* to include a prohibition on counting him in a *minyan,* even if he is present and praying. The Hida (1724-1806) responds to that claim. He wrote:[67]

> *Aharonim* have written about an *onen* that he may not be counted in a *minyan.* And the *Peri Hadash* brought proof of that fact from Siman #199, which prohibits his being counted in the *zimmun.* But, if those are the grounds, they can certainly be denied. For the *zimmun* case is very different. For any Jew who does not eat cannot be counted in the *zimmun,* and, therefore, the legal status of an *onen* is to be considered as one who has not eaten. But vis-à-vis being counted in a *minyan* one could claim that since he is still a full-fledged Jew . . . and is even now

> obligated to comply with all of the negative commandments, the verse "I shall be sanctified in the midst of the Children of Isarel"[68] can be applied to him.

The Hida reaffirms the contention that special circumstances warrant the prohibition of counting an *onen* for *zimmun,* but for *minyan* he can surely be counted since those special circumstances are not applicable. Yet, it is clear, the *onen* is exempt from prayer. Thus, it must follow that some degree of obligation applies to him if he chooses to obligate himself voluntarily.

Let me then conclude this digression with the reaffirmation of the contention that the term "obligation" is applicable to self-imposed observance of *mitzvot* from which one is legally exempt. We must now proceed to analyze whether or not the status of obligation voluntarily accepted can be considered the same as that of one who is *metzuvveh ve-oseh,* one who is "commanded and performs."

It must be stressed that the question of the status of self-imposed obligation as compared to other-imposed obligation is of both theological and legal significance. As we shall see, the two aspects of the question cannot always be separated from each other. For the purposes of this paper, the primary concern is with the legal significance of the status, though a few comments on the theological question will be unavoidable.

Theologically, the question involves the following: One whose obligation is other-imposed (that is, who is "commanded") and does not fulfill his obligation is a sinner. Can the same be true of one whose obligation stems from voluntary self-imposition? Theologically, therefore, the question applies to all commandments. The nature of the specific *mitzvah* is not relevant to the theological issue. Vis-à-vis the woman the question would apply equally to any positive time-bound commandment which she accepted upon herself voluntarily. If a woman accepts upon herself the obligation to wear *tefillin,* is her failure to do so on any given day a sin, or is it a reversion to nonobligatory status?

Legally, on the other hand, the question of the status of self-imposed obligation is of very limited significance. Whether or not the failure of a woman to wear *tefillin* is a sin, sufficient precedent has already been adduced that she may wear them if she wishes. In point of fact, it seems that there are only two areas in which the status of self-imposed obligation is legally significant. The first area involves the question of agency. In a number of instances the *halakhah* permits one who is himself obligated to perform a given *mitzvah* to appoint another individual who is *equally obligated* to act as his agent. The *shatz* – the *sheliah tzibbur* – is "the agent of the congregation" to lead in prayer and to act as its agent in fulfilling the obligation to pray. The halakhic question that thus arises is whether one

whose obligation to observe a *mitzvah* is self-imposed may serve as the agent through whom one whose obligation to observe the same *mitzvah* is other-imposed fulfills his obligation? To be specific, can a woman who has accepted upon herself the obligation to pray three times each day, at the appointed hours, serve as a *shatz* for a group which contains people whose obligation to pray is other-imposed?[69] Since one cannot observe the *mitzvah* of *tefillin* through an agent, the question of the status of voluntary versus other-imposed obligation in relation to *tefillin* is not relevant.

The second area, connected with the first, involves the eligibility of one whose obligation to observe a *mitzvah* is self-imposed to be counted toward a quorum which might be required for the proper observance of the *mitzvah*.[70]

There is one primary source which seems to indicate a negative answer to the question posed above. The Mishnah reads:[71] "This is the general rule: Anyone *she-eino mehuyyav* [on whom an obligation is not incumbent] cannot fulfill that obligation on behalf of the many." If one assumes that the Mishnah in using the term *mehuyyav* ("obligated") intends thereby to refer only to "one whose obligation is other-imposed," it would, of course, follow that women could not serve as agents for others in the fulfillment of positive time-bound commandments. It seems, though, that the meaning of the principle is not quite that clear. In the first place, the word used in *mehuyyav* ("obligated"), a term which has already been demonstrated to be applicable to the voluntary acceptance of *mitzvot*. Secondly, the principle is prefaced by the following clause: "A deaf-mute, imbecile, or minor may not serve as the agent through whom the many fulfill their obligation." Two things stand out immediately when the principle is considered together with its preface. Women are not specifically mentioned in the preface. That alone would not be sufficient to indicate that they were intended to be excluded from the principle. But the omission of women gains increased significance when one notes that the three categories which are specifically mentioned are such that even voluntary acceptance of the observance of *mitzvot* by them would not have any element of obligation attached to it, on the grounds that those three classes are mentally, and, therefore, legally, incompetent. Surely, the same cannot be said of women. Had the principle read *metzuvveh* ("commanded") instead of *mehuyyav* ("obligated"), or had the examples of the preface included women, the answer to the questions posed above would have been clear and unambiguous. Given, however, that neither is the case, the clarity of the answer is open to significant doubt.

Furthermore, one could not claim that women are included in the principle on the grounds that their voluntary fulfillment of *mitzvot* is limited in some way. We have already shown that women may observe *mitzvot* exactly as men do,[72] even if the observance of one *mitzvah* involves the violation

of another. If there were any limitations whatsoever on the voluntary observance of *mitzvot,* it would surely be reflected in such instances.

It is most probable that any definitive answer to the question must be contingent upon the meaning of the statement of Rabbi Hanina: "Greater is one who is commanded and performs than one who is not commanded and performs."[73] Thus, attention must now be directed to the meaning of that dictum.

Casual reference to that dictum has already been made in other contexts,[74] indicating that it deals, in essence, with "reward" and not with obligation. There is no inherent logic which would dictate that different degrees of "reward" entail different degrees of obligation.

The classical commentators have offered a variety of explanations of Rabbi Hanina's dictum. Three explanations will be quoted first, and dealt with together. The Tosafot offer two explanations. First, they claim:[75]

> It appears that the reasoning behind the dictum "that one who is commanded and fulfills" is preferable [*adif*] is that he worries and is concerned lest he transgress much more than one who is not commanded and fulfills. For the latter has *pat besalo* [an "ace in the hole"] that if he wishes he may forgo observance.

In another place they wrote:[76]

> For he is continually concerned to overcome his inclination in order to fulfill the command of his Creator.

Finally, a comment attributed to Ri ha-zaken (d.ca. 1185) reads:[77]

> One who is commanded and fulfills has a great reward because he is commanded and accepts the authority of the *mitzvot* upon himself.

Though worded differently from each other, the thrust of the three explanations is the same. Failure to comply with the *mitzvah* is not a viable alternative for one who is commanded. Thus, his efforts must be constantly directed toward avoiding that possibility. Why is nonobservance unthinkable? Since the authority of the *mitzvot* and their divine origin make failure to comply a sin, the commanded does not have any viable alternative. The noncommanded, however, can renounce his own voluntary acceptance of the *mitzvot* without either guilt or remorse. It is he who imposed the obligation upon himself, and it is he who can renounce the obligation.

There would be some reasonableness to Rabbi Hanina's contention, according to these explanations, if he were addressing himself to a distinction between Jews and non-Jews. Since non-Jews are not accustomed to thinking in categories of "commandedness," their observance of *mitzvot* is ultimately self-serving, and they could "take it or leave it." Jewish women,

on the other hand are bound by many commandments and approach observance of non-time-bound commandments with the same lack of viable options vis-à-vis those commandments as do men vis-à-vis all commandments. The mind-set of "commandedness" already exists in Jewish women. Is it therefore unreasonable to assume that they would apply that preexistent mind-set to *mitzvot* which they chose to observe voluntarily? Indeed, historical experience validates the opinion that women observe voluntary *mitzvot* at least as meticulously as do men who are obligated to observe them. If anyone had told our mothers or grandmothers that they could "take it or leave it" as far as reciting the blessing over the *lulav,* or hearing the blowing of the *shofar,* or counting the *omer,* or reciting the *yizkor,* or hearing *birkat ha-hodesh* were concerned, they would have been astounded. They "knew" that they were "commanded." Indeed, one of the oft-used arguments against the decision of the Committee on Jewish Law and Standards of the Rabbinical Assembly to count women in the *minyan* was the contention that women are so much more punctilious in their observance of *mitzvot* that counting them in the *minyan* would result in a radical decrease in the number of men who would attend.[78] Without passing judgment on the claim itself, it must be noted that it denies the contention that women take a self-imposed obligation lightly.

Above all, however, Rabbi Hanina's dictum cannot be the source on the basis of which to distinguish legally between self- and other-imposed obligations, either because it never applied to Jewish women, or because, even if it did, we must all admit that *nishtannu ha-zemannim* ("times have changed"). Jewish women who accept a legal obligation to observe voluntarily do not do so on a "take it or leave it" basis. Since only a "take it or leave it" attitude could possibly justify a distinction between a self- and other-imposed obligation, it follows that a woman who voluntarily accepts the obligation of daily prayer at the appointed times, and who understands that noncompliance with the obligation is a sin, may be counted in a *minyan* and serve as a *shatz*.[79]

The *minyan* requirement for a wedding *birkat hatanim* is based in the Talmud on two different biblical verses.[80] (1) Rav Nahman derives it from the verse "And he [Boaz] took ten men from the elders of the city" (Ruth 4:2). That derivation would apparently exclude women. (2) Rabbi Abahu deduces the requirement from the verse *Be-makhelot* ("In assemblies bless God, the Lord") *mi-mekor Yisrael* ("from the fountain of Israel") (Psalms 68:27). Rashi, ad locum, thus explains the Midrash: "For the benediction referred to by 'from the fountain' [i.e., the wedding benedictions][81] a *kahal* [assembly] is required." Rashi proceeds to define *kahal* as equal to *edah* and *edah* as equal to ten, based on "How much longer shall that wicked *edah* [community] keep muttering against Thee?" (Numbers 14:27).[82] That verse, in turn, is the Bavli's source for the prayer quorum.[83] According to

Rashi's interpretation of Rabbi Abahu's statement, therefore, anyone who may be counted for a prayer quorum may also be counted for a *minyan* for the wedding benedictions.[84] Since the disagreement between Rav Nahman and Rabbi Abahu remains unresolved by the Talmud, there is no greater reason to accept the view of Rav Nahman than to accept the view of Rabbi Abahu.[85] And since we have previously indicated that women who accept the obligation of daily prayer may be counted for a *minyan* for a prayer service, we now further conclude that such women may also be counted for a *minyan* at a wedding service.

Finally, the previous analysis was based on the assumption that Rabbi Hanina's dictum that "one who is commanded and performs is greater than one who is not commanded and performs" was universally affirmed. And indeed it is, in the Bavli, which has long-standing systemic primacy over the Yerushalmi. Nevertheless, a further significant dimension is added to our previous analysis by an opinion expressed in the Yerushalmi which implies the assumption that "one who is not commanded and performs is greater than one who is commanded and performs." It reads:[86]

> Rabbi Elazar said: [Those who returned from Babylonia] voluntarily accepted upon themselves the obligation for tithes [Nehemiah 10:38].[87] What is the source for this claim? [It is the passage:][88] "To all of the following we make a written pledge, attested to by our leaders, Levites, and priests" [Nehemiah 10:1].[89] What does Rabbi Elazar do with "And the first-born of our herds and flocks" [Nehemiah 10:37]?[90] Since they accepted upon themselves things for which they were not obligated, even those things for which they were obligated are considered as though they had accepted them voluntarily.

The passage is obviously complimentary in tone. The Returners are praised for accepting as obligatory those things from which they were actually exempt. So praiseworthy is that act that they are credited by Scripture with the voluntary acceptance of things which were, in actuality, not voluntarily accepted, but obligatory. Surely the passage implies that their acceptance of the voluntary obligations was not on a "take it or leave it" basis, and, even more important, that acceptance of those voluntary obligations was more praiseworthy than their expressed intention to comply with obligatory norms, thus implying that "Greater is one who is not commanded and performs than one who is commanded and performs."

We conclude Section One by noting that it is possible to assume that there could be four potential categories of women:

1. Those who would reaffirm the traditional exemption from positive time-bound commandments and generally refrain from observing those *mitzvot* from which women are legally exempt.

2. Those who would reaffirm the traditional exemption from positive time-bound *mitzvot*, but choose sporadically to observe some of them or all of them without viewing their own observance as obligatory in any way.

3. Those who would reaffirm their exemption from *mitzvot*, but voluntarily accept certain *mitzvot* upon themselves as obligatory, with failure to comply with those *mitzvot* considered as sin. Were a woman to adopt such practice, but without the proviso that failure to observe is sinful, she would be a member of category 2.

4. Those who, though recognizing themselves to be legally exempt, would accept upon themselves as obligatory the observance of all *mitzvot* from which women are legally exempt, with failure to comply with any of those *mitzvot* to be considered as sin. Should a woman choose to do so, but reject the notion of sin as the consequence of noncompliance, she, too, would stand legally in category 2.

We have, we hope, made it abundantly clear that the obligatory status of voluntary observance must be taken very seriously if it is to have the legal status of obligation. That seriousness is reflected in the recognition that, for that woman, there is no viable option to compliance with the norms. That, in traditional terms, means the recognition of sin as the consequence of noncompliance.

SECTION TWO

The issues involved in the question of the right of women to serve as witnesses are at once far simpler and far more complex than the issues involved in the question of their right to observe positive time-bound commandments.

The halakhic sources are unequivocal in prohibiting women from serving as witnesses. Furthermore, though the specific manner of the derivation of the prohibition may vary from source to source, all sources assume that the prohibition is *deoraita* ("biblical").

Sifrei Devarim[91] derives the prohibition by having recourse to the principle of *gezerah shava*.[92] It reads:

> Might a woman, too, be fit to serve as a witness? Scripture here [Deuteronomy 19:17] uses the word *shenei* [two],[93] and there [ibid., v. 15] it uses the word *shenei* [two].[94] Just as in the case of verse 17, the reference is clearly to men, and not women; so too, in verse 15, the reference is to men and not to women.

According to this source, the word *anashim*, which occurs in verse 17, is to be understood as referring to men alone, and is not to be understood as a generic term meaning "persons" – i.e., both men and women. Further-

more, *midrash halakhah* ("legal hermeneutics") views as irrelevant whether the word *anashim* ("men") in verse 17 refers to witnesses, judges, or litigants. It is the appearance of the word *shenei* in both contexts that allows the deduction that since it clearly refers to men in one context, it also does so in the second context. Thus biblical status is clearly attributed to the prohibition of having women act as witness.

The *gemara*[95] quotes three *baraitot,* each of which seeks to demonstrate that the phrase *shenei ha-anashim* ("two men") of verse 17 itself refers to the witnesses, despite the literal sense of the verse, which speaks of "the parties to the dispute." In each *baraita* that assertion is followed by a counter-claim that perhaps the phrase refers to the litigants, not to the witnesses. In each *baraita* the counter-claim is refuted. Yet each *baraita* concludes with the assertion that, "if you prefer," the proof that *shenei ha-anashim* ("two men") refers to the witnesses can be deduced by *gezerah shavah.* Taken at face value, the *baraitot* assert that by the internal logic of the verse it can be demonstrated that the *shenei ha-anashim* refers to witnesses and that that logic can be supported by a *gezerah shavah.* The Talmud, though, interjects an objection into each *baraita* indicating that one could question the supposed "internal logic" of the verse and could "prove" that *shenei ha-anashim* does not refer to witnesses. Hence the need for the *gezerah shavah* to serve as an alternative source from which to derive the prohibition.

Quoting one of the *baraitot* with its talmudic amplification will suffice to demonstrate the nature of the entire passage. Commenting on the statement of the Mishnah that the witnesses' oath applies only to men and not to women,[96] the Talmud asks:

> What is the source of the opinion? As our rabbis have taught: The phrase *ve-amedu shenei ha-anashim* ["And the two men shall stand"] [with which verse 17 opens] refers to witnesses. Are you certain that it refers to witnesses? Perhaps it refers to the litigants! [No!] Since the verse [later] contains the phrase *asher lahem ha-riv* ["the parties to the dispute"], the litigants are here specifically mentioned. To whom then does the opening phrase of the verse, *ve-amedu shenei ha-anashim* ["and the two men shall stand"] refer? It refers to the witnesses. If you prefer [i.e., if the foregoing does not satisfy you, then note that] the Torah in this verse [17] employs the term *shenei* as well as in verse 15. Just as verse 15 refers to witnesses, so, too, does verse 17 refer to witnesses. What, then, is the purpose of [the alternative] "If you prefer, etc."? You might argue that since the verse does *not* read *va-asher lahem ha-riv* ["*And* the parties to the dispute"], the entire verse refers to the litigants.[97] The *gezerah shavah* therefore comes to indicate that *shenei ha-anashim* ["the two men"] refers to witnesses.

In any case, the Bavli asserts that women may not serve as witnesses, and that the prohibition is *de-oraita* ("biblical"). It may be based solely on the logic of the verse, on the logic of the verse buttressed by a *gezerah shavah,* or on the *gezerah shavah* alone.

Maimonides codifies the law as follows:[98]

> Women are disqualified as witnesses from the Torah, as it says: "By the testimony of *shenei edim* – [two witnesses]" [Deuteronomy 17:6], masculine and not feminine.

According to him, too, the prohibition is unequivocal and clearly *de-oraita* ("biblical").[99]

For some, no further comment or analysis is necessary. The prohibition is clear, and its biblical status is universally recognized. Hence to them any attempt to try to explain why the sages saw fit to interpret the Torah so as to exclude females from testifying would be pure guess work, subject to human error, and, therefore, legally irrelevant. According to those who deduce the prohibition from the *gezerah shavah,* no search for reason would be appropriate, since every *gezerah shava* is ultimately Sinaitic (divinely ordained).

Others feel compelled to pursue the subject further. The sources cited above intimate no exceptions to the prohibition. Indeed, if the prohibition were classified as a *gezerat ha-katuv* (an inherently inexplicable biblical injunction), one would not expect to find any exceptions at all, unless the exceptions themselves were spelled out in Scripture. Yet it is well known that there are exceptions to the prohibition. Certain types of testimony are even referred to as *edut she-ha-isha ke-sherah lah* ("testimony that a woman may legally give").[100] Exceptions to a blanket prohibition beg for some explanation of the underlying reason for the prohibition. Since it is not the purpose of this paper to be a definitive analysis of the exceptions to the prohibition, we shall refer to the exceptions only as needed to support the plausibility of the proposed explanation of the underlying reasons for the prohibition.

The disqualification of a class as witnesses is explicable only if one could assert that the class possesses some characteristic which renders it unreliable. Imbeciles cannot serve as witnesses because the level of their mental competence makes them unreliable. Relatives of a defendant cannot serve as witnesses because their very closeness to the defendant makes them suspect to lie in his favor. Sinners, the nature of whose sin indicates a penchant for illicit gain, are disqualified because they are suspect to take bribes for testifying falsely. However the disqualification of the entire class of relatives, for example, does not exclude the possibility that there might be some relatives whose sense of justice and right would impel them to tell the truth, even if that truth were detrimental to the case

of their relative. It asserts, rather, that, as a class, there is sufficient suspicion to warrant disqualification of the entire class *qua* class. An individual imbecile might give an accurate and truthful account of what he saw, but there is sufficient suspicion that, as a class, the imbeciles' perception of the world makes a truthful and accurate description of an event unlikely. Similarly, if one could demonstrate a stereotypical image of women in general, sufficient to warrant the exclusion of the entire class as unreliable for testimony, it would not assert that every woman always conforms to each of the elements of the stereotype. However, the fact that some women varied from the stereotype would not disprove that the sages might have deemed the stereotype sufficiently widespread as to warrant the disqualification of the entire class because of the suspicion of unreliability.

It is well known that there are many highly commendatory statements in rabbinic literature about women as a class. Their stabilizing familial influence,[101] their devotion to God and *mitzvot*,[102] and their sensitivity[103] are all reflected in the literature. But, however commendatory these statements may be, they do not negate the rabbinic perception of the nature of women in general. Both the positive and the negative characteristics coexist in the rabbinic perception of the nature of the class of women.

Thus, the rabbis found support for their view that the role of the ideal woman is not in the world of the court, or commerce, or academics, but is basically restricted to the home, in the verse, "All glorious is the king's daughter within the palace" (Psalms 45:14)[104] That does not mean that the Rabbis knew of no women who were conversant with "the world." It means only that, generally speaking, they were not.

It cannot be denied that the rabbis perceived that there were significant characterological differences between women, as a class, and men as a class. "Women," said the rabbis, "*da'atan kalah aleihen*" ("are unreliable," fickle-minded).[105] Women are talkative, and talkativeness leads to embellishment. "Ten measures of talk were given to the world. Women appropriated nine of those measures, and one was left for the rest of the world."[106]

The following passage leaves little doubt that the rabbis were of the opinion that women possess sufficient characterological traits which warrant their exclusion from testifying.

> The sages say that four traits apply to women: They are greedy, eavesdroppers, lazy, and jealous. . . . Rabbi Yehoshua bar Nahmani adds: querulous and garrulous. Rabbi Levi adds: thieves and gadabouts.[107]

The class of women, as all other disqualified classes, was thus disqualified for what was assumed to be the general nature of women which made them nonconversant with the world of the courtroom, and unreliable as witnesses.

Minors are also disqualified as a class, yet the *mishnah*[108] lists a variety of areas in which their testimony[109] is considered reliable. Why are these exceptions to their general disqualification acceptable? Obviously, because they come from arenas which make a lasting impression upon youngsters, and their reporting of which can be assumed to be generally reliable.[110] If one could show one or two instances in which the same could be said about the testimony of women, it would buttress the contention that their disqualification was for cause, and not because of *gezerat ha-katuv.*

Given the reality that being an unmarried woman was considered a sorry state, and give the empathy which women have for others in that sorry state, and given particularly the fact that even the most incorrigible embellisher would not lie if she thought she would be caught in the lie, the rabbinic abrogation of the prohibition against women's testifying to permit a woman to testify about the death of another woman's husband and, on the basis of that testimony, to allow the widow to remarry, makes perfect sense.[111] The characteristics which generally disqualify the class of women are not salient in this type of case. Given that, the sages waived the prohibition.[112] More interesting yet, and further proof of the thesis, is the exception to the rule. Five categories of women[113] are so suspect to both hate and be jealous of another woman that even their innate feminine empathy for the plight of an unmarried woman, and even the possibility of being caught in a lie, cannot overcome their "jealous" nature, and they are not permitted to testify about a husband's death.

One more example will suffice. As with minors, there are areas which fall within the "world" of women, at least partially because of the "nosy" nature of women in general, like noticing clothing, jewelry, etc. As with minors, women, too, are acceptable as witnesses concerning such areas, because they may be relied upon in such matters.[114]

Admittedly, there is no primary source which directly attributes to their nature the disqualification of the class of women from testifying. But, given the fact that all other disqualified classes can be rationally understood, and given the fact that if the disqualification of women were a *gezerat ha-katuv* (an inherently inexplicable biblical injunction) it would be difficult to justify any exceptions, and given the fact that exceptions do exist, and given the fact that the sources reveal a general stereotype of women which would justify their exclusion as a class, and given the fact that the exceptions to the prohibition are easily comprehensible if the general stereotype is the cause of the class disqualification, the questionable nature of the explanation we have offered for the exclusion of women from testifying dwarfs to infinitesimal proportions.

Therefore, it is plausible to assert that there were underlying motivations which either led or compelled the sages to interpret as they did the biblical passages on the basis of which they disqualified women from tes-

tifying. Indeed, the passage in *Shevuot*[115] in which the disqualification of women as witnesses is related to a biblical text, itself reflects at least two other possible understandings of the biblical verse which might argue against the thesis that it was intended to exclude women. The first is that the phrase *shenei ha-anashim* ("the two persons") can be understood as referring to the litigants, and not to the witnesses. And the second is that even if it refers to witnesses, it may be generic, and was couched in the masculine not in order to exclude women, but merely as a reflection of the reality of the time. As a matter of fact, all the activities of the overwhelming majority of women were limited to the home, and women rarely participated in any kind of courtroom procedures. However, no one should understand any of the aforesaid to imply that the prohibition against women serving as witnesses is not *de-oraita* ("biblical"). By traditional canons of interpretation, it has biblical status.

Having reached this point, we cannot avoid expressing some judgment concerning the applicability of the rabbinic portrait of women to women in modern societies, even assuming that it did apply to women of their own time. Is the halakhically valid argument of *shinnui ha-ittim* ("times have changed") applicable to the supposed "nature" and legal status of women or not? A variety of responses to the question, and to the implications of the potential answers, are conceivable. We shall indicate the possibilities.

1. The nature of women has not changed, and the rabbinic description of it is still accurate. If that be the case, the conclusion is self-evident. The same characterological traits which underlay the original prohibition are still applicable, and the prohibition is reaffirmed in full.

2. The modern woman does not seem to be as described by the sages, but since the sages have so described women, it is moderns who misperceive their nature and it is they who are mistaken. Such a response will deny the appropriateness of a claim of *shinnui ha-ittim* ("times have changed"). If so, the prohibition will be reaffirmed in full.

3. Modern women are, indeed, not like the image portrayed by the sages and, were that stereotype the sole justification for the prohibition, a claim of "times have changed" would be in order. But the error is the assertion that the stereotype is the sole justification for the prohibition. There are sufficient other reasons to disqualify women from testimony. One such reason might be the claim of long-standing precedent. Another, the claim that an assertion of "the times have changed" would be rejected by large segments of the world Jewish community, resulting in potential schism within the Jewish people, with potential baneful ramifications affecting areas such as family law. The net result of this kind of argument would leave the prohibition untouched on grounds such as family law. The net result of this kind of argument would leave the prohibition

untouched on grounds such as *halakhah ke-divreihem ve-lo mi-ta'amam* ("the law is as they say, but not for their reason").

4. The biblical status of the prohibition leaves us no option other than the reaffirmation of the prohibition in its totality, even if it entails positing that the image of women which underlies it must now be considered a legal fiction, that is, applicable legally, regardless of its actual factualness.

5. The image of women has changed, but the change is not desirable. It is not true today that "all glorious is the king's daughter within the palace," but would that it were. The claim of "times have changed" may be halakhically valid, but in this instance should not be invoked because it would serve only to further a process which ought to be reversed! Hence, the existent norms should be reaffirmed.

6. The original justification for prohibiting women to act as witnesses is the only conceivable justification. But that justification is no longer valid not only because the status of women has changed, but also because the conception of the so-called nature of women has changed. That change is not only irrevocable, it is also desirable. Hence, failure to attempt some halakhically justifiable remedy to an untenable situation reflects a lack of seriousness about *halakhah* rather than a commitment to it. Those who affirm this postion, and I am among them, and who consider themselves to be committed to the *halakhah,* are therefore in duty bound to spell out what they consider to be halakhically justifiable remedies. They must deal particularly with the objection that the prohibition is "biblical" and with the effect that this position may have upon the problem of maintaining the unity of *kelal Yisrael* ("the whole Jewish people").

I shall spend no time justifying my opinion that the rabbinic image of women is the sole justification for observance of the present halakhic norms regarding testimony by women, nor defending my view that the modern image of woman does not justify the norms, nor proving that the change in the image is desirable. The preceding analysis regarding the justification for prohibiting women from acting as witnesses, I believe, validates my opinion that it is the rabbinic image of the nature of women which is the sole justification for the prohibition. I consider the opinion that the modern image of women does not justify the prohibition, and that this change from the rabbinic image of women is desirable, to be self-evident. I proceed, therefore, to deal with the problem raised by the *de-oraita* (the "biblical") status of the prohibition.

There are three possible approaches to the problem, each with its strengths and weaknesses, and they will be treated in ascending order of systemic difficulty. That is, the second approach requires greater halakhic daring than the first, and the third requires greater halakhic daring than the second.

1. Leave the prohibition theoretically intact, continuing to affirm that women may not serve as witnesses. Since, however, there are already long-standing exceptions to the prohibition, the sages of today will do nothing but add two additional categories of testimony to the list of exceptions, namely, witnessing a *ketubbah* (marriage contract) or a *get* (the document recording a divorce). These are the major areas in which witnessing according to Jewish law is still widely relevant. The justification for these two additional exceptions would be the same as that given for the previous exceptions, namely, that women may now be considered reliable in such matters because they are "*milleta de-atya le-igaloyei*" (i.e., "matters that are most likely to become generally known," since governmental offices record all marriages and divorces). The obvious advantage of such an approach would be that the basic norm remains untouched. Women would still be forbidden *de-oraita* ("biblically") to serve as witnesses, for example, in capital cases. No change in long-standing legal principles would be necessary.

That, though, is also a disadvantage. It leaves intact the premise that women, by their nature, are generally unreliable as a class. Adding two further exceptions does not deny the premise, and it is the failure of that premise to reflect present realities which motivated the search for a remedy in the first place. To devise a remedy which leaves the premise intact is a strange resolution to the problem. But, in addition, this approach cannot be applied to witnessing a betrothal.

Witnesses can be of two different types. If two people transact a deal in the presence of witnesses, the function of the witnesses is to serve as verification that the deal was transacted. They serve as legal protection for both parties. But if two people transact a deal without witnesses present, and both admit in court that the deal has been transacted, the absence of witnesses will not prevent the court from compelling compliance with the deal. In this sense, the witnesses are no more than verifiers of a valid and binding act. In the second type of witnessing, the witnesses are not simply verifiers of an act which is valid anyway, but are also the validators of the act itself. That is, the act cannot be considered legally valid, even by the admission of the parties, without witnesses. In such a case, the claim of *milleta de-atya le-igaloyei* is inapplicable, since no act could be independently verified as a legal act when the legality of the act itself was contingent upon the presence of witnesses. Thus, if the witness were an invalid witness, the entire act is invalid, even if the parties admit to it. An invalid act cannot be independently verified.

Witnessing a betrothal is of the second type. Based upon *gemara*,[116] both Rambam and the *Shulhan Arukh* so codify the law:[117]

> The betrothal of one who betrothes without witnesses, or even with one witness, is invalid, even if both admit that it took place.

Hence, the attempted expansion of the list of exceptions to the disqualification of women as witnesses would not work for one of the few areas in which witnessing is still widely relevant.[118]

2. The second approach is very different, and utilizes a statement of Maimonides as its basis. Maimonides wrote:[119]

> If the High Court offered an exegesis of a verse on the basis of one of the acceptable exegetical principles[120] as appeared appropriate to them, and some later court[121] saw some reason to overturn that exegesis, the later court may do so, and may explain as it sees fit.

On the basis of this passage of the Rambam one may posit that the talmudic sages interpreted Deuteronomy 19:17 to exclude women from testifying by invoking a recognized exegetical principle as they saw fit. Since what they "saw fit" was predicated on the general accuracy of an image of women which they espoused, and since that image is no longer considered to be generally accurate, the "court" of today sees "some valid reason" to overturn that exegesis. That valid reason is *shinnui ha-ittim* ("the change that time" has brought to our conception of the character of women). The "court" of today may therefore interpret that verse in a manner that does not prohibit women from acting as witnesses.

This approach is alluring, and has distinct advantages: (1) It invokes the rabbinic right to substitute for the *de-oraita* ("biblically rooted") norm which disqualified women from acting as witnesses by another "biblically rooted" norm which permits them so to act. The status of each norm, in its time, is *de-oraita* ("biblical"). (2) It eliminates the problems stemming from the different types of witnesses. (3) The ground for overturning the earlier interpretation is the recognition of the total inapplicability of the sages' view of women to the women of our time and place.

The second approach, however, has its disadvantages as well: (1) Its basis is a statement of the Rambam which does not seem to have wide support among *posekim.* It is, in other words, a *da'at yahid* ("one man's opinion"). (2) The right implied by the Rambam has never been consciously invoked by anyone. (3) Invoking it would work well only according to either the surface meaning of the Bavli[122] or according to the opinion of Rambam himself.[123] According to the former, we would interpret the phrase *shenei ha-anashim* ("the two persons") as referring to the litigants, and not to the witnesses. In regard to Rambam's opnion, we would understand *edim* ("witnesses") as being a generic term, rather than as referring exclusively to males. But, many could argue that according to the *Sifrei* or according to the Bavli's explanation of the *baraitot,*[124] even the position of the Rambam is inapplicable. Since a *gezerah shavah* is ultimately Sinaitic, the prohibition against having women act as witnesses is not based upon a rabbinical exegesis, but on Divine exegesis which the sages

merely conveyed, but did not originate. (4) Some would argue that if a "court" of today invoked such a right, it would open a floodgate resulting in the reckless use of this power to the ultimate detriment of the *halakhah.*

3. The third approach bears similarities to the second, though it is different from it in significant respects. This approach would base its claim on the principle that *yesh ko'ah bi-dei hakhamim la'akor davar min ha-torah be-kum va-aseh*[125] ("the sages may knowingly abrogate a norm which is *de-oraita* [biblical]). Though the general precedent allows rabbinic abrogation of norms only passively, that is, *be-shev ve-al ta'aseh* ("by refraining from doing what is commanded"), there is widespread agreement among *posekim* that "active" abrogation, i.e., permitting an act which is contrary to the Torah, is permissible when deemed warranted by the proper authorities. One such passage will suffice.

The Tosafot record:[126] "Even though generally the sages do not have the right to abrogate a matter from the Torah actively [i.e., by permitting the performance of a forbidden act,] but *be-makon she-yesh panim ve-ta'am ba-davar* ['when there is good cause and sufficient reason for it'], all agree that they have that right." Interestingly, the final proof of the Tosafot is connected with the very subject under discussion. The right of a woman to testify about the death of her husband[127] is universally recognized. That right is itself an active abrogation of a biblical norm which disqualifies women from *all* testimony. The proponents of this approach would assert that the changed status of women in our society generally and the radical change in our conception of the nature of women is "good cause and sufficient reason" to warrant abrogation of the norm. They reinforce their position by stressing their conviction that adherence to a norm, the sole rationale for which is no longer applicable, does not strengthen *halakhah,* but makes a mockery of it.

The approach has all of the advantages of the second approach, without some of the disadvantages of that approach. It is based on a principle formulated by the *gemara* and reaffirmed by many *posekim.* It is not a *da'at yahid* ("one man's opinion"). Not only has it received theoretical affirmation, it has actually been invoked. Furthermore, the right to abrogate the norm rather than to attempt to reinterpret the verse which was the basis of the norm, applies even to norms which are conceived as being *halakhah le Moshe mi-Sinai* ("revealed to Moses at Sinai").

This third approach is not without its disadvantages. Obviously, the floodgate syndrome problem applies to it. Furthermore, some may claim that today's students of the *halakhah* no longer possess the right of active abrogation of a biblical norm, even if sages of the past did. This claim is supported by the fact that this right "to abrogate" has not been invoked for a long time. Finally, some may assert that the change that has taken

place in the status of women generally and in our conception of their "nature" is not "good cause and sufficient reason" to invoke the ultimate systemic right, even if it still exists.

In the final analysis, none of the three possible approaches is simple, and all involve great concern for the impact that any one of them may have upon *Klal Yisrael,* the ideal of the unity of the people of Israel, for undoubtedly any action whatsoever would evoke vigorous opposition in certain circles.

SECTION THREE

The number of sources which bear directly on the question of the ordination of women is small. Obviously, to the extent that the absence of actual instances of ordination of women constitutes a legal precedent, the weight of precedent surely does not favor their ordination.

There is, as is well known, one source which seems explicitly to deny the women the right of ordination, or of any other type of appointment. Maimonides, paraphrasing the *Sifrei Devarim,*[128] wrote:[129]

> No woman may reign as a sovereign. . . . And, similarly, nobody but a man may be appointed to any *mesimot* [public office] among Jews.

It seems, therefore, that according to the Rambam the ordination of women would be biblically forbidden. It should be noted, however, that the latter half of Maimonides' statement appears to be his own extrapolation from the *Sifrei,* which restricts its prohibition to the appointment of a woman as queen. Maimonides' contention is not affirmed by other *posekim,* and is not recorded in the other codes. Furthermore, to the extent that Maimonides might have been motivated to expand the *Sifre*'s prohibition by his own view of the mental competencies of women, the claim of *shinnui ha-ittim* ("times have changed") is not only warranted, it is absolutely necessary. The Rambam asserts[130] that women should not be taught Torah because they would turn the words of Torah into *divrei havai* ("trivialities") and because of *aniyut da'atan* ("their inferior intelligence"). Even if this were true of women of the Rambam's time, no well-informed person could seriously continue to affirm its truth today. It is clearly and overwhelmingly contradicted both by experience and by all scientific evidence. Even if there could or might be disagreement among moderns about the characterological traits of women which might disqualify them from testimony, it is difficult to conceive of anyone asserting that women are intellectually inferior to men. Given that the Rambam's expansion of the *Sifrei* has no presently known source in rabbinic literature, it is most likely that it was his own perception of the intellectual capacities of women which motivated his words. Hence, women could not

and should not be disqualified from ordination even of the basis of *safek de-oraita* – that "it might possibly be a violation of a biblical norm." The biblical prohibition is restricted to the exercise of sovereign power by women. That subject, while itself worthy of halakhic analysis, is so theoretical at the present time that it need not be dealt with in the inquiry.

There is one further source which might be understood to proscribe the ordination of women. The Midrash comments on the words of Manoah:[131]

> "And Manoah said [to the angel]" 'Now let your words come.' Manoah said to him: "Until now I have heard from a woman, and women are not *benot hora'ah* ['qualified to give decisions'], *ve-ein lismokh al divreihen* ['and their words are not to be relied on']. But, let your words come – "I want to hear from your mouth."

If Manoah's statement about women is taken out of context, and the words (particularly the word *hora'ah*) are understood in their usual legal sense, his statement should be translated: "Women are not competent to render decisions, and their words [therefore] are not to be relied upon." In context, though, that understanding of the passage is impossible. What kind of decision had the woman rendered? She had done naught but report to her husband what the angel had said to her in his absence. But, bearing in mind that Manoah had requested the appearance of the angel with the words "let him come again to us *ve-yorenu* [and intruct us] how the child to be born should be handled," the meaning of Manoah's statement in the Midrash becomes clear. Neither the angel nor the woman was rendering decisions of any kind. Both were conveying instructions. Thus, Manoah claimed: "Women *einan benot hora'ah* [do not know how to take instructions], and their words cannot be relied upon." Since women do not know how to take instructions, the angel was asked to come again and tell Manoah directly how the child should be handled.

The biblical record of the angel's response puts Manoah in his place. The angel twice repeats: "Do as I told the woman." He never repeats the manner in which the child is to be raised. He repeats only the precautions the wife should take during her pregnancy.

Beyond these two sources, there seem to be no others which, no matter how loosely one would apply any of the rabbinic hermeneutical principles, could possibly be interpreted as stating explicitly that women may not be ordained.

Of the functions which a modern rabbi serves qua rabbi, only two may be halakhically open to any question, and only one seriously so. One involves the right of women to teach Torah, and the other the right to serve as a judge. We shall deal primarily with the latter, in the course of which the former will also be addressed.

The question is based on a *mishnah* which states: "Whoever is fit to judge is also fit to testify, though some are fit to testify even though they are not fit to judge."[132] If the first clause of the *mishnah* means: "Only those who are fit to be witnesses could ever be fit to judge," women are obviously excluded, since they are not fit to be witnesses, and could not, therefore, ever be fit to judge.[133] Indeed, that understanding of the clause is the *prima facie* meaning which the *rishonim* attribute to it. But they were challenged by the fact that the Bible records that Deborah, who was a prophetess, "judged Israel at that time . . . and the Israelites would come to her for decisions" (Judges 4:4-5). The Tosafot offer three resolutions to the problem. These resolutions are relevant to our subject.

First, they suggest that Deborah did not actually judge, but served only as the teacher of the law to others so that they could judge.[134] This answer affirms the prohibition of a woman serving as a judge. In the process, however, it posits as virtually uncontestable the fact that a woman can teach the law, even if she cannot judge. Thus, the minor question which had to be addressed is resolved.

Secondly, they suggest that the clause in the *mishnah* may not mean what we have claimed it to mean. Rather, the *mishnah* may be positing the contingency of judging and witnessing only for those for whom witnessing is a real possibility. For those for whom it is not a real possibility no contingency exists. Thus, the clause in the *mishnah* should be understood: "Those and only those *men* who are fit to be witnesses could ever be fit to judge." Women, though, might judge even though they could never be fit to be witnesses. According to this response, then, there is no prohibition at all on the right of women to serve as judges.

Finally, they suggest that the people may have accepted her as a judge, even though she was technically disqualified.[135] As is clear from the *mishnah*,[136] litigants are entitled to accept as a judge even one who is otherwise disqualified. Thus, Deborah had the right to judge because the Israelites accepted her as such.

In the final analysis, then, there is no legal objection to the technical granting of the title "rabbi" to a woman. The only rabbinic function which might be questionable is that of judging. Regarding judging there is support for the idea that women are not disqualified. Even if that is rejected, a woman rabbi serving a community would be acceptable as a judge on the grounds that they have accepted her, since rabbis today are selected by the communities which they serve.

It should be noted that the area of judging is connected with the area of testifying. Thus, the resolution of the issue of testifying, which was the subject of the previous section of this paper, takes on significance vis-à-vis this issue as well. If any of the potentially viable approaches discussed

there were adopted, the question of the right of women to judge would become a non-issue.

SECTION FOUR

The exemption of women from positive time-bound commandments has been variously rationalized. Some have affirmed that the exemption is intended to emphasize the centrality of the woman's role in relation to her husband, the home, and the family. That function is so central that the observance of *mitzvot* which might conflict with it is suspended because of it. Others contend that women have been exempted from such *mitzvot* because they have an innate religious sensitivity which makes their observance unnecessary. Whether either of these rationalizations is correct is of little moment to our present inquiry. Suffice it to say, that whatever the reason for the traditional exemption of women, the exemption itself has had the long-standing weight of precedent to support it. To solve the halakhic difficulties that these exemptions present in relation to the question of the rabbinic ordination of women, I posited at the end of Section One the existence of four categories into which women might be classified.[137] I urge the Faculty to go on record as accepting all four of those categories as defensible and viable options for women to adopt.

I am opposed to two alternatives which are often proposed. The first alternative recommends the adoption of a *takkanah* obligating all women to observe all *mitzvot* from which they are exempt. The second alternative recommends a pronouncement affirming that women should refrain from the observance of those *mitzvot* from which they are exempt, even if they may have the legal right to observe them. I am opposed to the issuance of a *takkanah* because the imposition of legal obligation by *takkanah* would make noncompliance with the dictates of that *takkanah* sinful. That would result in the creation of a large class of sinners where none now exists. I dread the thought that the Faculty of the Seminary, or any other segment of the Conservative Movement, should seek to impose a set of obligations not already recognized by the tradition upon any woman who is satisfied with the status quo.

On the other hand, there is an ever increasing number of Jewish women who see their roles differently, if not for their entire lives, then at least for significant segments of their lives. If such women view the traditional exemption as based upon the claim of the mother's familial centrality, they may yearn greatly to be more active participants in Jewish religious life during the years that they are not actively "mothering." Indeed, many may find it possible to remain equally religiously active even during peak periods of "mothering." If women are capable of holding full-time and responsible jobs without serious encroachment on their familial responsibilities,

there is no reason to believe that the "onus" of the observance of positive time-bound commandments would become the "straw that broke the camel's back." If such women see the traditional exemption as based upon the innate female religious sensitivity, they may choose to abide by the traditional patterns. But many women do not perceive themselves as more sensitive religiously than their male counterparts. In the final analysis, it is their own perception of their need for *mitzvot* which is most important.

Women who wish to observe *mitzvot* should be given every encouragement to do so, since there is sufficient legal precedent for allowing them to do so. At present, regrettably, such women are subjected to the most virulent type of vilification by two very different groups. Observant men have looked so askance at women who have adopted the observance of *mitzvot* from which they are exempt, that they give the impression that their behavior must be forbidden. The very people to whom such women turn for assurance that their behavior falls within legal parameters, for that is a great concern of many of them, give the opposite impression by merely tolerating their behavior, even if they do not actively attempt to discourage it.

These women, too, are often castigated by women who accept their traditional exemption from *mitzvot.* They are told either that they are trying to be like men or that they are allowing men to dictate what women should be. To the best of my knowledge and observation, these women are motivated, by and large, by purely religious motives. That does not imply that they were not at all affected by the spirit that animates the various women's or feminist movements.

Women must be allowed to increase their patterns of religious observance without hindrance from men or other women. Indeed, since their observance of *mitzvot* is permissible, there is no reason why they should not be encourage in their quest, if that is the path they have chosen.

To be sure, it must be made absolutely clear to all women who adopt the observance of *mitzvot* that there is often more involved than observance alone. That is particularly true either where a *minyan* is needed or where the issue of agency is involved. They must understand that only obligated individuals constitute a quorum and only one who is obligated can serve as the agent for others. Just because a woman comes to services, or dons *tallit* and *tefillin,* or receives an *aliyah* does not mean she has the right to be counted toward a *minyan* or to act as agent in behalf of one who is obligated to perform a *mitzvah.*

Women may be counted in a *minyan* or serve as *shatz* only when they have accepted upon themselves the voluntary obligation to pray as required by the law, and at the times required by law, and only when they recognize and affirm that failure to comply with the obligation is a sin. Then they may be counted in the quorum and serve as the agents for others. This is the position which I would recommend to the Faculty for adoption.

I anticipate that objections of various sorts will be raised against this recommendation, and would like to respond in advance to those objections which I foresee.

How can I require women to accept a voluntary obligation and recognize the consequence of noncompliance as sin when the concepts of "obligation" and "sin" are rarely mentioned by men? How can I count men in a *minyan* if they show up at services sporadically, never praying otherwise, and surely not viewing their regular failure to pray as sin in any way, yet refuse to count toward a *minyan* any woman who comes every day in order to say *kaddish,* or even without saying *kaddish,* but refuses to recognize the sinful nature of her noncompliance if she ever fails to pray?

I answer that I am fully aware of these realities, buy my concern is for the halakhic status of behaviors, not for the common misconceptions of the halakhic status of those behaviors. If we have failed to educate our constituents that, from our perspective, obedience to Jewish law is obligatory and not voluntary, that does not deny that it is, in fact, obligatory. A man is obligated to pray whether or not he recognized that obligation. Any time he does pray he complies with the obligation and can be counted toward the quorum. When he does not pray at the required times he sins whether or not he recognizes that failure as sin.

The halakhic status of a woman's prayer is very different. She can be considered obligated, and count toward the *minyan,* only when she accepts the status of obligation upon herself. Her obligation is self-imposed, and not other-imposed. It requires *recognition* of the obligatory state, and that, in turn, demands conscious recognition of the consequences of failure to comply with the obligation. The consequences are called sin. Only when those elements are present can she be considered legally obligated. If a woman prays without considering herself obligated, she exercises a right of hers, but does not fulfill an obligation. A prayer quorum requires people who are obligated, not people who are exercising a right. Whenever men pray they are fulfilling an obligation; women, though, may pray as the exercise of a right, as opposed to the fulfillment of an obligation. Thus, men always count toward a *minyan,* but women may not.

Some, I suspect, will object to the distinction between obligated and nonobligated women on practical grounds, even if they admit the distinction on halakhic grounds. The objection may be couched in theoretical terms such as *hakhamim lo natenu et divreihem le-shi'urin* ("the sages formulated their norms to be applicable without distinction"), but the objection will really be quite practical. How could one possibly count some women and not others, as a practical matter? I do not find the objection at all compelling. In a vast majority of cases, when ten men are present, the question will be entirely academic. The issue will be actual only when the ten persons present include both men and women, and it must be ascertained

whether or not there is a *minyan.* Even then, the distinction between categories of women will not be as complex as it might seem. If the women are in their home communities they are likely to be known as "obligated" or "nonobligated" women, in much the same way that youngsters in their home communities are known as "bar mitzvah" or "non-bar mitzvah." The issue becomes troublesome only in the rare instance when a woman in a strange community is necessary to complete the quorum. Is it any more unworkable in those circumstances to ask her if she considers herself obligated than it is to ask a youngster, under similar circumstances, if he is a bar mitzvah? I think not.

It would be worthwhile to create a religious ceremony celebrating a woman's acceptance of *mitzvot* as obligatory. Such a ceremony would have multiple functions. It would mark the occasion as religious. It would be important psychologically for both the woman and her community. It would be a practical guide for the determination of the woman's status.

In Section Two, I stated my conviction that failure to attempt some rectification of the testimonial status of women reflects a lack of seriousness about *halakhah* rather than a commitment to it.[138] Obviously one could attempt to resolve the problem and fail. It is only failure to attempt which reflects a lack of seriousness, not failure to succeed. Both because of its universally accepted *de-oraita* ("biblical") status and because of its implications for unity of the Jewish people, the matter of women and testimony is extremely difficult.

Before offering a specific proposal for consideration, I would like to emphasize as strongly as I can that the issue of male-female equality plays no part in my thinking on the subject. I find no ethical objection to discrimination against an entire class, when the discrimination is justified and defensible. I have made it quite clear, I hope, that I would be opposed to any argument for women's ritual rights which was predicated on an *a priori* claim that men and women *must* be equal. Testimonial equality between men and women may be the *result* of grappling with the issue of women and testifying, but it is not its underlying motivation. I reiterate that for me the underlying motivation for the difficult struggle is the firm conviction that the grounds for the disqualification of women as witnesses, which grounds are, in my opinion, the only possible continuing justification of the proscriptive norm, are no longer applicable. It is simply inconceivable to me that anyone could cogently argue that modern women are generally unreliable as witnesses, that the entire class of women should be disqualified. If ever a claim of *shinnui ha-ittim* ("times have changed") is appropriate, surely it is so regarding the rabbinic perception of the character of women.

I recommend, therefore, the exercise by the faculty of the ultimate systemic right of the learned who are committed to the *halakhah* to openly

and knowingly abrogate the prohibition against women serving as witnesses. This is the ultimate *halakhically warranted* act. It is not a *non-halakhic act.*

We have demonstrated in Section Three of this paper that there are no insurmountable halakhic objections to the granting of ordination per se to women. Sections One and Two were intended to apply to all women, a vast majority of whom would never seek ordination as rabbis. What remains to be discussed is the relationship of Sections One and Two to the ordination question.

The Minority Opinion of the Commission's report has cogently demonstrated that ordination should not be considered as a narrow question, but as a broad one.[139] To be sure, the issues addressed in the first two sections of this paper "flow from it [the ordination question] almost inexorably."[140] If one can say about issues that some flow more inexorably and others flow less inexorably, the issues of women in the *minyan* and as *shatz* belong to the first category and the issue of women as witnesses belongs in the second category.

The Minority Opinion restricts its concern to the issues of *minyan, aliyyot,* and *shatz.* My concern reaches beyond these issues. I would expect that a rabbi should serve his community as an example par excellence of commitment to the study of Torah and the observance of *mitzvot.* That should be no less true of female rabbis than of male rabbis. I recommend, therefore, that the Seminary admit women as candidates for ordination, on condition that they accept the observance of all *mitzvot* as an obligation. Should a woman rabbi renounce her obligatory status, she would be required to cease functioning as a rabbi.

If my recommendation concerning women in general and the problem of witnessing were accepted, that would obviously apply no less to women rabbis than to other women. The question which remains, however, is whether the rejection of that proposal would be sufficient reason for denying women ordination as rabbis. Since a woman acting as a rabbi would be greatly tempted to act as a witness to a *ketubbah* or a *get,* and would be hard put to explain to her congregants why she may not do so, would we by ordaining women be *mesayye'in li-dvar averah* ("accomplices to a transgression")? The frequently heard negative answer to this question is based on the fact that the Seminary does not refrain from ordaining *kohanim* as rabbis even though the functions of the rabbinate include officiating at funerals and burials, and the *kohen*-rabbi might find himself in a "compromised" position. I find that answer, as it is generally understood, to be inadequate. If a *kohen*-rabbi officiates at a funeral, he sins. But, the funeral is completely valid. Nobody claims that the deceased has not been "legally" eulogized or buried. But if one disqualified from serving as a witness were to witness a betrothal, the betrothed couple would not be legally betrothed.

I am nevertheless of the opinion that even if the proposal concerning *edut* is rejected, women should not be denied ordination. Though the case of the woman-rabbi is not an exact analogy to that of the *kohen*-rabbi, there is one aspect in which the two cases are alike. We function on the presumption that every graduate of the Rabbinical School is committed to the observance of the *halakhah.* Individual rabbis violate one or another of the *halakhot.* They do so for different reasons. Often, though rarely verbalized as such, the "violation" stems from the conviction that the *halakhah* being "violated" ought not to be the law. Many a *kohen*-rabbi who officiates at funerals does so because of the strong conviction that many or even all of the law dealing with the priest should no longer be considered as valid. I disagree with them. Yet, I am unwilling to claim that such rabbis have no commitment to *halakhah.* If the faculty of the Seminary, acting as a synod, affirmed that a woman even though ordained may not serve as a witness, the number of Seminary students and graduates who would ignore the expressed halakhic judgment of the faculty would be negligible.

Moreover, it is the widespread practice among Seminary students and Rabbinical Assembly members to consider the interests of those whom they serve and not merely their own personal convictions. Thus, couples contemplating *aliyyah* are usually urged by Conservative rabbis to use a *ketubbah* recognized by the Israeli rabbinate, or to have a *get* written by a rabbi recognized by them, in order to forestall any possible complications when they actually go on *aliyyah.* No matter how "liberal-minded" a Seminary student or graduate may be, he does not exercise his "liberal-mindedness" at the expense of those who might be adversely affected by it.

One of my most revered teachers has recommended to me in private discussion that women should be encouraged to adopt the observance of *mitzvot* and that the question of ordination be put off for a generation, until such behavior by women becomes common.[141] I must respectfully disagree with that recommendation. I have already stated my view that only women who have accepted the obligation to observe all the *mitzvot* should be considered candidates for ordination. If this position is affirmed, then the Committee on Admissions would seek evidence that the women who apply have complied with that requirement. In that case, the earliest group of women applicants would undoubtedly be those whose observance of *mitzvot* already reflects voluntary acceptance of all of the *mitzvot.* They will be the women who have had the fortitude to be trailblazers on previously unmarked paths. I cannot see why the forerunners should be denied the right which their very behavior will have bequeathed to those who follow them.

NOTES

1. Mishnah Kiddushin 1:7.
2. For example, eating of *matzah* at the Seder. Kiddushin 34a.
3. For example, the study of Torah. Kiddushin 29b and 34a.
4. Kiddushin 34a.
5. See analysis of Louis Ginzberg, *A Commentary on the Palestinian Talmud,* vol. II, pp. 158-164. Note particularly his comment at the bottom of p. 162.
6. On these two questions see David Feldman, "Woman's Role and Jewish Law," *Conservative Judaism,* vol. 26, no. 4, pp. 29-39, reprinted in Seymour Siegel, *Conservative Judaism and Jewish Law* (New York: Rabbinical Assembly, 1977), pp. 294-305. See specifically pp. 297-300.
7. Commentary to Sifra, par. 2, Weiss edition, 4c.
8. Lev. 1:4.
9. On the basis of Erubin 96b.
10. 4:8.
11. I.e., practicing blowing the *shofar* even on Shabbat. Sounding the *shofar* on Shabbat comes under the category of *shevut* and ought to be prohibited.
12. Male children are permitted to practice blowing the *shofar* even on the Sabbath because even though they, as minors, are not yet obligated to observe the *mitzvah* of blowing the *shofar,* they may do so voluntarily. Their practicing is therefore antecedent to their voluntary observance of the *mitzvah* and is permitted because they may observe the *mitzvah* voluntarily. The fact, therefore, that the *mishnah* excludes women, whom the *halakhah* exempts from the *mitzvah,* from the permission to practice blowing the *shofar* on the Sabbath implies the view that they cannot observe it even voluntarily. That, then, applies to all *mitzvot* from whose observance they are now exempted by the *halakhah.*
13. 96b.
14. 3:15.
15. Sukkah 42a.
16. In the printed *gemara: Ho'il ve-ishah lav bat hiyyuva he, eima lo tekabbel.* But see Rashi's explanation ad loc.
17. Hilkhot Tzitzit 3:9. Cf. comment of *Hagahot Maimoniyot,* ibid., letter *mem.*
18. It does not seem plausible that Maimonides understands the benediction to be an additional *mitzvah.* Were that the case, a man who performed a *mitzvah* without reciting the blessing would have fulfilled his obligation. Hilkhot Lulav 7:6, for example, clearly implies the opposite.
19. The recitation of a benediction over a *mitzvah* which one is not obligated to perform involves the "taking of God's name in vain." It is

berakhah le-vattalah – a purposeless benediction. However, if women were allowed to observe *mitzvot* qua *mitzvot,* it is difficult to fathom why it would be a "purposeless" benediction. See above, note 18, and below. Maimonides seems to allow women to perform the *mitzvah* without reciting the benediction in order to give them the opportunity to experience spiritual satisfaction (*nahat ruah le-nashim*).

20. *Or Zarua,* Sukkiah and Lulav, 314:2, 68d.

21. Ibid., 266, 62a.

22. The view of Rabbenu Tam receives regular mention, though we will not quote it directly. It can be found in Tosafot Eruvin 96a, s.v. *dilma* and parallels listed there in *Masoret Ha-shas.*

23. I.e., she could handle it for the *mitzvah* itself, but not take it unnecessarily from her son or husband to replace it in water on Shabbat.

24. And, as such, she may handle it even for nonritualistic or otherwise noncompelling reasons, such as putting it in water.

25. *Teshuvot Rashi,* #68, Elfenbein edition, pp. 80 f., and parallels.

26. Even his statement in Rosh Ha-shanah 33a, s.v. *Ha,* does not necessarily demonstrate his own position. Though that statement clearly implies that a woman who sounds the *shofar* would violate the commandment "not to add" (Deuteronomy 13:1) and, therefore, that the recitation of the blessing would be a purposeless benediction. Rashi's comment is no more than his explanation of the prima facie inference of the *gemara* that women are prohibited from practicing the sounding of the *shofar* on Shabbat. There is no greater reason to suppose that this statement reflects Rashi's own view than to suppose that his statement, s.v. *somekhot reshut,* reflects his own view. The latter statement asserts that there is no prohibition whatsoever on a woman's observance of positive time-bound commandments.

27. Kiddushin 1:7, 29a.

28. Kiddushin 31a. The statement made here that "those who observe because they are commanded are greater than those who observe without having been commanded" would be meaningless unless the *halakhah* recognized the existence of such a class. This implies that voluntary observance of non-commanded *mitzvot* is not only not forbidden, but that it is included within the halakhic framework. Legally speaking, women could surely not be excluded from that class. They must, therefore, be permitted to observe voluntarily.

29. The final sentence of the responsum reads as follows: "Proof: For we claim [Megillah 23a] that 'all count to seven called to the Torah, even a woman,' who can go up to the Torah and recite the blessing, without it being considered a purposeless blessing, even though she is exempt from the *mitzvah* of *Talmud Torah.*" From this "proof" it would appear that Rabbi Yitzḥak Ha-levi assumed that this *baraita* allowed a woman to be called to the Torah even first or last, as well as among the intermediate *aliyyot,* since

only the first and the last one recited the blessing. The matter is one of significant disagreement among *posekim,* but analysis of this question per se is irrelevant to this paper.

30. *Shulhan Arukh, Oraḥ Ḥayyim* 589:6.
31. *Responsa of Rashba,* vol. I, #123.
32. Eruvin 96a.
33. Tel Aviv, 5717, #1.
34. See above, note 22.
35. Kiddushin 31a.
36. *Hiddushei Ha-Ran* to Rosh Ha-shanah 33a, s.v. *ve-ein,* end.
37. *Hiddushei Ha-Ran* to Kiddushin 31a, s.v., *ve-yesh doḥin.*
38. Kiddushin 1:7, 61c and Pesaḥim 8:1, 35d. Cf. Bavli Pesaḥim 91b. It is irrelevant whether the statement refers to the First Pesah or to the Second Pesah (see Numbers 9:4-12), for if it refers only to the Second Pesah, it is because women are obligated to observe the Firsh Pesah.
39. The P'nei Moshe (d. 1780) accepts this reading both in Kiddushin and in Pesaḥim. The Korban Ha-Edah (1704-1762) emends the reading to "obligatory." The latter was obviously motivated to "correct" Rabbi Elazar's statement because of the question of the Bavli (Pes. 91b), *"I reshut amai doḥeh et ha-Shabbat"* ("If it is a voluntary [rather than obligatory] act, why may one violate the Shabbat [in order to perform it]?"). But the statement of Rabbi Elazar himself seems to indicate that precisely that is his *ḥiddush* ("innovation").
40. Sifra, par. #2. See above pp. 737-738.
41. The laying on of the hands on an animal during the Shabbat or a Festival is ordinarily prohibited, because in leaning heavily upon the animal, he is "making use" of the animal (Ḥagigah, 16b). This prohibition is categorized as a *shevut.* Since, however, men are obligated to bring certain sacrifices during a Festival, the *halakhah* permits them to violate this *shevut.* The question therefore arises, whether a woman who voluntarily brings a sacrifice on a Festival may also violate this *shevut.*
42. I.e., *tzitzit* containing a mixture of wool and flax.
43. See *Shulḥan Arukh, Orah Ḥayyim* 17:2 in Rema, and the explanation of the *Arukh Ha-shulḥan,* ad loc. Note that Isserles (1525-1572) prefaces his contention of *Yohara* with the statment that if women wish to wear *tzitzit* and recite the blessing, they may do so. I shall comment but briefly on the question of the right of women to wear *tallit* and *tefillin:* (1) It is difficult to accept "arrogance" as properly applying to an act totally independent of either numbers or intention. If many women wore a *tallit* it would seem less, if at all, "arrogant." (2) To define the act as "arrogant" seems to imply that its intention must be understood to be "to appear manlike." I shall address that subject in the final section of this paper. Regarding *tefillin* the Rema (O.H. 38:3) is more strict, adding to Caro's statement that they are

not obligated, the claim that women should be prevented from wearing *tefillin.* The *Mishnah Berurah* (ibid.), quoting the *Taz* and the *Magen Avraham,* explains the reason for this stringency on the grounds that *tefillin* require a *guf naki* ("a clean body") and that women are not inclined to be careful. The contention that *tefillin* require a *guf naki* applies no less to men than to women. See Shabbat 49a, and is, according to *Orah Hayyim 37:2,* the reason that *tefillin* are no longer worn all day by men. Abayee and Rava define *guf naki* as refraining from expelling intestinal gas and refraining from sleeping while wearing them. The *Shulḥan Arukh* lists Abayee's definition explicitly, and adds that "one may not permit his attention to wander from them." According to Tosafot (Shabbat 49a, s.v. *she-lo*), that may be what Rava means. In any case, experience contradicts the contention that women are any less careful or capable of being careful about these prohibitions than men. In traditional terms it seems absolutely appropriate to claim that *nishtannu ha-zemannim* ("times have changed") vis-à-vis this issue. That is particularly so considering the relatvely brief time span during each day when *tefillin* are actually worn. Thus, in the absence of any cogent reason to retain the Rema's stringency regarding women's right to wear *tefillin,* we are systematically entitled to revert to his own general premise that women may observe *mitzvot* from which they are exempt, and apply it even to this, a specific case in which he varies from his general premise.

44. *Shulhan Arukh, Orah Ḥayyim* 489, *Magen Avraham,* par. 1.

45. *Minḥat Hinukh* (New York: Shulsinger Bros., 1952), Mitzvah 306, vol. I, p. 241.

46. See below, note 60.

47. Hilkhot Tefillah, Ezriel Hildesheimer edition, p. 29. Cf. *Siddur Rashi,* #130.

48. Berakhot 30b.

49. Ibid., 27b.

50. One point is unclear in the *Halakhot Gedolot,* and I wish to spell out specifically what I am unwilling to deduce from it. One could conceivably deduce from his words that the option to recite the evening prayer or not to recite it applies each night, and that its legal status should be considered obligatory on any night that it is recited, even if one does not usually recite it nightly. The potential implications of this view for "women's issues" are vast and important. Therefore, I wish to state clearly that I reject any such interpretation. Since the primary purpose of the passage in *Halakhot Gedolot* was to deal with the repetition of the *amidah* when one has forgotten a special addition to it, it would be overstretching his words to make so far-reaching a deduction. Furthermore, it is unlikely that the author ever considered that possibility as potentially actual, since Jews had by then customarily recited the evening *amidah* every night.

51. *Sefer Ha-ravia,* pt. II, #563, Aptowitzer edition, p. 284, quoted in *Hagahot Maimoniyot,* Hilkhot Berakhot, chap. 2, letter *het.*

52. 24a.

53. The *Halakhot Gedolot* specifically excluded Rosh Ḥodesh, as we have seen. Nevertheless, this apparent error in the Ravia has no bearing upon the focal point of the present discussion.

54. See Tosafot Arakhin 3a *la-atoyei* regarding the reading *be-mishma megillah* instead of *be-mikra megillah.*

55. *Sefer Tashbetz,* #270 (New York, 5730), p. 20a.

56. Is is not clear exactly to what he refers. Page 31 is listed in parentheses. It may be that he refers to the principle that "one who is commanded and performs is greater than one who is not commanded and performs." We shall address ourselves to this principle shortly. In any case, his actual proof from the *gemara* surely does not include the words *yekholot le-hayyev atzman* ("they can obligate themselves"). That is clearly *his* statement. Note, too, the difference between this statement and that of Rashi, above, p. 739, *le-havi atzman be-ol ha-mitzvot* ("to place themselves under the yoke of the commandments").

57. See above, note 43.

58. *Responsa Besamim Rosh,* #89.

59. Di Molina clearly cannot mean that literally. He may mean that they have obligated themselves to all of the "prayer" *mitzvot,* like *lulav, shofar, sefirah, musaf.* But whatever the last clause means, he speaks, too, of women obligating themselves. Since the primary reason for quoting Di Molina is to demonstrate the use of the term *hiyyevu et atzman* ("they have obligated themselves"), it is not particularly relevant who the actual author of the responsum is. Even if Rabbi Saul Berlin forged the responsum (see *EJ* entry on Saul Berlin, 4:663), he would not have used terms and ideas which legalists would have immediately dismissed as outlandish.

60. The clause eliminated on p. 743 immediately following "anywhere" . . . includes the claim that Gumbiner's contention about *sefirah* is not comparable to *tefillat Ma'ariv.* Babad, however, does not explain why they are not comparable. He may well have known the view of the *Halakhot Gedolot* through its quotation by the Tosafot, Yoma 87b, s.v. *veha'amar,* for example. If he knew it from such a context, it is plausible to hypothesize that he considered the two cases non-comparable because the *reshut* status of *ma'ariv* is different from the *reshut* status of *sefirah* on several grounds: (1) not everyone agrees that *ma'ariv* is *reshut;* (2) even if it is *reshut,* it is not "completely" voluntary – see the view of Ri at the beginning of the aforementioned Tosafot; (3) even if *ma'ariv* is "completely" voluntary, nobody denies the right of a man to recite it if he wishes; whereas there are some who categorically deny to women the right to perform positive time-bound commandments.

Given such factors, all unmentioned by the *Halakhot Gedolot,* Babad asserts that even the right of women to count the Omer could not be deduced from a comparison to *ma'ariv,* and surely not the claim of "obligation." These factors force him to minimize (or ignore entirely) the obvious fact that both the *Halakhot Gedolot* and Gumbiner utilize identical language – *shavyei aleia hovah* ("he accepted it as an obligation"). Surely it is reasonable to assert that the *Magen Avraham* employed the language he did precisely because he wished to affirm that women may perform positive time-bound commandments, rendering their performance of them directly comparable to the *ma'ariv amidah* for men and even vis-à-vis the claim of "obligation."

61. Five passages have been quoted to demonstrate the applicability of the term *hiyyuv* ("obligation") to self-imposed observance: Gumbiner, *Halakhot Gedolot,* Ravia, Tashbetz, and Di Molina. These five can be divided into two categories. Gumbiner, Ravia, and Di Molina constitute one category. In these three passages the "acceptance of obligation" seems to be contingent upon widespread and long-standing acceptance of obligation by the nonobligated class. If the circumstances for the acceptance of voluntary obligation were deduced from these three alone, one would be inclined to postulate both the "widespread nature" and the "long-standing behavior" as necessary conditions for "acceptance of obligation." Were that the case it would follow that recent and/or individual acceptance of voluntary obligation would not qualify. The passages from the Tashbetz and the *Halakhot Gedolot* demonstrate that such a conclusion would be misleading. No greater proof of that could be sought than the statment of the Tashbetz. He applies the term *le-hayyev atzman* ("to obligate themselves") to the wearing of *tzitzit* by women. Not only does he fail to mention either the "widespread nature" or the "long-standing behavior" characteristics, but the example of *tzitzit* for women was surely never widespread nor long-standing.

It is true that one might say of the passage in the *Halakhot Gedolot* that his failure to mention either of the characteristics is explicable on the ground that the recitation of the *ma'ariv amidah* was both widespread and long-standing. But since the thrust of his argument is couched in terms like, "if one has already made the effort and prayed" and "once reciting it, he accepts it upon himself as obligatory," it is highly unlikely that he considered "widespread" or "long-standing" as necessary conditions for obligatory status. Indeed, the tone of the *Halakhot Gedolot* implies *individual* acceptance of obligation. The terms he uses and the tone of the passage render his failure to mention either the "widespread" or "long-standing" characteristics most likely to be both conscious and purposeful.

62. Berakhot 17b.
63. *Ibid.*, s.v. *ve-eino.*
64. Berakhot 3:1, 5d.

65. See above, pp. 743-744.
66. Hilkhot Keri'at Shema 4:7.
67. *Birkei Yosef, Oraḥ Ḥayyim* 55:5.
68. Lev. 22:32, used by the Yerushalmi, Berakhot 7:3, 10c, as a source for the quorum of ten. Cf. Bavli, Berakhot 21b.
69. Some wish to resolve the question by denying that a *shatz* today serves as an agent. Rather, they claim, he is more of a prayer leader who helps the congregation keep its place. I would oppose such a resolution to the problem for the following reasons: (1) It begs the question rather than answering it. It ignores the basic question of whether a woman could serve in this capacity whithout changing the definition of a *shatz* in a way that is certain to be deemed unacceptable by most. (2) Allowing women to serve on the basis of a changed definition would create the odd anomaly of allowing a woman who could not be counted in the *minyan* to serve as prayer leader for those (men and women) who do count toward a *minyan.* Our discussion of women in the *minyan* follows shortly. (3) It is not accurate to describe the *shatz* as merely a prayer leader rather than an agent even when everyone has a *siddur* to pray from, because there are elements of the service in which the *shatz* remains an agent, even under those circumstances. I refer primarily to the *devarim she-bi-kedusha, barekhu,* and *kaddish.* In these, the congregation is a respondent to the doxology offered by its agent on their behalf. No greater proof of this is needed for the communal nature of these prayers than the fact that they cannot be recited with less than a *minyan.* (4) The issue of the nature of a *shatz,* even in a congregation where all can pray, has already been widely discussed in the literature. *Orah Ḥayyim* 124:3 stipulates that even in a congregation where all are expert, the *shatz* must repeat the *amidah,* in order to maintain the *takkanat ḥakhamim.* The commentators understand this to imply that since, at times, the *shatz* does serve as an agent for those who cannot recite the *amidah* properly (an all-too-frequent occurrence in our own congregations), he must repeat the *amidah* as a communal agent even when he is, in fact, not serving as an agent for any specific individual. The Abudraham (14th century) (Wertheimer edition, p. 117 [Jerusalem, 5723]), quoting a responsum of Maimonides, goes even further. He asserts that the blessings recited by the *shatz* in the repetition of the *amidah* in a fully expert community are not to be considered *berakhot le-vattalah.* The *takkanat ḥakhamim* requiring a repetition was made in order to remedy a possible situation, but its fulfillment is not contingent upon the actual existence of that situation. It is similar to the recitation of *kiddush* in the synagogue, which was instituted for the benefit of guests, but is recited even when guests are not present; or to the recitation of *berakhah aḥat me-ein sheva,* which was instituted for the benefit of latecomers, but is recited even if there are none.

Only if one were to claim that there are no congregants anywhere who remain inexpert in the recitation of the *amidah* would it be defensible to claim that the *shatz* no longer serves as an agent. (And even then it would apply only to the repetition of the *amidah,* but not to *devarim she-bi-kedushah.*) Surely this is not true of our communities, regrettably. In the final analysis, it seems to me far preferable to retain the definition of a *shatz* as it has always been, and to restrict women who are not obligated from serving in that capacity.

70. The Committee on Jewish Law and Standards of the Rabbinical Assembly has dealt with the issue of women in the *minyan* in a variety of ways. A letter from the Committee Chairman to all members of the Rabbinical Assembly, dated October 5, 1973, is accompanied by a "Digest of discussion at the CJLS meeting of August 29, 1972" and by excerpts from papers prepared for the Committee. Two responsa permitting the counting of women were discussed. A version of the responsum by Rabbi Phillip Sigal appears in Seymour Siegel, *Conservative Judaism and Jewish Law* (New York: Rabbinical Assembly, 1977) pp. 282-292. Rabbi David Feldman responded to those responsa in a paper which is also excerpted in the aforementioned "Digest." I concur completely with Feldman's rebuttal of the two responsa. See, as well, Feldman's article, referred to above in note 6, particularly, pp. 300-302. The final vote of the CJLS "was not a vote of acceptance of a *teshuvah* but rather a vote of *takkanah* that men and women may be counted equally for a minyan" (quoted from p. 3 of "The Role of Women in Jewish Ritual," a summary of decisions of the CJLS, sent to all member of the Rabbinical Assembly by the Committee Chairman with a cover letter dated Jan. 6, 1975). The wording of the *takkanah* appears in the Committee Chairman's letter of Oct. 5, 1973. It reads: "Men and women should be counted equally for a minyan."

I find the *takkanah* inadequate. Its final wording ignores the question of obligation. Even if it had imposed obligation on women equal to that of men, I would be oppsed to the *takkanah* for reasons which are discussed below, p. 765.

71. Rosh ha-Shanah 3:8, 29a (Danby's Translation).

72. Above, p. 742.

73. Kiddushin 31a and parallels.

74. Above, pp. 739-740, 741.

75. Kiddushin, loc. cit., s.v. *gadol.*

76. Avodah Zarah, 3a, s.v. *gadol.*

77. Kiddushin, loc. cit.

78. See the Committee Chairman's letter of October 5, 1973, paragraph 4.

79. Careful distinction must be drawn between possible categories of obligation. There are two categories of other-imposed obligation, namely, obligation *de-oraita,* deriving from the Bible, and obligation *de-rabbanan,*

deriving from rabbinic legislation. These two categories are not generally considered to be legally equal. Thus, one whose obligation derives from the rabbis cannot be the agent through whom one whose obligation derives from the Bible fulfills his religious obligation. The classical statement of this premise is reflected in the question of the *gemara, "attei de-rabbanan u-mapik de-oraita?"* ("Can one who is rabbinically obligated act in behalf of one who is biblically obligated?") (Berakhot 20b).

Even granting this premise, it would be erroneous to equate the voluntary acceptance of *hovah* ("obligation") by one whose observance is *reshut* ("voluntary") with *hiyyuv de-rabbanan* (a rabbinically imposed obligation). The former is self-imposed, not other-imposed. Obligations which for some are other-imposed and for others self-imposed have the same halakhic status. In other words, the voluntarily accepted obligation to fulfill a biblical *mitzvah* has the same legal status as the other-imposed obligation to fulfill a biblical *mitzvah,* and the voluntarily accepted obligation to fulfill a rabbinic *mitzvah* has the same legal status as the other-imposed obligation to fulfill a rabbinic *mitzvah.* Thus, a woman who accepts the obligation to recite Shema could serve as the agent for men (assuming that that obligation is biblical for men; though see Berakhot 21a and Tos. Baba Kamma 87a, s.v. *Ve-khen,* end).

There is ample evidence for this thesis, as unusual as it may appear on the surface. (1) The view of Rabbi Elazar (above pp. 741-742) is explicable only by this thesis. Were he to equate the voluntary sacrifice of women with a rabbinically imposed obligation, he would be allowing a positive rabbinic injunction to taked precedence over a biblically enjoined prohibition. Indeed, his vew is very liberal, for it allows a woman's voluntary performance to have the legal status of a biblical obligation even without her "accepting the obligation." (Admittedly, though, the strength of this proof is weakened by the Bavli's reinterpretation of his statement, and by the emendation of his statement by the Korban Ha-Edah. See above, note 39.) (2) The view quoted by the Ravad (above, p. 742) is equally strong. If our thesis were not implied by it, that view, too, would allow a purely voluntary act (even without "accepting the obligation") to take precedence over a biblically enjoined prohibition. (3) The claim of Rav Yosef, who had become blind (Baba Kamma 87a, Kiddushin 31a), that until he had heard Rabbi Hanina's dictum that "greater is he who is commanded, etc.," he would have rejoiced if the law were in accordance with Rabbi Yehudah (that a blind person is exempt from all of the *mitzvot*) has been widely used by the *rishonim.* It is generally quoted (see Tos. Rosh ha-Shanah 33a, s.v. *ha* and *Eruvin* 96a, s.v. *dilma*) in reference to the right of one who is exempt from reciting blessings to recite them. The thesis is that Rav Yosef could not possibly have meant to change his life-style one iota by virtue of having been exempted from obligation. Quite the contrary, he would have

rejoiced because continued observance of his previous life-style would have been even more praiseworthy because he was "not commanded." Following the very reasoning of the Tosafot one could ask: Would Rav Yosef have rejoiced if he had thought that exemption from obligation would have denied him the right to be *shatz* in his own school? Would not the loss of that right have upset him as much as the loss of the right to recite blessings? Even the assertion that the blind are "rabbinically obligated" would not be sufficient to account for Rav Yosef's joy. His feeling could be explained only on the assumption that as one who was no longer "commanded" he could still have done everything he had always done, including serving as the agent for others. His status as "non-commanded" would have in his opinion resulted in greater "reward," and would not have caused any curtailment of his rights as one who is obligated. He would still have been "obligated" on the basis of self-imposed voluntary obligation. (4) The *gemara* (Berakhot 33a) states quite clearly that the unnecessary recitation of a benediction is biblically prohibited. The Rambam accepts this statement (see Hilkhot Berakhot 1:15 and *Teshuvot Rambam,* Blau edition, #124). Most other *rishonim,* following the lead of the Tosafot (Rosh Hashanah 33a, s.v. *ha*) interpret that statement as merely an *asmakhta*. Consistent with his own view, the Rambam forbids women from reciting blessings (see above, pp. 738-739). The Tosafot assert that the scriptural verse is an *asmakhta* in order to "justify" the *hava amina* of Rav Yosef. Though such a "justification" would "defend" Rav Yosef on the grounds that "rabbinic prohibitions" are less severe than "biblical prohibitions," it is not at all clear that the defense is unassailable. The end of the *sugya* in Pesaḥim 116b, in discussing the behavior of Rav Yosef and Rav Sheshet, both of whom were blind, regarding the recitation of the Haggaddah, rejects the leniency of "rabbinic prohibitions" as the justification for their behavior on the grounds that *kol de-takkun rabbanan ke-ein de-oraita takkun* ("rabbinic legislation is governed by rules that are the same as those that govern biblical legislation"). The same objection could be raiseed to the "justification" of the *hava amina* of Rav Yosef. Would he not perhaps have thought that the recitation of blessings might be forbidden to him, even if he were "rabbinically obligated," because of the dictum that rabbinic legislation is governed by rules that are the same as those that govern biblical legislation? Would it not have made perfectly good sense to claim that the prohibition of reciting "a needless benediction" is biblical but that it was inapplicable to Rav Yosef (and also to women) on the ground that voluntary observance is not to be equated with "rabbically imposed obligation," but rather that voluntary observance has the same legal status as other-imposed observance of the same *mitzvah.* If the other-imposed obligation is biblical, the self-imposed obligation has the legal status of the biblcally imposed obligation. If the other-imposed observance

is rabbinic, the self-imposed observance has the legal status of the rabbincally imposed observance.

There is an apparent logical paradox which should be noted. Assume, for example, that the recitation of Shema were voluntary for women and biblically enjoined for men until year X. During that time, the recitation of the Shema by a woman who voluntarily assumed the obligation would have the same legal status as the recitation of the Shema by those who were biblically obligated. Now assume that after the year X the rabbis had imposed upon women the obligation to recite the Shema. Thenceforth the women would be "rabbinically obligated." It would follow from this thesis that prior to year X, women who accepted the recitation of Shema as a voluntary obligation would have been entitled to serve as the agents through whom men fulfilled their obligation, but those same women could not serve as the agents of men following year X because their observance would be rabbinically enjoined, and one who is rabbinically enjoined to fulfill a *mitzvah* cannot act as the agent to fulfill that *mitzvah* for one who is biblically enjoined to observe it. That would imply that the self-same act would have a higher legal status when it is self-imposed than it does when it becomes other-imposed; a halakhically inconceivable situation.

The premise which underlies the paradox is the "given" that one rabbinically enjoined cannot act as the agent for one biblically enjoined to perform a given *mitzvah.* Without that premise there would be no paradox. Indeed, there is inherent logic to the premise that rabbinically imposed obligations should have the same legal status as obligations biblically imposed on the grounds that both are other-imposed. The two subcategories of other-imposed obligations would be distinguished from each other primarily by the source of the *mitzvah;* biblically imposed obligations finding their source in God Himself and rabbinically imposed obligations finding their source in the sages. If voluntarily assumed obligations have the same legal status as the same observances have for those for whom they are other-imposed, and if the legal status of the "biblical" and the "rabbinic" obligations could be considered legally equal, there should be no paradox. A woman whose obligation to recite Shema became rabiinically other-imposed after year X, could continue to serve as the agent for men.

There are indications that the sages recognized that rabbinically imposed obligations share some equivalence with obligations biblically imposed. The classical statement of this thesis is found in Shabbat 23a, oft quoted by *rishonim,* in the justification of the right to say *ve-tzivvanu* ("and He commanded us") for rabbinically imposed *mitzvot.* According to the *hava amina,* the word *ve-tzivvanu* seemed inapplicable to such *mitzvot,* since God did not command them. The *gemara's* resolution posits that *ve-tzivvanu* is applicable because God empowered the sages to act. Thus, *ve-tzivvanu* is appli-

cable because rabbinically imposed *mitzvot* are equal, in that sense, to biblically imposed *mitzvot.* Both are other-commanded. Only the direct source of the commands differs. The Tosafot (Rosh Hashanah 33a, s.v. *ha,* and Eruvin 96a, s.v. *dilma*) expand the principle to include the right of recitation of blessings (including the word *ve-tzivvanu*) to the blind. Surely they might have distinguished between biblically rooted *mitzvot* imposed upon the blind by the Rabbis and the *mitzvah* of Hanukkah which is rabbinically rooted and imposed on all. But they do not.

Even the claim of Berakhot (20b) that one "rabbinically enjoined" cannot act as the agent for one "biblically enjoined" is not as clearly uncontested as it appears. The *sugya* in Berakhot 48a apparently allows one "rabbinically obligated" to serve as the agent for "one biblically obligated." Rashi himself (ibid., s.v. *ad*) recognizes that as the *p'shat* ("patent meaning") of the *gemara.* Furthermore, Rashi is certainly correct to reject the statement of the *Halakhot Gedolot* as a viable explanation of the *sugya.*

To the extent that the paradox referred to above exists, it is predicated on an uncertain assumption. The logical paradox is not inherent to the claim that voluntary observance has the same legal status as other-imposed observance of the same *mitzvah.*

80. Ketubbot 7b.

81. Understood by the Geonim to refer to "entering under the canopy." See *Otzar Hageonim,* Ketubbot, pt. II, p. 7, par. 8.

82. The *edah* ("community") referred to consisted of the ten spies who brought evil reports from the Promised Land.

83. Berakhot 21b, completed according to Megillah 23b.

84. The *sugya* in Berakhot 50a does not necessarily affect the tenability of Rabbi Abahu's position. There, Rabbi Akiva utilizes the *be-makhelot* ("in assemblies") of Psalms 68:27 as the source of Rabbi Meir's claim that even unborn fetuses sang at the Red Sea, thereby negating the possibility that the verse could be used to distinguish between 100, 1,000, and 10,000 for the formula of *birkat ha-zimmun* ("calling upon the assembled to recite the grace after meals"). Rabbi Yose HaGelili retorts that *be-makhelot* alone is sufficient to distinguish between 100, 1,000, and 10,000, while the word *mi-mekor* ("from the fountain") could serve as the basis for Rabbi Meir's comment. In the *sugya* in Ketubbot (7b), Rabbi Abahu (ostensibly) rejects the use of *mi-mekor* as the source of Rabbi Meir's view on the grounds that if it were intended as his source it would have read *mi-beten* ("from the belly"). The *sugya* in Berakhot would bear directly on the *sugya* in Ketubbot only if one posits that Rava's statement in Berakhot (that the law is according to Rabbi Akiva) refers both to Rabbis akiva's conclusion *and* to this utilization of the verse as the grounds for Rabbi Meir's statement. Since the latter calim is not attributed to anyone in particular, i.e., it is *stam,* it is highly unlikely that Rava was even aware of it. Rava himself

provides no reason whatsoever for his rejection of Rabbi Yose's view concerning the formula for *birkat ha-zimmun.*

Rava's statements are used to link the two *sugyot.* That linkage is far from necessary, as the following will demonstrate. Rava rejects Rabbi Yose Ha-Gilili's view on the formula for *birkat ha-simmun* because the verse on which it is predicated must be utilized as the source for a *minyan* for the wedding benedictions, as Rabbi Abahu does. He rejects, as well, the possibility that it could be the source for Rabbi Meir's opinion on the ground that it would have to read *mi-beten.*

85. In Rabbi David Feldman's rebuttal paper, referred to above in note 70, he quotes the statement of the *Shita Mekubbetzet* to Ketubot 7b (New York: Feldheim, 5713, 39c), which excludes women from being counted for the wedding benedictions. Feldman, however, cojoins the staement with the view of Rav Nahman, as though it were clearly the source for the prohibition. That is an error. The comment of the *Shita Mekubbetzet* is made in a discussion of the requirement of *panim hadashot* (guests not previously present). It is not made in the context of a discussion of the dispute between Rav Nahman and Rabbi Abahu. it is totally independent of that dispute. Women who could not be counted to a prayer quorum could also not be counted for the wedding benedictions in the opinion of either Rav Nahman or Rabbi Abahu. For Rav Nahman, though, even women who could be counted toward a prayer quorum could not be counted for the wedding benediction. For Rabbi Abahu, they could be.

86. Yerushalmi Sheviit 6:1, 36b.

87. That is, they were at the time under no legal obligation for performing the *mitzvot* that were associated specifically with the land of Israel, such as the bringing of tithes.

88. The chapter lists both the obligations to be voluntarily assumed by the people and the signatories to the document.

89. Verse 1 states that these are voluntary obligations and verse 38 lists tithes. Thus, the obligation to give tithes, as implied by the words "we make a written pledge," was voluntary.

90. This refers to biblically ordained *mitzvot* in no way associated with the land and, therefore, should not have been included in a list of voluntarily accepted obligations.

91. Piska 190, Finkelstein edition, p. 230.

92. One of the hermeneutical principles whereby the Rabbis interpret the biblical text. "Literally: similar injunction or regulation. 'Inference by analogy' by virture of which, because in two pentateuchal passages, words occur which are similar or have the identical connotation, both laws, however different they may be in themselves are subject to the same

regulations and applications" (Herman L. Strack, *Introduction to the Talmud and Midrash,* p. 94).

93. "The two men who are parties to the dispute shall appear, etc."

94. "A case can be valid only on the testimony of two witnesses or more."

95. Shevuot 30a.

96. Shevuot 4:1, 30a.

97 That is, the addition of the *vav* ("and") to the *asher* would indicate that the phrase "the parties to the dispute" refers to individuals different from the *shenei ha-anashim* ("the two men") spoken of in the opening phrase of the verse. Without the *vav* ("and"), the phrase "the parties to the dispute" could be understood as explanatory of *shenei ha-anashim* ("the two men") with which the verse opens.

98. Edut 9:2.

99. The *Kesuf Mishnah,* ad loc., wonders why the Rambam ignored the proof of the *gemara,* viz., the *gezerah shavah.* Indeed, Maimonides' proof is not nearly as conclusive, since "the Torah usually uses the masculine form to include both men and women."

Perhaps, though, Maimonides was basing himself on the Yerushalmi, Shevuot 4:1, 35b, where Rabbi Yose ben Bun deduces that women may not serve as witnesses by *gezerah shavah* of Deut. 19:17 (*shenei ha-anashim*) and *al pi shenayim edim* (ibid. 17:6). His deduction seems to be claiming that *ha-anashim* cannot be generic because *edim* is not generic, but masculine. In essence, then, *edim* alone proves that only men can testify and is used by Maimonides as clarification of the meaning of *anashim* as nongeneric.

100. See Mishnah Rosh ha-Shanah 1:8.

101. See, Berakhot 17a.

102. See Sotah 11b and *Sifre Numbers,* Piska 133, Horovitz edition, p. 177, lines 13-15.

103. See Megillah 14b and Baba Metzia 59a.

104. See Shevuot 30a. The New Jewish Publication Society translation reads: "the royal princess, her dress embroidered with golden mountings is led to the king," and notes that "meaning of the Hebrew is uncertain."

105. Shabbat 33b, Kiddushin 80b.

106. Kiddushin 49b.

107. *Bereshit Rabbah* 45:5, Theodor Albeck edition, pp. 452 f.

108. Ketubbot 2:10.

109. The fact that they must have attained majority in order to be believed does not disprove the point. That requirement exists only to ensure that they recognize the importance of their testimony, which, as youngsters, they would not. In the final analysis though, their testimony is about matters which they witnessed as *minors.*

110. It is irrelevant whether the exceptions in the case of minors are instances of rabbinically required testimony or biblically required testimony, since the exceptions in the case of women are clearly instances of biblically required testimony (see below). Though the Bavli (Ketubbot 28a & b) explains the exceptions in the case of minors as instances of rabbinically required testimony, the Yerushalmi (Ketubbot 2:10, 26d) obviously understands the Mishnah to refer, as well, to biblically required testimony. See David Halivni, *Mekorot U'mesorot,* Nashim, p. 116, note 4.

111. Cf. Maimonides' statement (Gerushin 13:29): "Let it not seem difficult in your eyes that on the basis of a woman's testimony, the sages allowed even strict matters of possible forbidden relations [For if the testimony were false and the assumed widow would remarry, the consequences for her when her supposedly dead husband would be found to be alive, would be dire indeed]. For the Torah is not insistent either upon the two-witness requirement or the other rules of testimony . . . in a case in which the witness could not escape detection if the testimony were not true. [In that case] it is highly unlikely that a witness would testify falsely."

112. Mishnah Yebamot 16:7.

113. Mishnah Yebamot 15:4.

114. For a partial listing, see Rema In *Hoshen Mishpat* 35:14.

115. 30a.

116. Kiddushin 65a.

117. Rambam, *Ishut* 4:6; *Shulhan Arukh, Even ha-Ezer* 42:2. The quotation in the paper is from the latter.

118. It probably could work with difficulty, for divorce. See, carefully, Rambam, Gerushin 12:2, 3, 5, for intimations that if two parties admit that a divorce between them took place, the divorce is valid.

It must be stressed that I have been addressing myself to the possibility of categorizing betrothal and divorce as instances of *milleta de-atya le-igaloyei.* Obviously, it would be easier *after the fact* to recognize the validity of a marriage witnessed by an ineligible witness. The betrothal could be validated by the assumption that the husband *ba'al le-shem ishut,* "had had relations with his bride with the intention of thus making her his wife." There would be no comparable leniency for *after the fact* recognition of an invalidly witnessed divorce.

119. Mamrim 2:1.

120. See Herman L. Strack, *Introduction to the Talmud and Midrash,* chap. 11.

121. Evidently implying that the latter need not be *gadol be-hokhmah uve-minyan* ("superior in wisdom and numbers"). See Jose Faur, *"De-oraita', de-rabbanan ve-dinim muflaim be-mishnato shel ha-Rambam," Sinai,* vol. 67, no. 1 (Nissan 5730), p. 35.

122. Above, pp. 753-754.

123. Above, p. 754.
124. Above, p. 753.
125. See Yevamot 89b-90b for the *locus classicus* of the principle. The subject is very complex, and I apologize for referring to a volume which I have written which is not yet published. The volume is entitled *The Halakhic Process: A Systemic Analysis.* The entire seventh chapter is devoted to an analysis of rabbinic rights vis-à-vis matters that are *de-oraita* ("biblical"). The book, which is scheduled for early publication, will provide analysis of far more sources than I present in this paper. [This volume is now available.]
126. Nazir 43b, s.v. *ve-hai.*
127. Yebamot 15:1.
128. #157, to Deut. 17:15, Finkelstein edition, p. 208.
129. Melakhim 1:5.
130. Talmud Torah 1:13.
131. *Bemidbar Rabbah* 10:5, based on Judges 13:12.
132. Niddah 6:4, 49b.
133. The Yerushalmi (Shevuot 4:1, 35b) deduces the disqualification of women as judges from "and *shenei anashim* ['two men,' i.e., Eldad and Medad] had remained in camp" (Numbers 11:26). The reference here is clearly to men, Eldad and Medad, and clearly to judging. The Yerushalmi then applies the exclusive masculinity of this *shenei anashim* to *shenei ha-anashim* ("the two persons") of Deuteronomy 19:17, deducing that women may also not serve as witnesses.
134. Tosafot Niddah, 50a, s.v. *ha-kol.* Cf. Tos. Shevu'ot, 29b, s.v. *shevu'at* and Tos. Yevamot, 45b, s.v. *mi.*
135. Tosafot Shevu'ot 29b, s.v. *shevu'at.*
136. Sanhedrin 3:2.
137. Above, pp. 751-752.
138. Above, p. 761.
139. See Simon Greenberg, ed., *The Ordination of Women as Rabbis: Studies and Responsa* (New York: Jewish Theological Seminary, 1988), p. 29.
140. Ibid.
141. See note 61.