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In recent years, especially with the emergence of the Women's Liberation Movement, considerable attention has been focused on the role of women in Jewish life. In this issue, *TRADITION* presents the views of two prominent Jewish thinkers on the various aspects of this controversial subject. Rabbi Berman is Chairman of the Department of Judaic Studies at Stern College for Women, Yeshiva University. Rabbi Bleich's contribution appears as part of his regular feature, "Survey of Recent Halakhic Periodical Literature."

## THE STATUS OF WOMEN IN HALAKHIC JUDAISM

### INTRODUCTION

The strident voice of an intelligent, energetic and well-organized minority can often completely overshadow the real expression of the large constituency whom the spokesmen claim to represent.

Jewish women are not an organized constituency: they have no elected spokesmen, no leaders designated to interpret their beliefs and feelings to the rest of the world. Any attempt to generalize about their condition, particularly about a matter as internal as their religious state, is fraught with multiple dangers, not least among which is the ascription to them all of the views of a minority among them.

We would indeed fall prey to this particular danger were we to assume that the voices calling for the liberation of Jewish women from their enslavement by Jewish law and Jewish society, were in truth the expression of the majority of Jewish women today. We may rather assume, certainly within the Orthodox community, that most observant women have been able to discover a life of fulfillment and religious growth within the existing patterns of Halakhah.

Certainly the growing number of young women engaged in Jewish studies in yeshiva high schools and on the college level,

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the growing number of girls being reached by Yeshiva University Torah Leadership Seminars and NCSY, augur well for the ability of the religious community to successfully integrate young Jewish women into its existing social and religious structure.

However, relegating the excited voices to a minority does not mean that we can safely, or ought morally and religiously, simply ignore them. Minorities of one generation have a strange way of becoming the majorities of the next. Fingers pointing out manifest injustices seem often to become transformed into fists banging through walls of resistance to rectification.

The purpose of this paper will be threefold. Firstly, I would like to describe the sources of discontent, the issues which have given rise to the public campaign to change the position of women in Jewish law. Secondly, I would like to offer an analysis of the legal components of the status which Jewish law assigns to women. Thirdly, in the light of my analysis I will attempt to evaluate the justice of the complaints and make some modest proposals for confronting the problems. Given the great complexity of the general area of the status of women in Jewish law, and the paucity of reasoned studies of the matter, I will not presume to offer a comprehensive analysis of the status, nor a thorough proposal as to what changes might ultimately be possible in this area of Jewish law. If, however, this paper encourages such research and opens the questions for serious discussion, I will be gratified.

### I

As I have read or heard them, the basic issues around which the discontent centers are three in number. Firstly, and perhaps most important, is the sense of being deprived of opportunities for positive religious identification. This concern goes beyond just the demand for public equality through being counted to a *minyan* or being given the right to be called up to the Torah. The focus is more significantly on the absence of even private religious symbols which serve for men to affirm the ongoing quality of their covenant with God. The fact that Jewish women are relieved of the obligations of putting on *Talit* and *Tefillin*, of

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praying at fixed times of the day, and even of covering their heads prior to marriage, and have traditionally been discouraged from voluntarily performing these acts, has left them largely devoid of actively symbolic means of affirming their identities as observant Jewesses.

An interesting byproduct of this absence of covenant affirming symbols is the emphasis which Orthodox out-reach groups have placed on dress standards. Not wearing slacks has been treated as if it were a revealed *mitzvah*, equivalent to *Tzitzit* as a sign of one's commitment.

The Orthodox community has argued so vehemently in its battle with non-normative variants of Jewish commitment that content without form is short-lived and not successfully integrated by the individual or passed on to children. This same argument is now being cast up before us by the women of our own community who feel the need for a greater degree of form and structure to give proper expression to their deep religious commitments.

The sense of injustice which arises out of the first issue is intensified many fold by the disadvantaged position of women in matters of Jewish Civil Law, particularly areas of marriage and divorce. From her complete silence at the traditional wedding ceremony, to the problem of *Agunah*, the law seems to make women not only passive, but impotent to remedy the marital tragedies in which they may be involved. There is no need to describe at any length the psychological impact of a woman knowing that the event of marriage places her totally within the power of her husband. In case of failure of the marriage, his whim can, and in so many cases has, prevent her from ever building a new life for herself. Few Orthodox rabbis have not been faced with *Agunot* of reluctant husbands, or with the offspring of the second, illicit, marriages of such tragically mistreated women.

The feeling of being a second class citizen of the Jewish people is almost unavoidable when the awareness exists that men are almost never subject to the same fate, that a variety of legal devices exist to assure that they will be free to remarry no matter what the circumstances of the termination of a prior mar-

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riage, and despite the will of the first partner.

The third issue has less to do with specific Jewish laws, but is more related to the Rabbinic perception of the nature of women and the impact that it has had on the role to which women are assigned. No objective viewer would claim that Jewish women are physically or socially oppressed. They tend not to be beaten by their fathers or husbands, and they tend to have free access to the not insignificant wealth accumulated by Jewish families. However, Jewish women have been culturally and religiously colonized into acceptance of their identities as “enablers.”

Jewish society has projected a uni-dimensional “proper” role for women which denies to them the potential for fulfillment in any area but that of home and family. The Psalmist’s praise of the bride awaiting the moment of her emergence to be married to the King, “All glorious is the King’s daughter within the palace” (Psalms 45:14), has been taken as if it mandated her remaining “within” her home. Our apologetics have relegated women to the service role; all forces of the male dominated society were brought to bear to make women see themselves in the way most advantageous to men.

The blessing recited by men each morning thanking God “for not having made me a woman,” is seen as simply symptomatic of a chauvinistic attitude toward women, intentionally cultivated by the religious system as a whole. Part of that process involves the citing of statement out of context, such as “women are light minded” (*Shabbat* 33b). Another component of that process is the childish giggling which afflicts grown men in their study of such passages as if the assent to this secret truth were a form of covert rebellion against their mothers and wives.

Taken together, these three issues, deprivation of opportunities for positive religious identification, disadvantaged position in areas of marital law and relegation to a service role, are at the heart of a growing dissatisfaction with their religious condition by an ever increasing proportion of young Orthodox women.

How are we to respond to this dissatisfaction and implied threat of disaffection?

The first step is to call a moratorium on apologetics. It is one thing to recognize the problems and to attempt to understand

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the theological halakhic, economic and cultural factors which produced them. It is proper, and indeed vital, that we discover and define the values and/or social conditions which gave rise to the position of Jewish women. It is a completely different matter, both dishonest and dysfunctional, to attempt through homoletics and scholasticism to transform problems into solutions and to reinterpret discrimination to be beneficial.

To suggest that women don't really *need* positive symbolic *mitzvot* because their souls are already more attuned to the Divine, would be an unbearable insult to men; unless it were understood, as it indeed is, that the suggestion is not really to be taken seriously but is intended solely to placate women. Could we really believe that after granting women this especially religiously attuned nature, God would entrust to men — with their inferior souls — the subsequent unfolding of His will for man as expressed in the Halakhah?

It is time to admit that we have attempted through our apologetics to make a virtue of social necessity. We have striven to elicit voluntary compliance by women to a status which men need never accept. It is analogous to telling an unemployed worker that he ought to be thankful that he has no job since the economy requires a rate of 5% unemployment and he therefore has the great honor of enabling everyone else to make a good living. It is becoming increasingly difficult for Jewish women to accept the idea that their own religious potential is exhausted in enabling their husbands and children to fulfill *mitzvot*.

It is time to stop talking about the reluctant husband-*Agunah* problem and to do something about resolving it. Many women feel that if that same problem affected men, the Halakhah would long ago have made some ameliorating provisions. The attempt to suggest that refusal by women to pliantly accept the fate to which they are subjected demonstrates a lack of faith in the Divine Will, would be more convincing if the evil decree fell more equitably among both men and women.

Apologetics will only serve to exacerbate the problem and to convince increasing numbers of women that the Rabbis are engaged in an all out battle to keep women subjugated. Lack of seriousness in approaching these problems will only serve to

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confirm people's worst stereotypes of religious backwardness and refusal to accept women as real people.

The distinguishing line between apologetics and explanation is exceedingly thin. In attempting the latter one may fall easily into the former, and indeed what is satisfactory as explanation for one person may be mere apologetics to someone else. Meaning exists so often only in the eye of the beholder. Despite this danger, and while recognizing it, it is vital for us to examine those laws and social practices which seem to be unjust to women. When all is said and done, these laws were the total preoccupation of centuries of Jewish sages and scholars. Indeed, these were the very same sages and scholars through whose interpretative skills capital punishment was virtually abolished; through whose legal creativity the task of the transformation and eventual elimination of slavery was accomplished; and through whose social awareness a Jewish social welfare system came into existence which is unmatched to this day for its sensitivity to the feelings of the poor.

It has often been suggested that the ethical strength of a legal system and its jurists may be gauged by their treatment of the powerless; the poor, the alien, the widow and the orphans. By any such test, Jewish law and its Rabbinic jurists would stand high, if not at the very pinnacle, among the legal systems of the world. It is difficult to conceive of these same jurists setting out with malice aforethought to subject their own mothers, wives and daughters to the most blatant forms of injustice and inequity. It is crucial, therefore, for us to see these laws and practices through their eyes if we are ever to achieve a Jewish perspective as to how to proceed in the future.

## II

Any serious attempt to understand the condition of women in Jewish law must begin with the recognition that womanhood does not merely represent membership in a group like doctors or merchants. These latter groups do indeed form classes of people for whom special laws apply which are directly related to their common activities, but their membership in the class

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does not affect their total legal relations. Womanhood, on the other hand, within Jewish law, constitutes an independent juristic status, shaping to varying degrees every legal relationship and being characterized by a special set of rights and duties determined extrinsically by law rather than by contractual agreement.<sup>1</sup> It is this very concept which was intended by the often misconstrued Talmudic dictum "women are a separate people."<sup>2</sup>

This fixing of the rights and duties of a group through conferring upon them a separate legal status was never an accidental or random occurrence in legal history. The function of status conferral was usually both for the protection of the individual members of the class and for the more comprehensive purpose of determining the basic structure of society and protecting this structure from disturbance.<sup>3</sup> But these purposes can sometimes be so broad as to make impossible the formulation of a single descriptive principle to encompass the reasons for the existence of the status as well as the particular modifications of rights and duties through which those goals would be achieved.<sup>4</sup>

Indeed the Talmudic sages made not a single attempt to formulate a general principle governing the status of women. The closest they come is in the attempt to define under a single heading the affirmative precepts from which women are exempt. Thus, the Mishnah states:

All affirmative precepts limited as to time, men are liable and women are exempt. But all affirmative precepts not limited as to time, are binding upon both men and women.<sup>5</sup>

Even this principle, so extensively cited by subsequent Jewish jurists, is found by the *Gemara* to be inadequate as a general principle.<sup>6</sup> The *Gemara* rather found that there were affirmative precepts limited as to time which were yet incumbent upon women,<sup>7</sup> and on the other hand affirmative precepts not limited as to time from which women were exempt.<sup>8</sup> Thus, the statement that, "Women are exempt from affirmative precepts limited as to time," is found to be descriptive of *some*<sup>9</sup> of the laws regulating the status of women, but is inaccurate as a general description, and is certainly not a useful predictive principle.

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Having thus entered into the question of women's exemptions from obligations, let us pursue this matter further. Maimonides lists a total of fourteen positive commandments from which women are exempt.<sup>10</sup> Of those, only eight are affirmative precepts limited as to time,<sup>11</sup> while the other six are not so limited.<sup>12</sup> But beyond these, the Talmud identifies at least six more affirmative precepts, equally limited as to time, from which women are not exempted;<sup>13</sup> to which may be added four affirmative precepts of Rabbinic origin, also limited as to time, as to which women are also equally obligated with men.<sup>14</sup>

These facts make it impossible to explain women's exemptions exclusively in terms of the absence of need for time conditional commandments.<sup>15</sup> While the argument which Rabbi Rackman makes, that the laws of *Niddah* invest women's natural cycle with an awareness of sanctity of time which makes other time-bound commandments unnecessary, is attractive; it nevertheless is not consistent with the data. Women are obligated to fulfill as many positive precepts limited as to time, as the number from which they are exempted. Some other principle or principles must have been operative in determining the specific set of obligations and exemptions which constitute the legal status of women.

As is evident from what I said earlier about the significance of status conferral to the total structure of society, it would be folly for me to attempt to incapsulate the determinants of the status of women in Jewish law in a single principle. There are, aside this, two other major sources of complexity in the treatment of these issues.

The first source of additional complexity is the fact that the Talmud itself records serious debate as to whether women are indeed exempt from the individual positive time-bound precepts. Out of the eight laws where exemption is ultimately granted, only three involve explicit and uncontroverted Talmudic exemption, namely *Sukkah*, *Lulav* and *Shofar*.<sup>16</sup> Of the remaining five, there is substantial debate regarding three of them, namely *Tzitzit*<sup>17</sup> and *Tefillin*<sup>18</sup> (which constitutes two separate commandments according to Maimonides, one for *Tefillin* of the arm and one for *Tefillin on the head*<sup>19</sup>). In these cases, positions



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were taken by some authorities to the effect that women were equally obligated with men. In one other instance, that of the counting of the *Omer*, the Talmud nowhere specifically provides for exemption of women, though Maimonides insists they are exempt since it is clearly a time-bound positive precept.<sup>20</sup> In the final case, concerning the recitation of the *Shema*, while the Babylonian Talmud does explicitly indicate exemption for women and records no dissenting opinion,<sup>21</sup> the Jerusalem Talmud implies that there may have been a dissenting opinion arguing for obligation.<sup>22</sup>

Similarly, with regard to the six time-bound positive commandments where obligation is affirmed, substantial debate is recorded. In only two of those cases is there no Talmudic dissent; as to fasting on *Yom Kippur*,<sup>23</sup> which while positive in form, involves only refraining from the five kinds of physical pleasure specified by the term *Innuy*; and as to assembling once in seven years (*Mitzvat Hakhel*)<sup>24</sup> where the written Torah specifically includes women in the directive.<sup>25</sup> In relation to each of the other four *mitzvot* falling into this grouping, namely: *Kiddush* on *Shabbat*,<sup>26</sup> *Matzah* on *Pesach*,<sup>27</sup> rejoicing on festivals,<sup>28</sup> and sacrificing and eating of the Pascal lamb,<sup>29</sup> the Talmud records opinions of sages who argued in favor of women's exemption.<sup>30</sup>

The significance of these debates lies in the implication that for many of the Talmudic sages, neither the world view of Torah, nor the social order of Jewish society, would be totally disrupted by the adoption of what came to be the dissenting opinions. Indeed, it was with apparently complete equanimity that the scholars were able to discuss the possibility that women were truly obligated to wear *Tefillin* and *Tzitzit*, and to recite *Shema* at the appointed times. Despite the breadth of consequences adoption of such dissenting opinions might have had, the positions were neither written out of the literature,<sup>31</sup> nor attacked as subversive of the accomplishment of Divine Will. This makes our attempt to define the status of women much more complex. Any formulation must now not be so narrow as to totally exclude these dissenting positions from inclusion in the Jewish perspective.

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A second source of complexity in attempting to define the status of women in Jewish Law, is the nature of the changes that have been experienced within the law itself. For example, it would appear that during the *Tannaitic* period there were three distinct positions as to the relationship of women to the *mitzvah* of Talmud Torah. While the Mishnah<sup>32</sup> reflects the extreme positions of Ben Azzai arguing for obligation,<sup>33</sup> and Rabbi Eliezer propounding that it is prohibited to teach Torah to women,<sup>34</sup> the *Tosefta*<sup>35</sup> suggests an intermediate position in which women are not obligated to study Torah, but would not be prohibited from doing so. *Amoraic* discussion already reflects only this intermediate stance, clearly indicating the absence of obligation<sup>36</sup> but not pursuing the prohibitive character of the position of Rabbi Eliezer.<sup>37</sup> This centrist stance would equate the study of Torah with other *mitzvot*, such as *Shofar* and *Lulav*, in regard to which women, though not obligated, remained free to fulfill them voluntarily.

However, this position fades during the period of the *Rishonim*, to be replaced with variants of the more extreme position of Rabbi Eliezer. Maimonides, Jacob b. Asher and Josef Karo gave full effect to the prohibitive statement of Rabbi Eliezer, but limited it to teaching the Oral Law, permitting for women the study of the written law, though hesitating to allow men to teach even that to women.<sup>38</sup> Among *Ashkenaz* scholars, Rabbi Eliezer's position also came to the fore, but with exemption granted to allow for the teaching of functional as opposed to theoretical Jewish knowledge, whether in the written or Oral Law.<sup>39</sup>

Among the *Acharonim*, two divergent approaches have manifested themselves. On one hand, the stringencies have been carried even further to the point of serious consideration being given to the possibility that it is even prohibited for women to study the Oral Law by themselves,<sup>40</sup> and for men to teach them even the complexities of the Written Torah.<sup>41</sup> On the other hand, two more permissive lines of thought have also begun to emerge. One such line constructs its case for permission to teach women both Written and Oral Torah, on a purely functional base. Thus the *Chafetz Chayim* and others have argued that the fact that Jewish women are beneficiaries of a secular education makes it manda-

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tory for us to assure that their knowledge of Scripture and Rabbinic thought be sufficient to preserve their identity as Jews.<sup>42</sup>

A second line of opinion developing among the *Acharonim* is even more interesting because for the first time since Ben Azzai it speaks in terms of an obligation of women to study Torah, albeit a limited one. Rabbi Josef Karo already suggested that women are obligated to study those laws which pertain to them.<sup>43</sup> But it is Shneur Zalman of Liadi who formulates a broad principle by which women are obligated to study all laws of the Torah, both Biblical and Rabbinic, except those concerning *mitzvot* which they are not obligated to perform.<sup>44</sup>

The flux thus evident in the history of Jewish law makes it a quixotic task to describe in simplistic generalities the position of women within Jewish thought. These problems and many others will have to be treated in great detail before any truly accurate comprehensive statements can be made in this area. Indeed, because of the vastness of the material and the paucity of basic legal analyses, much of what I will say in the coming section of this paper will be quite tentative in character.

Despite the inherent difficulty of defining the precise social function of any legal status, and despite the special complexities inherent in debate and legal development, certain broad patterns seem evident as to the status of women in Jewish law. The most striking of the patterns is the absence of a specific role definition for women. Had the Torah intended to preclude for women all roles but that of wife-mother-homemaker, the means of doing so were easily at hand. Much as the law clearly prescribed the obligations of a husband to his wife,<sup>45</sup> the obligations of a father to his child<sup>46</sup> and the obligations of children to their parents,<sup>47</sup> the law could have made mandatory for women not only marriage and procreation but also the entire range of household duties which would have defined an exclusive role for them.

Despite the dissent of Rabbi Yochanan ben Berokah, the law prescribed that women were not obligated in the *mitzvah* of procreation.<sup>48</sup> Beyond that, the one attempt by the Mishnah<sup>49</sup> to define precise household obligations for a wife is immediately modified by two principles. Firstly, someone else may substitute in the performance of those duties, and secondly, the motive of the

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prescription is to avoid idleness which might lead to idiocy<sup>50</sup> or to sexual immorality.<sup>51</sup> While Maimonides prescribes five forms of personal service by wife to husband as the minimal level of household obligations,<sup>52</sup> he indicates elsewhere that these are viewed as correlative to the husband's support of his wife.<sup>53</sup> Indeed, the parties to a marriage may by prior agreement eliminate almost all mutuality of obligation of both financial support and personal service.<sup>54</sup>

Thus, the law ends up mandating for women, neither marriage, nor procreation, nor specific household duties. Jewish law does not then define with any precision whatsoever a "proper" or "necessary" role for Jewish women. While not demanding adherence to one particular role, it is nevertheless clear that since for most of our history, our continuation as a people depended upon the voluntary selection by women of the role of wife-mother-homemaker, the law would and did encourage the exercise of that choice.

Indeed, the Torah modified the civil and religious demands it made upon Jewish women, to assure that no legal obligation could possibly interfere with her performance of that particular role. If a woman elected to discover her fulfillment in the relation to her husband and children and in the shaping of a home, no law would stand in the way of her performance of that trust. It is for that reason, I believe, that the primary category of *mitzvot* from which women were exempted were those which would either mandate or make urgently preferable, a communal appearance on their part. It was the mandatory departure from the home which would constitute the greatest threat to the proper performance of household responsibilities, and it was, therefore, from those obligations that women were relieved of responsibility.

In the light of this proposition, we can understand why there was complete unanimity as to the Torah's having exempted women from the *mitzvot* of *Succah*, *Lulav* and *Shofar*. These acts were of necessity performed outside of the home, in the latter two instances, preferably at the central sanctuary.<sup>55</sup> We may likewise understand why it was necessary for the Torah to specifically inform us that women were obligated to attend the

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reading of the Torah at *Hakhel*, and why it was so obvious that they were included in the mandatory restrictions of *Yom Kippur*. Finally, we may now better understand the reason for the debates as to whether women are exempted from such *mitzvot* as *Tefillin*, *Tzitzit* and the reading of the *Shema*. For while obligations such as these need not involve communal appearance, and can adequately be fulfilled at one's own home, their very association with communal worship would create, and indeed has created for men, a powerful religious preference for their performance within the context of communal presence. We can readily see the development of debate premised on whether obligation should be preserved due to the possibility of private performance, or whether exemption is implied by the preference for communal appearance.<sup>56</sup>

The underlying motive of exemption would then be neither the attempt to unjustly deprive women of the opportunity to achieve religious fulfillment, nor the proposition that women are inherently more religiously sensitive. Rather, exemption would be a tool used by the Torah to achieve a particular social goal, namely to assure that no legal obligation would interfere with the selection by Jewish women of a role which was centered almost exclusively in the home. However, it is vital to emphasize that even with these exemptions, the wife-mother-homemaker role is not the mandated, or exclusively proper role, though it is clearly the preferred and therefore protected role.

The attempt to foster a particular social goal through class legislation defining the status of a segment of the community is, as I indicated earlier, a common practice in the history of law. However, the development in Western law from status to contract, allowing the individual more complete self-determination as to his rights and obligations, has made status based laws seem unduly restrictive of individual self-expression. It is admittedly very difficult for an American raised with almost a sense of sanctity of individual rights, to accept a stance which gives not only primacy to the social goal, but then assigns to the individual a status which would encourage the achievement of that goal. Yet, that is exactly what Jewish law seems to do. Placing its emphasis on the communal need for the maintenance of strong

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family units as the central means of the preservation of the Jewish community both physically and spiritually, the law assures that nothing will interfere with that goal. The obligations, and thereby the rights, of the individual will be governed in part by the overriding character of that social interest.

We now arrive at the second element of our proposition as to the status of women, that the exemption from obligations results in a loss of rights. While not self-evident,<sup>57</sup> it is clear in Rabbinic literature that the exemption of women from obligations of participation in communal worship results in their disqualification from being counted to the quorum necessary to engage in such worship. For each member of the *minyan* must stand equal in obligation and capable of fulfilling the obligation on behalf of the entire *minyan*.<sup>58</sup> The absence of such mutuality, of equality of obligation, prevents the constitution of an *Edah* or community, and prevents the individual with lesser obligation from fulfilling the *mitzvah* on behalf of one with a different and greater degree of obligation.<sup>59</sup>

Similarly in civil matters, the fact that women are relieved of the obligation to testify,<sup>60</sup> results in their inability to be part of the pair of witnesses who bind the fact-finding process of the court.<sup>61</sup> No slur on the testimonial veracity of women is intended. Rather, the law begins with the desire to exempt women from mandatory public appearances and therefore deprives the court, in effect, of subpoena power over women. But, in turn, the inability of the court to compel her presence results in the correlative loss on the part of women of the power to compel the court to find the facts to be in accord with their testimony.<sup>62</sup> The patterns which constitute the status of women in matters of Jewish civil law are even more complex than those we treated in relation to matters of religious law. The instance of testimony merely illustrates a kind of internal consistency but does not exhaust the additional considerations of social interest brought to bear in matters of interpersonal relationships.<sup>63</sup>

### III

Much remains to be written on these matters and hopefully

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some of it will come by the hands of women dealing creatively with the corpus of Jewish law. But if my analyses have been appropriate and I have not overstepped the boundary into apologetics, then we are in a position to at least reach some modest conclusions as to directions in dealing with the problems raised at the outset of this paper. In a legal system which is contract oriented, the basic laws are those which guarantee the rights of individuals. Those laws are then modified or limited only to the extent necessary to secure certain basic social interests. That pattern is reversed in a status oriented legal system, where the basic laws are those which assure the social interests through status conferral. However, those laws are then modified to assure the highest possible level of individual rights achievable in consonance with the desired social goals.

Thus, in Jewish law, while the goal of family stability seems to be the motive force behind many of the elements of the status of women, the law recognizes that women are disadvantaged by that position and attempts to compensate to the extent possible. A central role in this corrective process is played by the laws of *Niddah*. These regulations prevent the wife from being seen purely as a sexual object even if she elects the preferred role. Not only is the sexual relationship prevented from becoming the total relationship between husband and wife, also the wife's role even within that relationship is not one of total submission. On a second level, the laws of *Niddah* address the service role of the wife and perform the same limiting function as to that role, namely prevent the service role from being seen as the totality of the relationship and the wife from being seen purely as a service object or servant. It is of crucial significance, as the Talmud points out, that those very forms of personal service which are initially obligatory on a woman, are the ones which she may not perform in her husband's presence while she is a *Niddah*.<sup>63a</sup>

The corrective process is also reflected in the assignment of power to the court to act on behalf of a woman in compelling her husband to issue a divorce to her. These steps indicate very clearly that the accomplishment of the underlying social purpose of a particular status should not be viewed as a *carte blanche* for imposing on members of that class all disabilities which flow

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from their status. Rather, any side effects which are disadvantageous and also are not necessary for the achievement of the social goal, are to be eliminated by secondary legislation.<sup>63b</sup>

In the light of this analysis we may suggest that on one hand, the exemption from communal presence seems to be a central element of women's status in Jewish law, necessary to assure that no mandated or preferred act conflict with the selection of the protected role. But, on the other hand, many of the elements of the three areas of problems delineated at the start of this paper, are accidental side effects of the status conferral, which in themselves contribute nothing, and may ultimately interfere with, the attainment of the central social goal. If such be the case, it is the unavoidable responsibility of religious leaders to do all within their power to eliminate these detrimental side effects.

Firstly, it is vital for religious leadership to recognize the reality of the religious quest of Jewish women. While the law assigns them a distinct status, it does not suggest that their essential religious condition stands at a level any different from that of Jewish men. If a Rabbi is concerned with whether a man has prayed three times each day, he must be equally concerned with the daily prayer of women. If a Rabbi worries whether a man's feelings about *kashrut* are sufficiently strong to keep him eating kosher outside the home also, he must be equally worried about whether a woman's experience with *kashrut* is sufficiently meaningful to assure that she observes the laws in a way which is fulfilling to her and which communicates positive feelings about it to her husband and children. In brief, women must be made to feel that their own religious development is a vital concern to communal leadership, and that the community will seek out means of enhancing their religious growth.

A small number of religious women have begun donning *Talit* and *Tefillin* daily, and have, in so doing, discovered a vital source of religious expression and strength.<sup>64</sup> It seems to me very unlikely that that particular form of religious observance will become widespread among Jewish women. However, constantly increasing numbers of women are attending synagogue services with some regularity, and that trend can be expected to intensify



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with the increasing liberation of women from the home and with the spread of *Eruvin* in religious communities. Under these circumstances, relegating women to the back of the synagogue, both physically and spiritually, will only assure their gradual disappearance from religious life. Building committees, and through them, synagogue architects, must be sensitized to the necessity of designing structures which demonstrate that in the appearance before God, men and women are equal. *Mechitzot*, while crucial for the achievement of proper prayer, must not constitute insurmountable barriers to the approach to the Divine presence.

These structural concerns must be accompanied by changes in the expectation from religious women by communal leadership. There is no reason why unmarried women should first make their appearance at some point towards the end of the Torah reading, nor is there any reason why Rabbis should be more permissive of talking in the women's section than they are of such demeanor among the men. Lesser demands reflect only one thing, less significance to the endeavor.

Equal in significance with prayer is another mode of worship, Torah study. If Torah study is to occupy such an important place in the life style of Jewish men, how can we expect it to play no role whatsoever in the lives of Jewish women? Whether justified on principled or purely functional grounds it is clear that when the intellectual development of a Jew in secular areas exceeds his or her intellectual development in Jewish knowledge, it leads at best to fragmented personalities performing mechanical religious duties and at worst to total disillusion and disaffiliation. Aside from this danger to the Jewish identity of women, the failure to educate women Jewishly deprives Jewish scholarship of most valuable resources which we cannot afford to lose.

Most important of all in this area, we must encourage women to develop in a creative fashion whatever additional forms they find necessary for their religious growth. I would not presume to know what new religious developments could emerge from Jewish women consciously setting for themselves the task of discovering customs expressive of their religious feelings in contemporary society. Their practices might involve their own form of public worship to follow and supplement the standard serv-

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ice, but expressive of women's sensitivities. It might involve the creation of new religious artifacts or of new patterns of communal study. Only one thing is certain, and that is that the creative religious energies of Jewish women remain a major source of untapped strength for the Jewish community as a whole, and those energies must be freed.

The second problem area is that of the position of women in matters of civil law. In the absence of Jewish political autonomy, most issues of this sort are moot. However, the problem of the *Agunah* of the reluctant husband continues to plague Jewish ethical sensibilities. The Talmudic sages had already resolved this problem by designating the court to act on behalf of the wife and allowing them to physically compel her husband to consent to the issuance of a "*get*."<sup>65</sup> This solution worked well until the Enlightenment, and the loss of Jewish judicial autonomy. Since that time, Jewish jurists have been a colonized people. Deprived of their powers, they have rationalized their impotence as a desirable state — if we can't do anything, then it must be not desirable in the eyes of God for us to do anything.

Indeed, this area almost more than any other, cries out for rectification. If it is true that Jewish legal process is completely stymied by this problem, a premise which I am most reluctant to accept, then that still does not absolve religious leadership of their responsibilities. If neither the conditional "*get*," nor the conditional "*ketubah*" are halakhically acceptable, then perhaps we ought to turn to the civil courts to solve our problem for us. Historically in American law, ante-nuptial agreements in contemplation of divorce have been considered to be void as contrary to public policy.<sup>66</sup> However, some recent developments seem to indicate a good possibility for a more positive judgment at the present time.<sup>67</sup> Perhaps at this time, every Jewish couple who marry should sign a standard form contract under which both parties agree that in case of dissolution of the marriage by either civil divorce or annulment, each will consent to and execute the issuance and acceptance of the Jewish divorce. The validity of such a "*get*," issued by a proper Rabbinic court but under order of a civil, non-Jewish, court, is already recognized in the Mishnah,<sup>68</sup> and is cited by subsequent authorities.<sup>69</sup>

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If the legalization of such an ante-nuptial agreement would require enabling legislation, then that course of action is certainly possible. I can not believe that we may interminably badger the state for money for Jewish education, but cannot marshal the necessary energies to accomplish the rectification of this severe injustice.

The third problem area is in one regard the most sensitive of them all. In the previous two areas, it was obvious that many of the specific disadvantages were side-effects of the status of women, unrelated to the achievement of the social goal of family stability. Given their totally non-productive character it was simple to suggest that they be ameliorated. This third area, however, that of the projection of a uni-dimensional "proper" role for women and its relegation of women to the service role, seems closer to the stance which we have defined as central to the social goal, namely the creation of a preferred role for women.

Firstly, there is a critical distinction between a mandated role and a preferred role. Jewish law, as we have seen, specifically refrained from mandating for women the exclusive role of wife-mother-homemaker. It may very well be the case that throughout most of human history there were no alternatives practically available. But are we to assume that the Torah did not foresee the current developments and therefore simply failed to make adequate provisions to further eliminate such choices when they would become possible? On the contrary, it would seem to me that we would be compelled to conclude the exact opposite, that the Torah specifically intended to keep alternative options open in expectation of a time when they might become possible.

If such be the case, that the Torah pledged itself to maintaining role options, then we must not wantonly foreclose such choices. Indeed, perhaps we ought to look more closely at the potential for enrichment of the traditional role which becomes possible through its supplementation with meaningful engagement outside the home. We may discover that such enrichment furthers rather than detracts from, the accomplishment of our social goal of family stability. And if so, it may behoove us as a community to provide for our young women alternative role models to help them integrate the realization that being a good

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Jewess does not mean forgoing creativity and fulfillment beyond the context of the role of homemaker.

On the other hand, the law does protect and thereby indicate a preference for the more traditional role which has home and family as its most exclusive dimensions. Since society now allows for the election of radically different roles, it becomes increasingly vital for creative religious minds to offer meaningful expositions of why this preferred role ought to be chosen over all other available options. It may very well be the case that the investment of one's total personality in the endeavor of shaping the soul of growing Jewish children is the most fulfilling way in which a person's energies may be used. It may also be the case that women are either inherently or by socialization more capable of making the kind of total commitment necessary for the maintenance of constant love and devotion which form the religious character of a child. All this may be true, but women will have to be convinced, not compelled, to submit to its logic.

Furthermore, we will have to communicate more clearly that election of the traditional role does not mean self-relegation to the service role or the role as enabler. The achievement of the social goal of family stability is not to be at the expense of the souls of Jewish women. Their integrity as religious personalities will have to be emphasized more forcibly both to men and to women themselves.

These steps, small though they be, may lead in the direction of a more fulfilled Jewish womanhood of the future, and as a result, a more perfected total Jewish society.

### NOTES

1. vis. G. W. Paton, *A Text-Book of Jurisprudence*, Second Edition, 1951, Oxford Press, pp. 319-324.

2. *Shabbat* 62a. The basic issue at stake in the Talmudic discussion is that the definition of "ornaments" is different for men and for women, and that the legal consequences as to carrying on *Shabbat* differ for each group.

3. Julius Stone, *Social Dimensions of Law and Justice*, Maitland Pub., Sydney, Australia, 1966, pp. 138-141. We cannot, however, totally exclude the occasional function of status as a means of exploiting the weak rather than pro-

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tecting them. vis. Paton, *Ibid.*, p. 321 and pp. 252-253. Despite the absence, as yet, of systematic studies on this issue in Jewish law, I would suggest that this motive is not present.

4. This difficulty would not arise in relation to the status of the mentally incompetent. There, the protective purpose and the disabilities related thereto could be relatively easily formulated into descriptive principles. The status of the minor might be an intermediate case.

5. *Mishna Kiddushin* 1:7 (29a).

6. *Kiddushin* 33b-34a.

7. Id. e.g. eating *matza*, rejoicing on festivals, and *Hakhel* (assembling).

8. Id. e.g. study of Torah, procreation and redemption of first born sons.

9. Id. e.g. *Sukkah*, *lulav*, *shofar*, fringes and phylacteries.

10. *Sefer Hamitzvot*, end of affirmative precepts. These, out of the sixty which are always incumbent upon each individual.

11. 1. Reading *Shma*.

2. Binding *Tefillin* on the head.

3. Binding *Tefillin* on the arm.

4. Wearing *Tzitzit*.

5. Counting the *Omer*.

6. Living in the *Sukkah*.

7. Taking the *Lulav*.

8. Hearing the *Shofar*.

12. 1. Study of Torah.

2. For the King to write a Torah for himself.

3. For *Kohanim* to bless the people.

4. Procreation.

5. For a groom to celebrate with his wife for a full year.

6. Circumcision of sons.

13. 1. *Kiddush* on *Shabbat*. vis. *Berachot* 20a.

2. Fasting on *Yom Kippur*. vis. *Sukkah* 28a.

3. *Matza* on *Pesach*. vis. *Kiddushin* 34a.

4. Rejoicing on Festivals. vis. *Kiddushin* 34a.

5. Assembling once in seven years. vis. *Kiddushin* 34a.

6. Sacrificing and eating the Pascal lamb. vis. *Pesachim* 91b.

14. 1. Lighting *Chanukah* lights. vis. *Shabbat* 23a.

2. Reading *Megilat Esther* on *Purim*. vis. *Megillah* 4a.

3. Drinking four cups of wine on *Pesach*. vis. *Pesachim* 108a.

4. Reciting *Hallel* on the night of *Pesach*. vis. *Sukkah* 38a.

15. Rabbi Emanuel Rackman, "Arrogance or Humility in Prayer," *TRADITION*, Volume 1, Number 1, Fall 1958, p. 17. Cf. Rabbi Norman Lamm, *A Hedge of Roses*, Feldheim, Inc., New York, 1966, pp. 75-76.

16. *Sukkah* 38a, *Kiddushin* 33b.

17. *Menachot* 43a.

18. *Kiddushin* 35a. cf. *Eruvin* 96b.

19. Maimonides, *Sefer HaMitzvot*, Positive Commandments nos. 12 and 13.

20. *Mishneh Torah*, *Temidim Umasfim* 7:24 though *Menachot* 65b seems to

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imply the contrary, and both the *Tur* and the *Shulchan Arukh* (*Orach Chaim* sec. 489) omit any reference to exemption for women.

21. *Berachot* 20a and 20b.

22. *Jerusalem Talmud*, *Berachot* Ch. 3 *Halacha* 3 (25b).

23. *Sukkah* 28a.

24. *Kiddushin* 34a.

25. *Deut.* 31:12.

26. *Berachot* 20b.

27. Rabbi Zeirah in *Jerusalem Talmud Kiddushin* 1:7.

28. *Kiddushin* 34b. cf. *Seder Nashim* by David Halivni, p. 655, who argues that even Abaye agrees that women are obligated in "Simcha."

29. *Pesachim* 91b.

30. Given the contexts and forms of these debates it is not reasonable to suggest that these are merely clarifying discussions as per Maimonides, *Introduction to the Mishnah*, sec. 4 (Rabinowitz edition, 1948, pp. 28-30). However, it might be interesting to pursue the question of how Maimonides would categorize these disputed laws given his position in the *Introduction to the Mishnah*, as compared with his listing of the exclusion of women at the end of the Positive Commandments in his *Sefer HaMitzvot*.

31. Of course the recording of these dissenting opinions assured that none would confuse them with the approved majority positions, as well as preserving them for the possibility of future adoption by the majority of some subsequent Great Sanhedrin. vis. *Mishna Eduyot* 1:4-6.

32. *Mishna Sotah* 3:4 (20a).

33. The texts of both the *Jerusalem Talmud* and the *Babylonian Talmud* would seem to support the position that according to Ben Azzai, women are equally obligated with men in the study of Torah. (cf. *Tosafot Sotah* 21b s.v. *Ben Azzai*, straining the reading of *J.T. Sotah* 15b.) This position is further supported by *Mishna Nedarim* 35b.

34. The *Amoraim* lend an Aggadic quality to the statement of Rabbi Eliezer through their addition of the word "Keilu" ("as if"), *Sotah* 21b. (See my comments on the usage of "Keilu" in *Encyclopedia Judaica*, Vol. 10, p. 1484, in article entitled "Law and Morality.") The misogynistic tendencies here implied are made more specific in *J.T. Sotah* 16a.

35. *Tosefta Berachot* 2:12.

36. *Kiddushin* 29a. cf. *Berachot* 22a and the manner in which it omits the references to women's study implied in its source, *Tosefta Berachot* 2:12.

37. vis. *Sanhedrin* as in instance of women studying Torah in relation to which Rabbi Eliezer's objection is not raised by the *Amoraim*. Many other such instances reflect the rejection of the position of Rabbi Eliezer.

38. Maimonides, *Mishneh Torah*, *Talmud Torah* 1:13. *Tur*, *Yoreh Deah*, ch. 246. *Shulchan Aruch*, *Yoreh Deah*, ch. 246 sec. 6.

39. *Tosefta*, *Sotah* 21b, s.v. Ben Azzai, *Sefer Hasidim* (ed. Bolonia) sec. 313. (ed. Mosad HaRav Kuk, pp. 244-245).

40. Elijah Gaon, commentary to *Shulchan Aruch*, *Orach Chayim*, ch. 47, comment 18.

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41. David HaLevi, *TaZ to Shulchan Aruch, Yoreh Deah*, ch. 246, comment 4.

42. Chafetz Chayim and others cited in *Responsa Tzitz Eliezer*, Rabbi Eliezer Waldenberg, vol. 9, no. 3, p. 32. Indeed the authorities cited limit the distinction between written and oral Torah, and function essentially in terms of what is necessary to counter the effects of the society to which Jewish women are exposed.

43. *Beit Yosef to Tur, Orach Chayim* ch. 47, s.v. *Vekasav*. His alleged sources are elusive. vis. Walidenberg, op. cit., p. 31.

44. *Shulchan Aruch HaRav, Laws of Talmud Torah*, 1:15. The *Beit HaLevi* (vol. 1, responsum no. 6) while affirming the possibility of an obligation resting on women to learn all laws necessary for their proper fulfillment of *mitzvot*, denies that such study would constitute a fulfillment of the *mitzvah* of *Talmud Torah*.

45. *Exodus* 21:10. *Ketuboth* 47b.

46. *Kiddushin* 29a.

47. *Kiddushin* 30b-31a. *Ketuboth* 46b.

48. *Mishna Yevamot* 6:6 (65b). David Feldman, *Birth Control in Jewish Law*, New York University Press, 1968, pp. 53-56.

49. *Mishna Ketubot* 5:5 (59b).

50. as per Rashi, *Ketubot* 59b, s.v. *Shiamum*.

51. as per Maimonides, *Commentary to Mishna Ketubot* 5:5.

52. Maimonides, *Code, Laws of Marriage* 21:7.

53. Maimonides, *Code, Laws of Marriage* 12:4.

54. id. cf. *Kesef Mishna, Ibid.*, 21:10; and *Tur, Even HaEzer*, ch. 80.

55. Maimonides, *Code, Laws of Shofar*, 1:2; *Laws of Lulav*, 7:13.

56. In light of my earlier comment that probably no single principle is adequate to explain all matters related to the status of women, I should note that the principle of exemption from communal appearance seems not adequate to explain the presence of debate in relation to the *mitzvot* of *Simcha*, *Kiddush* and *Birchat Hamazon*. However, we ought at least note the following:

(1) David Halivni (Weiss) argues persuasively that actually even Abaye (the only dissenter as to *Simcha*, *Kiddushin* 34a) does agree that women are fully obligated in *Simcha*; the only question being the mode of fulfillment. (*Mekorot Umesorot — Seder Nashim*, p. 655) Indeed, the explicitness of the *Sifrei* (*Re'eh* sec. 138) including women in this obligation, would support his contention.

(2) As to *Kiddush*, it is again Abaye who suggests that women have only a Rabbinic obligation (*Berachot* 20b). The context, Amoraic testing of the principle of women's exemption from time-bound positive precepts, and finding it unsound, suggests a preliminary attempt by Abaye to use that principle in a predictive manner. The attempt is refuted simply by citing again the authoritative *Beraita* that women are obligated "*devar Torah*," and Abaye does not persist.

(3) The character of women's obligation in *Birchat Hamazon* is also raised in the context of testing the above principle (*Berachot* 20b). Indeed, the *Gemara* does not even identify by name anyone who maintains that women are not obligated *mi'deoraita*, but merely explicates the proposition of the *Mishna* (id)

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that they are obligated. Interestingly, the purpose of the question is said by the *Gemara* to be in order to determine whether they can fulfill that obligation on behalf of the community.

57. This entire area, including the supposed duty orientation of Jewish as compared to Roman law, and the nature of right-duty correlatives in relation to the community, begs further analysis.

58. Based on *Mishna Rosh Hashona* 3:8 (28a). See David M. Feldman, *Woman's Role and Jewish Law, Conservative Judaism*, vol. 26, no. 4, Summer, 1972, at pp. 35-36.

59. e.g. *Berachot* 20b.

60. *Lev.* 5:1, *Sifre to Lev.*, ch. 11 law 3, *Sefer Hachinuch*, mitzvah 122, indicating exemption from obligation. cf. *Minchat Chinuch* ad. loc.

61. *Tosfeta Shavuot* 3:5. Maimonides, *code, Law of Witnesses* 5:1-3 and 9:1-2, indicating emphasis on disqualification from the "kat" ("pair") rather than general loss of reliability.

62. The essential function of the "pair" of witnesses is to bind the fact finding process, unless they are directly contravened. Vis. Maimonides, *Code, Law of Witnesses*, 5:3, 19:1, and 22:1.

63. cf. *Encyclopedia Talmudit*, vol. 2, pp. 251-254.

63a. *Ketubot* 61a. Maimonides, *Code, Laws of Marriage*, 21:8.

63b. Further illustration of this process is to be found in legislation "Mipnei darkei shalom" (*Mishnah Gittin* 5:8-9) eliminating incidental injuries resulting from status as a non-Jew.

64. For precedent see *Eruvin* 96a. The practice was approved by *Tosafot* ad. loc. s.v. *Michal*; but disapproved by Rama to *Shulchan Aruch, Orach Chayim*, 38:3. cf. David Feldman, op. cit. note 58, at p. 36.

65. *Bava Batra* 48a. David Amram, *The Jewish Law of Divorce*, second edition, Hermon Press, New York, 1968, pp. 54-62.

66. M. Cathey, *Ark. L. R.* 24:275, Fall 1970.

67. G. Williston, *Contracts*, sec. 1741-1742 at 53. Also, J. Goldstein and J. Kitz, *The Family and the Law*, pp. 224-228.

68. *Mishna, Gittin* 9:8.

69. e.g. Maimonides, *Code, Laws of Divorce* 2:20.