

AUTHOR

TITLE

TYPE OF THESIS: Ph.D. ☐ D.H.L. ☐ Rabbinic ☒

Master's [] Prize Essay []

1. May circulate [X]) Not necessary
) for Ph.D.
2. Is restricted [] for years.) thesis

I understand that the Library may make a photocopy of my thesis for security purposes.

3. The Library may sell photocopies of my thesis. ~~X~~
yes no

3/3/02
Date

Jonathan S. Ross
Signature of Author

Library
Record

Microfilmed 19 September 02
Date

mon t. l. l.
Signature of Library Staff Member

Af Hen Hayu B'oto Ha-nes:
"They Too Were in that Miracle"
A Study of Women's Exemption From
Time-Bound Positive Commandments in Jewish Law

Jonathan S. Roos

Thesis submitted in partial fulfillment of the requirements for Ordination
Hebrew Union College – Jewish Institute of Religion
March 1, 2002

Referee, Professor Jonathan Cohen

"Af Hen Hayu B'oto Ha-Nes: They too were in that miracle": A Study of Women's
Exemption from Time-Bound Positive Commandments in Jewish Law

Jonathan S. Roos

This rabbinic thesis examines the Jewish law rule by which women are exempt from positive *mitzvot* that are specific to a time of day or time of year (time-bound positive *mitzvot*). The Torah does not contain any explicit reference to this rule. It is first formulated in the *tannaitic* sources and explained and developed in the Talmud and later Jewish legal writings. The rule, and particularly its application and enforcement, generate a great amount of discussion among Jewish legal authorities. The discussion is so varied and contradictory that some contemporary scholars have concluded that women's exemption from time-bound positive *mitzvot* is not a legally binding rule at all. I conclude, however, that there is in fact a rule of law by which women are exempt from these commandments. The extensive literature on this rule, with all its debates and contradictions, represents a literary history of the application and enforcement of the exemption, not an indictment of the rule's existence as a rule.

The discussion of the exemption rule demonstrates an important characteristic that operates in Jewish law to a degree that is not found in most other legal systems. Jewish law is founded on the Torah, which includes both narrative and statutory elements. Occasionally, the Sages' reading of Torah to derive normative rules generates challenges to their own understanding of the biblical narrative. Such developments in Jewish law, like the women's exemption rule, must reconcile both statutory and narrative elements. For example, the Sages must reconcile the exemption rule with the explicit commandment

in the Torah that women must “rejoice on the festival.” The sages must also reconcile the rule with their reading of the narrative account of women at Sinai. This dual demand to reconcile the rule with both the narrative and statutory elements of the Torah generates much of the discussion in the Jewish sources. Misunderstanding the complexities of this dynamic leads many scholars to questionable conclusions about the meaning of the exemption rule and its application.

The exemption is particularly significant, I argue, because most attempts to apply and understand the rule ultimately lead to a broader discussion about the inclusion or exclusion of Jewish women from the scope of Jewish law. I trace that question to Sinai and to different readings of the Sinai narrative. By closely analyzing the *halakhic* debate over enforcement and application of the exemption rule, this thesis uncovers a more significant, subsurface discussion about the nature and scope of divine revelation vis-à-vis women.

Table of Contents

Introduction	1
Chapter Two	17
Chapter Three	39
Chapter Four	60
Conclusion	77
Bibliography	87

Introduction

This thesis examines some legal and theological issues related to women's participation in Jewish ritual life. More precisely, this is a study of a specific rule in Jewish law that governs Jewish women's religious obligations. Jewish Law holds that women are exempt from performing any of the commandments that are categorized as positive and specific to a given time of the day or time of year. Jewish men do not enjoy the same exemption. In fact, Jewish men do not enjoy any such blanket exemptions based solely on their gender identity. Before continuing with the exemption rule and its implications, I will present a brief introduction to the concepts of Jewish law that are particularly relevant to this thesis.

Traditional Jewish law is a system of obligations (or commandments) that are incumbent upon humans and interpreted by humans, but whose ultimate authority is Divine. The Traditional Jewish theory of revelation and authority of the law holds that Moses received the written Pentateuch from God at Mount Sinai. God also revealed to Moses a vast body of law and lore that was not recorded in writing but carried in Moses' head and passed on orally. The content of these revelations are called "Written Torah" and "Oral Torah" (or Oral Law) respectively. The *grundnorm*, or authority upon which this entire legal system rests, is the idea that God directly revealed His law to humans in the form of the Written Torah. This tradition also holds that the Torah contains within it the guidelines and hermeneutic principles by which trained Jewish jurists (most often

rabbis) can glean the part of Jewish tradition called "Oral Torah." Sometimes, the rabbinic authorities argue that laws of the Oral Torah are considered to have biblical origins while they acknowledge other laws as rabbinic in their origins.

Post-biblical authorities, starting with the *Mishnah*, sought to categorize the commandments ("*mitzvot*" in Hebrew) according to certain characteristics. They divided the *mitzvot* into obligations that existed between one person and another, like the commandment not to steal, and those that existed between a person and God, like the commandment to keep the Sabbath. They also divided the *mitzvot* into positives and negatives or those that can be phrased, "Thou shalt..." and those that can be phrased, "Thou shalt not...." The early sages further categorized the *mitzvot* as specific to a time of the day or time of year (time-bound), like the obligation to recite certain prayers before a given hour each day or the obligation to light candles on the holiday of Hanukkah. They categorized other *mitzvot* as not specific to time, like the obligation to honor one's parents.

These categorizations were part of a larger attempt by post-biblical Jewish scholars to systematize Jewish law and present elements of the Oral Torah. In this context, the *tannaim* first formulated the rule stating Jewish women are exempt ("*patur*" in Hebrew) from all of the commandments that are both positive and time-bound. The rule, and attempts to apply and understand it, precipitated much discussion in classical Jewish sources like the Talmud and medieval Jewish law codes. That discussion continues unabated in contemporary Jewish legal scholarship and feminist literature.

The duration and fervor of the ongoing discussion of this rule are not unwarranted. The proper observance of *mitzvot* is fundamental to the traditional, orthodox Jewish

understanding of how a Jew must live his or her life every day. Samson Raphael Hirsch summarized this understanding as follows: "it is only by the conscientious keeping [of] the commandments of the Torah that our individual lives, the flourishing of our families, and our national independence is ensured."¹ With such importance placed on properly fulfilling the demands of Jewish Law, it is little wonder that a rule like women's exemption from time-bound positive would generate such scrutiny and debate.

Layered onto this theological importance is the fact that there are many points related to the exemption rule that are open to question and interpretation and thereby fuel the discussion. For starters, the rule first appears in *tannaitic* sources. On the one hand, the *tannaim* do not simply make up this rule without grounds. The Torah makes no pretense to social or legal equality between men and women. Passages (like Numbers 27:1-11 about Zelophehad's daughters) indicating some degree of respect for and recognition of women notwithstanding, the Torah presents women as subordinate to or dependent upon men. The *tannaim* or later rabbis did not need to invent the idea that women are subject to different legal demands than men. On the other hand, the Torah does not explicitly state a rule by which women are exempt from time-bound positive *mitzvot*.

The exercise of categorizing *mitzvot* is another point that generates significant discussion. As chapter two of this study demonstrates, different authorities interpreted the categorization of *mitzvot* differently. Furthermore, as that chapter and the next explain, there are so many time-bound positive *mitzvot* that are specifically incumbent upon women

¹ Samson Raphael Hirsch, *The Pentateuch Translated and Explained*, Vol. 3, Leviticus (Part 2), Translated by Isaac Levy. 2d. ed. completely revised (New York: The Judaica Press, 1971), 708.

to necessitate asking whether or not this rule actually has any legal force or if it is something observed only in the breach.

The fact that the early sources themselves never state a rationale for women's exemption from time-bound positive *mitzvot* engenders a great deal of discussion and debate over various proposed explanations. No principle is ever cited in connection with the rule that could help us understand its intent or its origins. In the absence of any such statements, contemporary critics and scholars have attempted to derive from the rule a number of generalizations about Traditional Judaism's perceptions of women. Critics like Judith Wegner argue that the exemption rule is a calculated move by the rabbis to maintain exclusive male hegemony over women's productive potential and sexuality.²

Defenders of the rule (often labeled "apologists") cite a number of different arguments for its origins. There are at least three commonly presented arguments regarding the rationale behind the exemption rule. All three arguments assume, at least in part, that the divine order of the universe contains distinct roles for women and men. First, some commentators argue that women are inherently more holy than or otherwise superior to men and therefore do not require the mundane reminder of time-bound positive *mitzvot*. Samson Raphael Hirsch exemplified this view in his commentary to the Torah where he wrote:

[Women's] exemption from time-bound positive *mitzvot* can most certainly not be on account of their being considered in any way of lesser worthiness of importance.... God's Torah takes it for granted that our women have greater fervour and more faithful enthusiasm for their God-serving calling... Accordingly it does not find it necessary to give women these repeated spurring reminders to remain true to their calling, and warnings against weaknesses in their business lives. Thus, at the very origin of the Jewish

² Judith Romney Wegner, *Chattel or Person: The Status of Women in the Mishnah* (New York: Oxford University Press, 1988), 153-154.

People, God's foresight did not find it necessary to ensure their bond with Him by giving women some permanent symbol in place of Mila for men. So, also, at the Lawgiving at Sinai....³

Rabbi Hirsch based his argument not only on a theory of women's essence but also on a theory of *mitzvot* as instrumental devices whose purpose is known to humans.⁴

Hirsch's reference to women at Sinai reflects an important theme that I will highlight throughout the discussion of the exemption rule. I will demonstrate that analysis of women's exemption from time-bound positive *mitzvot* ultimately leads to basic questions about revelation and the scope of the divine will as expressed in Jewish Law. This question of Sinai is at the core of my analysis in chapter four.

The second rationale for the exemption posits that the Rabbis formulated the exemption to liberate women and help them raise families. Requiring women to perform time-bound positive, this theory holds, would only have been cruel and overly burdensome. Saul Berman presents a version of this argument wherein he concludes that the exemption rule is, "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."⁵

The third argument, which is less common today (or at least less commonly expressed), holds that women are exempt from certain categories of *mitzvot* because they are inherently inferior to men and even "polluted" or marred somehow. We will see this argument particularly in the fourth chapter.

³ Hirsch, (comment on Leviticus 23:43), 712.

⁴ We will see, in chapter three, a similar theory of *mitzvot* proposed by Ramban to explain contradictions to the exemption rule.

Regardless of the debate over categorizations and rationales within the rabbinic and contemporary sources, the exemption rule has significant impact on the status of women in Jewish public life. Jewish communal authority is inherently linked to the issue of legal obligation. The extent of demands placed on a would-be leader by Jewish law determines or restricts his or her access to public authority in many situations. One of the major questions raised by the Conservative movement in considering women's ordination as rabbis was whether or not a woman can act as public agent to fulfill the *halakhic* obligations of a man. The specific problem is that under Jewish law, an individual can fulfill many legal obligations through the agency of another person. For example, a man fulfills his obligation to recite *birkat hamazon* (the grace after meals) by hearing another person recite the blessing on his behalf and responding appropriately. However, only a person who is obligated equally to perform that *mitzvah* is legally valid to serve as the first man's agent. If a woman is not obligated to perform a certain *mitzvah*, like *birkat hamazon*, then she cannot publicly lead the community in fulfilling its obligation for that *mitzvah*. Her authority is further undermined by the fact that a thirteen-year old boy (even one with no formal training) could serve as the public agent in the same situation. The question is not merely of women's agency vis-à-vis men but women's obligations under Jewish Law, which becomes a *sine qua non* for leadership status.

The significance of the exemption rule is not lost on most Jewish feminist theologians and legal scholars. Many have addressed the exemption rule in their works. In some cases, their critique of the rule is in fact the core of their argument. Paula Hyman, writing in the 1970s, identified the exemption rule as the single determining factor behind

⁵ Saul Berman, "The Status of Women in *Halakhic* Judaism," *Tradition* 14 (Fall 1973), 17. Although a

women's status and lack of autonomy in Jewish Law. She argued, "By exempting women from time-bound *mitzvot* ... and denying them legal independence, Judaism relegated women to a second-class status."⁶ When the Conservative movement considered, and ultimately decided in favor of, granting rabbinical ordination to women in the 1980s, its leading *halakhic* authorities also identified the exemption from time-bound positive *mitzvot* as one of the significant issues that needed to be addressed.⁷

Most contemporary scholars base their analyses on a perception that the exemption rule relates to the larger issues of women's status and discrimination in Jewish Law. Typical of this perception are Hyman's argument about women's "second class status" and other works highlighting the androcentric nature of Jewish Law versus the supposed gender equality of contemporary Western secular law. Many scholars also perceive that the fundamental questions related to the exemption rule involve issues of women's voluntary practice and fulfillment of time-bound positive *mitzvot*. In this sense, most contemporary scholars focus on matters related to the application and enforcement of the exemption rule.⁸

This study will look closely at such questions of application and enforcement throughout the *halakhic* literature. I contend that these practical discussions contain within them fundamental theological issues. Surrounding the exemption rule are issues of interpretation, interpretive authority, and competing theories of revelation all of which

"defender" of the exemption, Berman dismisses the idea that women are more holy than men (see p. 9).

⁶ Paula Hyman, "The Other Half: Women in the Jewish Tradition," *Response* 7 (Summer 1973), 69.

⁷ Joel Roth, "On the Ordination of Women as Rabbis," in *The Ordination of Women as Rabbis: Studies and Responsa*, ed. by Simon Greenberg (New York: The Jewish Theological Seminary of America, 1988), 128-9.

impact the application (or rejection) of the law. In fact, as Hirsch's reference to Sinai indicated, women's exemption from time-bound positive *mitzvot* is ultimately a question of how we interpret the most basic ideas of Jewish law and the legal narrative.

Women's participation in Jewish ritual life continues to complicate attempts by Reform Jewish thinkers who seek to balance contemporary, progressive Judaism with classical Jewish law and tradition. On one hand, progressive Jews mostly live in societies where equal rights and social equality for women are cherished values if not actual norms. On the other hand, as noted above, Jewish law makes no apology for its gender inequality. Jewish law makes different demands from women and men such that many Reform Jews agree with Hyman's perception that *halakhah* excludes or otherwise discriminates against women as women in ways that never occur for men. The problem facing progressive-minded Jews at the turn of the twenty first century then continues to be one of balancing post-Enlightenment values and progressive impulses with a commitment to some form of Jewish tradition and classical texts.⁹

Ritual practice provides such fertile soil for this discussion because it is the only field on which most Reform (and even most Conservative) Jews dwell as Jews. Many if not most Reform Jews hold little regard for living according to the dictates of Jewish civil law - those areas of classical *halakhah* dealing for example with property, financial

⁸ See for example, David Golinkin, "May Women Wear *Tefillin*?" *Conservative Judaism* (Fall 1997), 3ff. For an orthodox example see Alfred S. Cohen, "Women and the Reading of the *Megilla*," *The Journal of Halacha and Contemporary Society* 30 (Fall 1995), 40-41.

⁹ See especially: David Aaron, "The First Loose Plank" *CCAR Journal* (2001), 87-116. In response to the 1999 Pittsburgh Platform of Reform Judaism, Aaron challenges Reform Jews to reconsider how they integrate the ideas of modernity and post-modernism with the increasingly common search for "spirituality" in ancient traditions.

matters, and torts. Traditional Jewish Law lacks any means of enforcement and no claim to absolute authority over Reform Jews who turn to secular laws for adjudication of civil matters. These same Jews, however, live their ritual lives in a way that very much reflects traditional Jewish laws and practice. A Jew who would never consider the instructions of *halakhah* when deciding how to handle lost objects most likely observes Passover with a seder based on and consistent with the instructions of a traditional, orthodox *haggadah*. Progressive Jews, in other words, are most fully "Jewish" in their ritual lives and practices. Although it is but one rule among the myriad of Jewish laws, women's exemption from time-bound positive *mitzvot* requires deep and complex analysis because it partakes of both Jewish ritual life and the clash between contemporary and ancient notions of gender and equality.

The Constitutional Model: A Theoretical Approach to Jewish Law

Jewish law can be described as a constitutional legal system. Regardless of whether or not one accepts explicit divine revelation as the source of *halakhah*, the Torah is the foundational document upon whose authority the rest of the law developed. In the words of a prominent Conservative Jewish legal scholar: "The document called the Torah embodies the constitution ... which it behooves man [sic] to obey, and is, therefore authoritative."¹⁰ Any legal developments in the history of Jewish law can therefore be described as constitutional interpretations - or at least they can be evaluated in terms of their interpretation vis-à-vis the constitution.

¹⁰ Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: The Jewish Theological Seminary of America, 1986), 10.

The Torah and the American Constitution share three important general characteristics. First, they both sit atop the hierarchies of their respective legal systems. Second, they are documents containing both explicit rules and general principles. The Torah contains explicit rules like the sexual purity laws of Leviticus 18 and expressions of principle and ethical value like parts of Leviticus 19. The American Constitution likewise contains the characteristics of a law code, like the rule that a person must be a native-born American at least thirty-five years old in order to serve as President, and statements of principle, like the fourteenth amendment promise of equal protection. Third, the Torah and the American Constitution both invite future interpretation and (so the theory goes) contain within them the principles by which such interpretation is authorized.

Although we can speak of the Torah as a constitution in the corpus of Jewish law, we must remember some important points that distinguish the Torah from the national constitutional documents that were produced in the wake of the Enlightenment. First of all, the Torah and a document like the American constitution derive their authority from radically different sources. The Torah, in traditional orthodoxy, is given directly by God to the people through the agent of Moses. The Constitution, although shaped and delivered to the American people by such great men as James Madison, makes no claim to divine status. It is admittedly and unashamedly the product of human minds. The impact of this difference is less significant in a Reform context where the Torah is not considered the product of divine revelation.¹¹ Nevertheless, the Torah and the American constitution

¹¹ While such a bold, blanket statement of Reform Jewish theology of the Torah deserves further exploration, it is beyond the scope of this study. I urge interested readers to see: Aaron, "The First Loose Plank."

face different problems of constitutional authority when reading interpretations of the constitution.

The second point is that Post-Enlightenment constitutions are often rights-centered documents. Scholars generally agree that Jewish law, on the other hand, is a system of duties and obligations. While the existence of duties implies the existence of (at least) derivative rights, those rights are not the fundamental basis of Jewish law. Most contemporary scholars, however, tend to focus on rights and the lack of rights for women in Jewish law. This rights-oriented approach is not really appropriate for such a system. A focus on duties would perhaps give us more clear understanding of women's status in Jewish law.¹²

The third important difference between the Torah and modern constitutions has to do with the concepts of equality and egalitarianism. While most modern constitutions, particularly the American, are based on fostering and protecting egalitarianism as an ideal, Jewish Law makes no such claim. Jewish Law clearly and openly acknowledges that it does not view all groups or individuals as inherently equal. Our modern rights orientation and egalitarian ethic combine to create the common critique of *halakhah*: its lack of equal rights. As one scholar wrote on this issue, "Women today cannot be expected to consent to a double standard or rights [i.e. one civil and one religious]."¹³ Any serious Reform approach to Jewish Law cannot simply reject concern for egalitarianism as anachronistic and therefore irrelevant. Furthermore, it is perhaps possible to speak of equality in a way

¹² Michael J. Broyde, "Human Rights and Human Duties in the Jewish Tradition," (Epilogue) in *Human Rights in Judaism: Cultural, Religious, and Political Perspectives* (Northvale, NJ: Jason Aronson, 1998) Michael J. Broyde and John Witte, Jr., eds., 274.

that validly applies to *halakhah* by carefully applying contemporary legal theories to any study of Jewish law.

Maimon Schwarzschild presents a definition of equality that could be useful in studying *halakhah*. His work indicates that our problems with inequality and lack of equal rights in Jewish law may not be problems of Jewish law per se. Schwarzschild points out that there is inequality built into to any individual law and any legal system. Furthermore, he argues, that any conception of equal rights is problematic because the exercise of equal rights always leads to unequal outcomes. For example, equal opportunity employment rules still produce a workforce of people whose paychecks vary widely. He notes, "Equality of rights implies equality of dignity for every person," and equality of dignity is often mocked by gross inequalities of condition. If we use Schwarzschild's model and focus on equality of dignity rather than on equality of rights or duties then we may have a model of equality that can be applied even to orthodox conceptions of Jewish law.¹⁴

There are significant differences between the Torah and the American constitution and weaknesses to an approach that analogizes the two. Nevertheless, in a Reform context, there are enough similarities that we can carefully apply secular constitutional legal theories, like those of Ronald Dworkin, to the system of Jewish law and its specific legal developments. Dworkin's theory provides us a model for evaluating specific parts of classical Jewish law in a way that is grounded in modernity.

¹³ Ze'ev Falk, "Can Judaism Incorporate Human Rights, Democracy, and Personal Autonomy?" in *On Liberty: Jewish Philosophical Perspectives* (New York: St. Martin's Press, 1999), Daniel H. Frank, ed., 114.

¹⁴ Maimon Schwarzschild, "Constitutional Law and Equality," in *Blackwell Companion to the Philosophy of Law and Legal Theory*, ed. by Dennis Patterson (Cambridge, Mass.: Blackwell, 1996), 162. Many traditional defenses of the treatment of women in Jewish law base their arguments on the idea that

The rule of women's exemption from time-bound positive *mitzvot* is a good candidate for such analysis for a number of reasons. First, it is not a rule explicitly stated in the Torah but as part of the Oral Torah. As such the exemption rule involves issues of interpretation and of the authority of law. The rule is derived through rabbinic legal interpretation yet it has the status and force of divine revelation. In this sense, the exemption rule is akin to the right to privacy in American constitutional law. The Constitution itself does not explicitly formulate a right to privacy. That right is derived and formulated first by the U.S. Supreme Court in the *Griswold* case.¹⁵ The right to privacy, nevertheless, is considered a constitutional right based on the theory that it is contained in the penumbras of the constitution. The Oral Law likewise represents a kind of penumbras to the text of the Torah. It is not visible on the Torah page, but it can be "read" from the page by a skilled scholar.

Second, the exemption rule demands our close attention because it combines gender, Jewish ritual, and the tension between orthodox tradition and contemporary Reform trends. The issue of women in Jewish law is particularly significant for our generation as women have been granted the opportunity for rabbinic ordination in some denominations and seek it or expanded public roles in others.

Dworkin's theory provides two guidelines for determining the validity of any interpretation. He argues that, in order to be considered valid, interpretative authority is limited by two elements. First, there must be "constitutional integrity." Any valid interpretation must be based on the idea that the constitution is not a list of discrete,

separate role and separate gender obligations are a source of greater dignity than the secular equal rights model.

independent rules and laws, but a "system of principle." Jurists, like the Rabbis in our case, cannot read elements of the constitution (Torah) or legal corpus as expressing a particular view, "unless they find it consistent in principle with the... constitution as a whole, and also with the dominant lines of past constitutional interpretation."¹⁶

Second, Dworkin argues that any interpretation must be consistent with the history of the community and its constitution. This requires that interpretations of the constitution make sense in light of the history of interpretation. Even more important, however, interpretations must be consistent with our understanding of the historical narrative of that constitution. In the case of Jewish law that means any interpretation must fit our understanding of what happened at Sinai, the moment of the delivery and ratification of the Torah as constitution. We must answer the question of what happened at Sinai, especially regarding women, if we are to legitimately address the application of Jewish law to women.

Organization

This thesis is organized in three chapters that correspond to these elements of Dworkin's theory. However, I do not apply Dworkin's theory here. Instead, I examine the complexities of the rule and particularly its enforcement as presented in the traditional Jewish legal texts. Having clarified the major issues that arise in light of enforcing and applying this rule, I urge future scholars to apply Dworkin or other appropriate legal theories to meet the challenge of contemporary Reform Judaism's struggle to incorporate

¹⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996), 281-286.

Tradition without sacrificing modern, intellectual integrity. Chapter one traces the development of women's exemption from time-bound positive *mitzvot* as a rule. The rule does not appear explicitly in the Pentateuch itself. It is derived and first stated concisely by the *tannaim* and then fully developed by the *amoraim*. We will see that, although the exemption is formulated and evident in the *tannaitic* literature, many of the rabbis do not know of it or do not enforce it in the *Mishnah*, *Tosefta*, and *tannaitic midrashim*. By the time of the Babylonian Talmud, the rabbis apply and enforce the rule more frequently but still inconsistently and with many exceptions. The complexities that arise in attempts to enforce the rule create a sense in the Talmud that the rule itself is something that needs further explication. The long *sugya* starting on B.T. Kiddushin 34a specifically explaining the application of the rule clarifies some points but raises more complications as well.

Chapter two then takes up the question of Dworkin's first principle, constitutional integrity, to the extent that the *halakhic* literature seeks consistency. Given the existence of a rule exempting women from time-bound positive *mitzvot*, the scholars and *rishonim* must explain the numerous contradictions to the rule and the wide variances of interpretations in the legal sources. *How* they reconcile those contradictions with the exemption rule is the focus of that chapter. Questions of biblical interpretation and biblical authority, expressed in the sources in terms of the *de-oraita* or *de-rabbanan* status of various laws, emerge as the primary focus of the rabbis' attempt to maintain legal integrity and understand how and when to enforce the rule.

The third chapter will compare two texts that hold opposing interpretations of women's experience at Sinai. The analysis of these texts will make clear that questions

¹⁶ Dworkin, *ibid.*, 10, 125; Ronald Dworkin, *Law's Empire* (Cambridge: The Belknap Press of Harvard

related to women's exemption from or participation in time-bound positive *mitzvot* ultimately lead us to questions women's inclusion in the expression of Divine will. If Sinai is the *grundnorm* of the entire system of Jewish law with all its obligations and exemptions, how we read and understand that seminal moment in the traditional history determines our understanding of women's status vis-à-vis Jewish ritual law.

The concluding chapter will summarize the analysis of women's exemption from time-bound positive *mitzvot*. Having studied the development of the rule and examined the literary history of its enforcement, I will return to Dworkin's theory as a way to understand the underlying themes of the *halakhic* discourse. We will find that any interpretation that reads the rule as exclusive and proscriptive regarding women's practice is not constitutionally valid. While such readings may be able to satisfy the first principle of integrity they simply cannot be reconciled with the traditional mythology of Sinai. Before looking at this core question, let us start at the surface with the formulation of the rule itself.

Chapter Two

Women's participation in orthodox, Jewish ritual life is defined by the fact that women are not obligated to uphold many of the commandments *because they are women*. Jewish law allows for many cases in which various groups are relieved of certain ritual obligations. Many of these cases depend on temporary situations like illness or matters of status or choice like occupation. For example, a mourner is excused from reciting daily *shema* during the period of *aninut* (between the time of the death and the funeral). His exemption during *aninut* is a practical reality but it does not change his fundamental inclusion in the commandment. On the other hand, a non-Jew is not even included in the commandment to recite *shema*.¹ Women's exemption from time-bound positive *mitzvot* is special in that it is one of the only cases in which Jewish law exempts such a large group of Jews (half the population) on a permanent and biologically determined basis.

Women's exemption from time-bound positive *mitzvot* appears nowhere in the Pentateuch. While the Jewish sages of late antiquity (the *tannaim*) formulated the exemption rule in concise language, neither they nor later Jewish authorities applied and enforced the rule in a consistent manner. Nevertheless, Jewish tradition, particularly since the time of the talmudic sages, interprets the exemption rule as biblical in its origins and its force. One contemporary Jewish scholar has demonstrated conclusively, in fact, that the

¹ M. Berakhot 3:1 says, "One whose dead lies before him is exempt (*patur*) from reciting *shema*, *amidah*, and wearing *tefillin*, and from all the [positive] commandments stated in the Torah." The operative word "*patur*" is the same as in the Mishnaic formulation of the women's exemption rule.

entire discussion of the exemption in the Talmud serves no other purpose than to prove that the exemption has biblical authority.²

I. *Tannaitic* Sources

The *tannaitic* sources formulate the exemption rule, but they rarely cite it or apply it to legal discussions of specific *mitzvot*. Those few texts that cite the general exemption often contain conflicting opinions about its application. The *tannaitic* sources are noteworthy however because they foreshadow many of the major themes and issues that arise in later discussions of the rule. These issues appear in great detail in a Talmud *sugya* that starts on Kiddushin 34a. That *sugya*, one of the most important texts on this subject, explains the exemption rule in depth. Because that text is long and confusing, however, later authorities and scholars frequently misunderstood (if not purposefully misinterpreted) it. The *sugya*, for example, does not explain any reason for the exemption nor does it address how the exemption is to be applied in practice.

These unresolved issues occupy the attention of post-talmudic writings about women's exemption and open the door to much speculation. Because the application of the rule involves both theoretical and practical elements, the codes and post-talmudic commentaries often grapple with fundamental questions of law and history in the course of their examining the women's exemption. One of the main questions that appear throughout Jewish legal writing is how to understand the nature and application of the rule. There is much debate as to whether the women's exemption rule is prescriptive or

² Jay Royner, "Rhetorical Strategy and Dialectical Necessity in the Babylonian Talmud: The case of Kiddushin 34a-35a," *HUCA* 65 (1994), 177ff, actually shows how the pieces of the *sugya* fit together and

descriptive; whether it describes a social situation that may vary from place to place and does not demand strict enforcement or prescribes how people must behave regardless of their social situation or geographical locale. The *halakhic* authorities also debate whether, if the rule is prescriptive, the Hebrew word "*patur*" (exempt) should be translated as "forbidden" or "excused." As we shall see, "excused" may imply that women could choose to fulfill the time-bound positive *mitzvot* if they so wanted.

The *Mishnah*, *Tosefta*, *Sifre* (Numbers), and *Mekhilta de Rabbi Shimon bar Yohai* are the earliest sources to cite the exemption. There are three significant points regarding the *tannaitic* statements exempting women from time-bound positive *mitzvot*. First, the formulation of the exemption from time-bound positive *mitzvot* is a new development in the *tannaitic* sources. The Bible, in fact, contains no reference to categories of *mitzvot* at all. The grouping of *mitzvot* into categories is a characteristically *mishnaic* exercise as is the attempt to elucidate rules governing obligations and exemptions for different groups of people vis-à-vis those *mitzvah* categories. As Jacob Neusner describes it, "The *Mishnah*'s sole logic of coherent discourse.... rests on the classification of things by their intrinsic traits and the formulation of the rule governing things of a given class."³ Second, the sources present the exemption concisely and with almost no explanation or discussion. Such concise, unexplained presentation allows the disparate interpretations we will see further on in this study. Third, the *tannaitic* citations of the exemption foreshadow many of the issues and controversy that arise in later sources.

all serve vital functions, but he falls just shy of concluding that the Talmud's goal is to establish the exemption as a rule.

³ Jacob Neusner, *Introduction to Rabbinic Literature*, The Anchor Bible Reference Library (New York: Doubleday, 1994), 101-102.

Women's exemption from time-bound positive *mitzvot* is not consistently or universally applied in most of the *tannaitic* sources. The basic discrepancies between different sources are striking and belie any sense of a cogent, universal rule. The categories of many *mitzvot* and details of their observance were still fluid in the *tannaitic* sources. For example, the *Sifre* classifies *tzitzit*⁴ as time-bound whereas the *Tosefta* classifies the same *mitzvah* as not time-bound. Furthermore, there is paucity of sources citing the rule *as a rule to be enforced* despite the fact that women are exempt from many specific *mitzvot*. Such discrepancies beg the question: did the *tannaim* universally "know" a rule exempting women from time-bound positive *mitzvot*; and if they did, why is there such variance regarding its enforcement?

A general rule of women's exemption from time-bound positive *mitzvot* is surprisingly absent from most *tannaitic* sources. For example, most *halakhic midrashim* derive women's exemption or obligation to perform various *mitzvot* on a case by case basis using the same hermeneutic devices (*kal v'homer*, *mi'ut*, *gezerah shavah*) that they use in other discussions. The *halakhic midrashim* exempt women from numerous *mitzvot* but they never, except in the *Mekhilta de-Rabbi Shimon bar Yohai* passage above, cite the general rule as a reason for women's exemption. In fact, the *Mekhilta de-Rabbi Ishmael*, *Sifra* (Leviticus), and *Sifre* (Deuteronomy) do not seem to know the women's exemption rule.⁵

Mishnah Kiddushin 1:7 presents the exemption formulated concisely as a *halakhic* rule: "All time-bound positive *mitzvot*, men are obligated but women are exempt." It is

⁴ Ritual fringes that must be attached to any four-cornered garment (see Numbers 15:37-40).

⁵ *Mekhilta*, for example, exempts women from *tzitzit* but never says anything about time-bound positive *mitzvot*.

unclear, however, whether this *mishnah* presents a list of prescriptive rules or descriptive statements. Scholars disagree on this point and some writers present very strong arguments for one side or the other.⁶ The *mishnah* contains a simple list of five categories of *mitzvot* and the obligations of different people regarding those *mitzvot*. However, the *mishnah* does not make clear if women are commanded along with all Jews but excused from perform the *mitzvot* in A and C (in the outline of this *mishnah* below) or if women are not even commanded to do the *mitzvot* in the first place. The *mishnah* reads:

- A. All *mitzvot* regarding a son that are incumbent on a father - men are obligated but women are exempt ("*patur*").
- B. All *mitzvot* regarding a father that are incumbent on a son - both men and women are equally obligated.
- C. All time-bound positive *mitzvot* - men are obligated but women are exempt.
- D. All positive *mitzvot* that are not time-bound - both men and women are equally obligated.
- E. All negative *mitzvot*, whether they are time-bound or not - both men and women are equally obligated....

The structure of this entire chapter of the *Mishnah* as well as its placement within the tractate further indicates the anomaly of the exemption here. The chapter lists acquirable items in what seems to be hierarchical order - women are at the top of the list and bartered chattel items are at the bottom. It is plausible that the *Mishnah*, having listed women along with slaves and property, must now clarify the distinction between women and the other items on the list. Although women can be "acquired" like the other chattel objects on the list they are also people and thus obligated to perform (at least some) *mitzvot*.⁷

⁶ Wegner, 148, for example, clearly sees women's exemption as a purposeful and prescriptive rule. Most scholars, however, do not focus on the *Mishnah* but on the Talmud and later codes.

⁷ The dual nature of women as both chattel and people is the central thesis of Wegner's study.

The section regarding women's exemption from *mitzvot* (1:7-8) is unlike the rest of *Mishnah* Kiddushin, which deals only with issues regarding marriage. It is also unlike other *halakhic* sources that discuss women's exemption. This chapter of *Mishnah* discusses the acquisition of women and slaves and later address children's legal obligations in relation to their parents. The Talmud and later codes as well as other *mishnaot* (i.e. M. Berakhot 3:3 regarding *shema*) often discuss women, slaves, and children together as exempt from various *mitzvot*. The *Mishnah*, however, discusses only women's obligations and exemptions here; slaves and children are conspicuously absent from this discussion of exemption.

The *Mishnah* does not contain any explanation or discussion of the reason underlying women's exemption. This text does not attempt to locate the scriptural basis for the rule nor does it elucidate the categories of *mitzvot* involved. The *Mishnah* also lacks any discussion about how the exemption operates in practice. The absolute silence on such issues further bolsters the argument that this statement reflects the *mishnaic* organizing enterprise but does not necessarily reflect a rule. For example, M. Berakhot 3:3 states simply that women, slaves, and minors are exempt from reciting *shema*. This *mishnah* offers no explanation for the exemption and, most notably, does not cite the formulation: "*all time-bound positive mitzvot, men are obligated but women are exempt.*" This exemption of women from *shema* may be an example of a *tannaitic* source applying the rule but the text does not explicitly say so. Such silence opens the possibility for us to question whether the rule was unknown or otherwise not enforced in this case.

Tosefta (Kiddushin 1:10) addresses various details about the exemption that are missing from the *Mishnah*. In particular, *Tosefta* attempts to explain the categories of

mitzvot by giving examples for each. The lists presented in the *Tosefta* are not meant to be exhaustive as indicated by the word *k'gon* ("such as") at the start of some of the lists. However, these lists of examples are cited – with some changes that will be noted below – as *baraitot* in the Talmud. They become, in fact, foundational blocks for building the Talmud *sugya*. The *Tosefta* says:

- A. What is a time-bound positive *mitzvah*?
 - 1. For example: *sukkah*, and *lulav*, and *tefillin*.
- B. What is a positive *mitzvah* that is not time-bound?
 - 1. For example: returning lost property, sending away the mother bird, guard rail on the roof, and *tzitzit*.
 - a. R. Shimon exempts women from *tzitzit* because it is a time-bound positive *mitzvah*. (*Tosefta* Kiddushin 1:10)

Tosefta's list of examples reveals the uncertainty of the categories of *mitzvot* in *tannaitic* writings. As the example of *tzitzit* shows, the assignment of any given *mitzvah* to a single category is not firmly set. The anonymous *tanna* categorizes *tzitzit* as a non-time-bound *mitzvah*. Rabbi Shimon, on the other hand, deems it to be time-bound and thereby exempts women. Rabbi Shimon's rule (B.1.a.) is perhaps one of the first examples in which the exemption is applied as a prescriptive rule. R. Shimon exempts women from *tzitzit* *because* it is a time-bound positive *mitzvah*. He challenges the categorization *because*, as he understands the law, it determines women's obligation or exemption.

R. Shimon's ruling also appears in a discussion of *tzitzit* in *Sifre Bamidbar*:

"God said to Moses... they shall make for themselves *tzitzit*," [Numbers 15:37-38]. The women were also included [in this commandment]. R. Shimon exempts the women from *tzitzit* because women are exempt from all time-bound positive *mitzvot*. This is the general rule said R. Shimon:

women are exempt from all time-bound positive *mitzvot*. The practice is for men and not for women, for those who are “*kasher*” and not those who are “*pasul*.” R. Yehuda b. Baba said: in particular, the sages exempted the woman’s veil from taking *tzitzit* and they did not obligate [*tzitzit*] for her outer garment (*talit*) except that her husband sometimes wore it. (*Shelah Piska 9*)

R. Shimon presents and enforces the exemption rule more strongly here than in the *Tosefta*. As in the *Tosefta*, he contradicts the anonymous ruling and exempts women from *tzitzit* because it is a time-bound positive *mitzvah*. There is no exegetical derivation of the exemption here; no reference to, or specific reading of, the scriptural verse. He gives only the formulated rule as his reason. R. Shimon goes on in the *Sifre* passage, however, to teach explicitly that the exemption from time-bound positive *mitzvot* is a general rule: “This is the general rule... women are exempt from all time-bound positive *mitzvot*.” The instruction only seems necessary in a context that does not “know” the rule already. That general rule also informs the sages decision that women’s garments do not require *tzitzit*.

The *Sifre* passage shows some disagreement as to whether or not women were exempt from the *mitzvah* of *tzitzit*. The anonymous statement at the beginning of the passage indicates that women are obligated to perform the *mitzvah* according to the Bible. However, R. Shimon exempts women and R. Yehuda, in the name of the sages, notes that a woman’s garment must have *tzitzit* only if there is the possibility that a man might wear it. In other words, a woman does not need the *tzitzit* for herself (which is why the veil never needs *tzitzit*). This exemption in the name of the sages contradicts the opening, anonymous statement but does not necessarily indicate knowledge of a general rule exempting women from all time-bound positive *mitzvot*.

The stated practice of women wearing *tzitzit* on certain garments in order to enable a man to fulfill his obligation also reflects sensitivity to practical reality in this source. The problem of “hybrid” garments vis-à-vis *tzitzit* garners similar treatment and similar conclusion in the Jerusalem Talmud. In the Jerusalem Talmud, the sages discuss whether or not a Jew must attach *tzitzit* to garments that are used exclusively at nighttime.⁸ They also examine the same question regarding garments that may be used during either the day or night (Jerusalem Talmud Kiddushin 1:7). The Talmud, demonstrating a preference to be over-inclusive rather than under-inclusive, rules that the hybrid garment requires *tzitzit*. The parallel is instructive to us in the following way. Nighttime garments do not require *tzitzit* because nighttime is technically outside the scope of the *tzitzit mitzvah*. However, a nighttime garment requires *tzitzit* if it may cross the boundary into daytime usage. Likewise in this *Sifre* passage, women’s garments do not require *tzitzit* because women are outside the scope of the *mitzvah*. However, a woman’s garment requires *tzitzit* if it may cross the gender boundary and be worn by a man.⁹

This *midrash* in *Sifre* also introduces a possible rationale for the women’s exemption. R. Shimon’s explanation of the rule could be understood as saying women are exempt from time-bound positive *mitzvot* because they fall into the category of “*pasul* [ritually invalid]” whereas men are “*kasher* [ritually invalid].” We find here one of the first examples of the argument, cited in the introduction, that women face different obligations than men because of some inherent flaw in women as women. Later sources do not adopt the terminology, however, and therefore this cannot accurately be described as the

⁸ Wearing *tzitzit* is not required at night.

predominant *tannaitic* view of women. The idea that women's inherent character is somehow related to their obligation or exemption from *mitzvot* will reappear in a variety of later sources that I will address in chapter four.

Tosefta Kiddushin 1:10 also explains that women's exemption from certain *mitzvot* results from their status. In its description of *mitzvot* incumbent on sons regarding their fathers, *Tosefta* teaches that a woman's status, specifically her marital status, determines her ability and thereby her practical obligation to perform certain *mitzvot*. The text reads:

- C. What is a *mitzvah* regarding a father that is incumbent on a son?
 - 1. To feed, provide drink, clothe and cover, to take him out and bring him back in, and to wash his face, hands, and feet.
 - a. [The obligation] is equally for men and women, *except that the man has the ability to do them while the woman does not because she has another authority over her [i.e. her husband].*

The example in *Tosefta* here (C.1.a.) does not occur specifically in the context of time-bound positive *mitzvot*. It does, however, demonstrate a case in which the law obligates women to perform a category of *mitzvot* equally as men yet then excuses women from fulfilling that obligation because of an immediately more pressing obligation related to their status. The issue of raised here of *reshut ba'al*⁹ - the authority of a woman's husband as a reason for exempting her from *mitzvot* - will become more significant in later texts. The *Tosefta*'s inclusion of this statement here indicates sensitivity to social structures and status as they affect a woman's ability to perform certain types of *mitzvot*. It is therefore all the more noteworthy to see that *Tosefta* does not attach any similar explanation to women's exemption from time-bound positive *mitzvot*. In other words, if

⁹ Jerusalem Talmud 1:7; Another instructive "hybrid" example, but beyond the scope of this paper, may be found in the development of the exemption from time-bound positive commandments for *androgynus* and

women's exemption from time-bound positive *mitzvot* is simply a statement of social reality - i.e. women cannot perform them because they are obligated to care for children - why doesn't the *Tosefta* say so like it does for *mitzvot* regarding a father incumbent on a son?

The problem seen in *Tosefta* and *Sifre* of categorizing the *mitzvot* develops into a more fundamental problem when the texts seek to establish the scriptural source for the exemption. The only *tannaitic* text to address the scriptural derivation is *Mekhilta de-Rabbi Shimon bar Yohai*.

The *Mekhilta de Rabbi Shimon bar Yohai* cites the women's exemption in the context of a discussion of *tefillin*. Interpreting Exodus 13:9, this *midrash* derives the general exemption from time-bound positive *mitzvot* as follows: Exodus 13:9 teaches that one of the purposes of *tefillin* is to promote Torah study (to keep Torah "in your mouth"). Since women are exempt from Torah study based on another *midrash*¹⁰ they are also exempt from *tefillin*. Since *tefillin* is a positive time-bound *mitzvah*, women are exempt from all time-bound positive *mitzvot*. The *midrash* says:

Another interpretation: "[They shall be for you as a sign upon your arm and a memorial between your eyes] so that the 'Torah' of the Lord is in your mouth." [Exodus 13:9] This is to exclude women. Just as *tefillin* in particular is a time-bound positive *mitzvah* and women are exempt, so all time-bound positive *mitzvot* women are exempt. (*Mekhilta de-Rabbi Shimon bar Yohai*, 13:9)

The *midrash* never cites a socio-political reason for the exemption from time-bound positive *mitzvot*. There is no reference to women's status or to women's

tumtum. See for example, *Shulkhan Arukh*, O.H. 17:2.

¹⁰ *Sifre Devarim*, section 46: " 'Teach them to you sons,' [limad'tem otam et b'neikhem] (Deut. 11:19) and not your daughters."

obligations as women, mothers, and wives. The midrash instead derives the rule using “cold” legal logic devoid of any narrative meaning. The Babylonian Talmud does not try to expand the derivation or supply the narrative or meaning behind the rule. The Talmud, in fact, places this derivation at the center of its explanation of the rule in Kiddushin. This Talmud *sugya* generates most of the discussion and debate regarding women’s exemption especially among contemporary scholars. That discussion develops, in large part, from the long and confusing nature of this *sugya*.

The Babylonian Talmud, Kiddushin 34a: Contents and Discontents

The Talmud accepts the exemption as a general rule and ultimately spends its massive effort on the question of “how do we know this?” Rovner argues in his detailed study of this *sugya* that the lengthy (3 full pages) talmudic discussion of women’s exemption from time-bound positive *mitzvot* does not add anything new *halakhically*. First, the Talmud simply states the exemption as formulated in the *Mishnah*. Next, the talmudic authorities acknowledge the existence of certain *mitzvot* that contradict the exemption. Lastly, the rabbis proceed to dismantle each of the presented contradictions. The *sugya* reconciles those contradictions in such a way that both the general exemption from time-bound positive *mitzvot* and the obligation to perform certain, specific time-bound positive *mitzvot* remain standing. *How* they do so is the focus of the next chapter. Rovner argues that the *sugya* artfully and thoroughly addresses all the potential difficulties and ambiguities of the exemption so that it stands solidly as a rule with biblical force. He concludes, “the difference between the *Bavli* [Babylonian Talmud] and the its predecessors is that it has deconstructed every source, reconfigured the material in a

fundamentally different manner, and come up with an integrated structure that can account for an entire system both exceptions and the rule.”¹¹

Two problems occupy the attention of the *sugya*. First, the examples and exceptions listed in the *baraita* threaten the claim that there is a universally enforced rule of women’s exemption from time-bound positive *mitzvot*. Accordingly, Rovner concludes, the first goal of the *sugya* is to demonstrate the impossibility of a universally enforced rule that obligates women to fulfill all time-bound positive *mitzvot*, despite the existence of time-bound positive *mitzvot* incumbent upon women (i.e. four cups of wine, matzah, rejoice on the festival). Second, the suggestion that *tefillin* are not time-bound “threatens the effort of the whole enterprise” because *tefillin* serve as the basis for the entire exemption. The second goal is, therefore, to demonstrate that the exemption rule could not also be extended to all positive *mitzvot*.¹²

Rochelle Millen and other scholars disagree with Rovner and attempt to show that the exemption was not a rule. For these scholars, a rule is only considered to be a rule if it is widely enforced or consistently enforced. They argue that the Talmud itself is confused about the exemption and its derivation. Millen ultimately concludes that the Talmud is not even sure *tefillin* is a time-bound positive *mitzvah* and therefore any general rule derived by categorizing it as such is not valid.¹³

It seems clear, despite the conflicting opinions among scholars, that by the time this *sugya* is finalized the talmudic authorities know women’s exemption from time-bound positive *mitzvot* as a rule. While it is beyond the scope of this study, future research

¹¹ Rovner, 205

¹² Rovner, 212, 216.

should address the question of when the rule became firmly established within the Talmud.¹⁴

Unlike the paucity of citations in the *tannaitic* sources, the Babylonian Talmud often cites the rule to explain women's exemption. We noted above, for example, that the *Mishnah* simply exempts women from reciting *shema* without any explanation (M. Berakhot 3:3). The *gemara*, on the other hand, explains the exemption from *shema* by immediately citing the rule: "Reciting *shema*: This is simply because it is a time-bound positive *mitzvah* and women are exempt from all time-bound positive *mitzvot*."¹⁵ In other words, the Talmud in such instances operates with the understanding that the rule precedes and causes the exemption from the specific *mitzvah* (reciting *shema* in this case).

The Talmud also demonstrates a self-conscious awareness of the rule when discussing *mitzvot* that contradict the rule. For example, the Talmud tells us women are obligated to eat matzah on Passover despite the fact they should be exempt according to the rule (see Pesachim 43b). Again, the Talmud understands the rule to precede and cause the exemption from the specific *mitzvah*. It is then incumbent on the Talmud to explain if and how a specific *mitzvah* contradicts the rule. This is exactly what the Talmud does regarding matzah on Pesachim 43b and it is exactly what it does for three pages in Kiddushin vis-à-vis the general exemption rule itself.

The *sugya* describing the general rule, in Kiddushin 34a-35a, leaves a number of questions unanswered or unresolved. It does not address the question of why women are

¹³ Rochelle L. Millen, "An Analysis of Rabbinic Hermeneutics: B.T. Kiddushin 34a," in *Gender and Judaism: The Transformation of Tradition*, ed. T. M. Rudavsky (New York: NYU Press, 1995), 33.

¹⁴ Rovner argues that the *sugya* reflects a very late (Saboraic) redaction but he never addresses the issue of enforcement.

¹⁵ B.T. Berakhot 20b.

exempt from time-bound positive *mitzvot*. The *reshut ba'alah* argument that we first encounter in *Tosefta* appears in the Talmud but again it appears vis-à-vis non time-bound positive *mitzvot*, specifically fearing one's parents. There is also no trace of R. Shimon's intimation that women are, by nature, invalid and men valid.

The problem of categorizing the *mitzvot* also remains unsettled by the time of this *sugya*. The sages of the Talmud inherited the *mitzvah* categories from *tannaitic* literature. They also realized from the start of their enterprise that they needed to explain the many contradictions to the enforcement of the exemption rule. Given these complications to the consistency of the application of the rule and the difficulty of finding an explicit scriptural basis, the Talmud then tackles the question: how do we know this? The process of comprehensively answering this question produces many twists and turns, each of which attracts criticism and discussion from later authorities and scholars. The confusion starts immediately with the start of the *sugya*:

1. "All time-bound positive commandments..." The Rabbis taught in a *baraita*: What are time-bound positive *mitzvot*? *Sukkah*, *lulav*, *shofar*, *tzitzit*, and *tefillin*. And what are positive *mitzvot* that are not time-bound? *Mezuzah*, guardrail on the roof, returning lost property, and sending away the mother bird.

2. But is it a general rule? Because matzah, rejoicing [on Festivals]¹⁶, and assembling [on *Sukkot* every seventh year]¹⁷ are time-bound positive *mitzvot* that are incumbent on women. Furthermore, studying Torah, procreation, and redeeming the first-born son are positive but not time-bound commandments yet women are exempt.

3. R. Yohanan said: we do not learn [all specifics] from general rules even where exceptions are stated therein. As we learned: "an *eruv* and a cooperative dish could be made with everything except water or salt." (Eruvin 27b) But there are more [exceptions than just water and salt]: such as morels and mushrooms. So, we do not learn [all specifics] from general rules even where exceptions are stated therein.

¹⁶ Deut. 16:14.

¹⁷ Deut. 31:12.

The first paragraph reminds us of the problem of categorization. The *baraita* presenting examples of time-bound positive *mitzvot* and positive *mitzvot* not time-bound disagrees with the similar lists we received in the *Tosefta*. The Talmud has accepted R. Shimon's categorization of *tzitzit* as a time-bound positive *mitzvah* and added *shofar* to the list:

<i>Tosefta</i>	<i>Sukkah</i>	<i>lulav</i>			<i>tefillin</i>
Talmud	<i>Sukkah</i>	<i>lulav</i>	<i>shofar</i>	<i>tzitzit</i>	<i>tefillin</i>

The Talmud has also added *mezuzah* to the list of positive *mitzvot* not time-bound and changed the order from the *Tosefta*.

<i>Tosefta</i>		return lost property	mother bird	guard rail	<i>tzitzit</i>
Talmud	<i>mezuzah</i>	guard rail	return lost property	mother bird	

The second paragraph of the *sugya* in Kiddushin presents some of the *mitzvot* contradicting the rule and anonymously asks the fundamental question: given the contradictions, is women's exemption even a general rule? The third paragraph answers the challenge of the second by teaching a general legal principle in the name of R. Yohanan. He argues that the ability to find exceptions to a rule do not nullify the rule. They only demonstrate the existence of exceptions to rule. Automobile speed limits provide a contemporary example of R. Yohanan's teaching. The fact that an ambulance is legally allowed to drive 45 miles per hour on a road with a posted 30 mile per hour speed limit does not indicate that there is no speed limit on the road. Furthermore it does not mean that all speed limit signs must list all exceptions to the speed limit in order to remain valid. Although R. Yohanan's legal principle is supposed to settle the challenge and end

the debate, the Talmud continues with two more pages of point-by-point refutation of various challenges to the rule.

Greenberg focuses her attention on this third paragraph and misinterprets R. Yohanan's statement as overturning the rule rather than overturning the challenge. She translates the phrase from the Talmud, "*ein lomdin min ha-klalot*," to mean, "we do not derive [a rule] from these principles." In other words, Greenberg argues that the Talmud itself teaches that this is not a prescriptive rule and thereby women should be obligated to perform the time-bound positive *mitzvot*. Greenberg's critics challenge her on this very point of translation and interpretation.¹⁸

The *sugya* continues:

"All time-bound positive commandments, women are exempt..." How do we know this?

1. It is learned from *tefillin*: just as women are exempt from *tefillin* so they are exempt from all time-bound positive *mitzvot*.

a. *Tefillin* [exemption] is derived from Torah study: just as women are exempt from Torah study so they are exempt from *tefillin*.

2. [Objection: Let us say instead that women are *obligated* to wrap *tefillin*] by drawing an analogy (*hekesh*) between *tefillin* and *mezuzah* [a positive *mitzvah*, incumbent upon women].

a. [Response: We can not do that because] *tefillin* are analogized to Torah study in the first and second paragraphs of *shema*; but *tefillin* are [only analogized to *mezuzah* in the first paragraph].

They are not analogized to *mezuzah* in the second paragraph.

1. [New objection:] So, let *mezuzah* be analogized to study of Torah [i.e. let women be exempt from *mezuzah* also!]

[Response:] You can not think so because it is written, "[You shall write them upon the doorposts of your house....] That your days may be

¹⁸ Blu Greenberg, *On Women and Judaism: A View from Tradition* (Philadelphia: JPS, 1981), 81; Naomi Y. Englander-Schaffer, "Review Essay on Blu Greenberg's *Women and Judaism*," *Tradition* 21 (Summer 1983), 139; Rovner's analysis also shows Greenberg's explanation as a misreading of the *sugya*.; Joan Friedman, "Women and Time-bound Positive Commandments: An Comparison of Alfasi, Maimonides, and the Tosafists," (Rabbinic Thesis, HUC-JIR, New York, 1980), 6, also agrees with Greenberg's interpretation.

multiplied.” (Deut. 11:21) - Do men only need life and not women?!

This repeated back and forth exchange of challenges and responses continues until all the challenges are overcome and the derivation of women’s exemption from *tefillin* is left standing unchallenged. The end of the *sugya*, closing as it started with the example of *tefillin*, relies on several hermeneutic devices before finally achieving its two goals.¹⁹

III. The Codes: Making and Breaking the Rule

The post-talmudic sources all “know” of the general rule exempting women from time-bound positive *mitzvot*. Like the Talmud, most of these sources repeat it exactly as it is formulated in the *Mishnah*. Some, most notably, Rambam make some subtle but significant changes in its formulation. While these later sources all know the exemption, they do not agree on its meaning or its implications.

The Talmud, as I noted above, does not answer two important questions. It does not offer a socio-political or explicitly theological rationale for the rule. It also does not address how the exemption is to be applied in practice. These two unsettled issues intertwine in the attempt by post-talmudic authorities to explain and apply the exemption. Their encounter with the general rule includes theoretical and practical elements both of which are complicated by the long and confusing nature of the *sugya*. In all fairness, the Talmud succeeds in the difficult task of reading the rule into the Torah thus establishing a strong biblical support for the rule. Ultimately, the attempt to solve these unsettled issues along with the new ones that arise in the process creates a complete re-evaluation of

women's exemption from time-bound positive *mitzvot*. In a sense, the post-talmudic authorities are brought back to square one. They know a rule exempting women from time-bound positive *mitzvot* but they do not agree if it is prescriptive or descriptive. They do not agree on the practical implications and execution of the exemption. Furthermore, as Friedman has shown, the rabbis do not agree or disagree along any significant thematic or generation lines.²⁰ The complications and responses that arise from applying the women's exemption rule will be the focus of our next two chapters. First, however, we will examine how some of the codes explain and develop the general rule.

R. Yitzhak Alfasi, author of an 11th century *halakhic* gloss on the Talmud, presented the rule exempting women from time-bound positive *mitzvot* in a manner that hinted at difficulties future commentators would expand. His account of the rule shows two significant developments from the talmudic discussion in Kiddushin. First, Alfasi ends his retelling of the *sugya* with R. Yohanan's legal principle (see above) simply stated. Alfasi does not include any of the Talmud's attempts to derive a scriptural source for the rule. Second, he removes *tefillin* from the *baraita's* list of time-bound positive *mitzvot*. This subtle deletion typifies his attempt to clarify the Talmud and provide a simplified general rule. Alfasi boils the entire three page *sugya* down to the three paragraphs here:

"All time-bound positive commandments." The rabbis taught in a *baraita*: What are time-bound positive *mitzvot*? *Sukkah*, *lulav*, *shofar*, and *tzitzit*. And what are positive *mitzvot* that are not time-bound? *Mezuzah*, guard rail on the roof, returning lost property, and sending away the mother bird.

But is it a general rule? Because matzah, rejoicing on Festivals, and assembling are time-bound positive *mitzvot* yet women are obligated [to do

¹⁹ In addition to using analogy (*hekesh*) as a means for setting up challenges to be overcome, the *sugya* also uses *mi'ut* and a *halakhic* principle first formulated in this context: "two (or three) verses that teach the same thing do not teach us a general rule."

²⁰ Friedman, 74.

them]. Furthermore, studying Torah, procreation, and redeeming the first born son are positive commandments that are not time-bound yet women are exempt.

R. Yohanan said: we do not learn [specifics] from general rules even where exceptions are stated therein. (*Alfasi, Kiddushin 14b*)

Alfasi avoids the confusing elements of the *sugya* and removes the controversial issue of *tefillin*. We are left with a rule that incorporates the focus of many previous texts. We have the simplicity and clarity of the *Mishnah*, the elucidation of categories with specific examples as in *Tosefta*, and the response to contradictions of the Talmud. Alfasi's presentation of the *shema sugya* from *Berakhot* also reflects his acceptance of the exemption as a rule. He writes simply, "Reciting *shema* and *tefillin*. Because they are time-bound positive *mitzvot* and women are exempt from all positive time-bound *mitzvot*."²¹

Rambam, in one of the first comprehensive *halakhic* codes, the *Mishneh Torah*, re-states the general rule in his own words and lists a number of exceptions not found in the *Kiddushin sugya*. Rambam does not use the phrase "time-bound positive *mitzvot*" and rarely cites the rule explicitly as the reason why he rules women are exempt from certain *mitzvot*. Rambam does not, for example, cite the rule as the reason why women are exempt from reciting *shema* or *tefillin* although he does agree that women are exempt from both.²² In her ground-breaking thesis on this subject, Rabbi Joan Friedman attempted to argue that Rambam, "did not attempt to restate the general principle," and probably did not even know the rule.²³ It is more plausible, however, that Rambam sought

²¹ Alfasi, *Berakhot* 11b-12a.

²² Rambam, *Hil. Kri'at shema*, 4:1; *Hil. Tefillin* 4:13.

²³ Friedman, 13.

to clarify the meaning of "time-bound" and did not cite the rule in order to keep his code as simple as possible. In any event, he restates the general rule as follows:

...all the positive *mitzvot* that are from time to time and are not regularly performed (*tadir*), women are exempt - except for reciting *kiddush hayom* (the blessing sanctifying a holy day like Shabbat) and eating matzah on the first night of Passover, and eating the *pesakh* offering and slaughtering it and gathering and rejoicing on the festival - for which women are obligated. (*Rambam Hil. Avodah Zarah*, Ch. 12, #3)

Joseph Karo's rulings in the *Shulkhan Arukh* also indicate a clear acceptance of the exemption as a rule. As the three citations below demonstrate, Karo simply states that women are exempt from certain *mitzvot* because those *mitzvot* are categorically time-bound positive. Unlike Rambam's *Mishneh Torah*, this code almost always cites or refers to the exemption rule with each applicable *mitzvah*.

Women and slaves are exempt [from *tzitzit*] because it is a time-bound positive *mitzvah*. (O.H., 17:2)

Women, slaves, and minors are exempt from reciting *shema* because it is a time-bound positive *mitzvah*. But it is proper to teach them to accept upon themselves the yoke of the reign of heaven. (O.H., 70:1)

Women, slaves, and minors are exempt from *tefillin* because it is a time-bound positive *mitzvah*. (O.H., 38:3)

Women's exemption from time-bound positive *mitzvot* develops through (at least) three stages. The *tannaitic* sources formulate a rule exempting women from time-bound positive *mitzvot* but, generally speaking, they do not universally or consistently apply and enforce the rule. In almost all cases where these sources exempt women from a certain obligation, they do so through typical midrashic derivations (especially, however, the *mi'ut*). The first citations of the rule appear in these earliest sources but we cannot describe those citations as much more than the first formulations of the rule. By the time

of the redaction of the Babylonian Talmud, however, women's exemption from time-bound positive *mitzvot* has gained wider acceptance. The Talmud acknowledges the various contradictions (or exceptions) to the rule, but ultimately the talmudic discussion of the rule seeks to bolster the rule in the face of those contradictions. Lastly, the *rishonim* all know of the rule as formulated and developed in the Talmud. These authorities struggle to apply the laws in practice and simultaneously codify the *halakhah*. In the process, they are confronted with practical issues that force a reevaluation of the rule itself. The differences between authorities regarding enforcement of the rule become most noticeable in this regard. In each of the *halakhot* cited above from *Shulkhan Arukh*, for example, the *Mapah*, an Ashkenazic gloss written by a contemporary of Karo, immediately challenges the application of the exemption rule. In each case, he allows or even requires women to perform and maintain some form of the time-bound positive *mitzvot*. In doing so, the *Mapah* enters the question of women's inclusion or exemption from the *mitzvot* in general. We will start the next chapter looking at these Ashkenazic glosses and the various other issues that amount to a challenge to the universality and integrity of the rule.

Chapter 3

As we saw in the previous chapter, the authors of the early *halakhic* codes knew the exemption rule and applied it extensively in their writings. The application of that rule, however, proved to be problematic. The fact that these *rishonim* knew the rule and sought to enforce it did not necessarily mean that they did so universally and consistently. We find exceptions to the rule in many places. Along with those exceptions, we often find a discussion of (or at least reference to) other legal principles that stand in relation to women's exemption from time-bound positive *mitzvot*. According to Dworkin's theory, the ways in which these other principles operate, whether contradicting or supporting the constitutional nature of the exemption rule, help us to better understand that rule and the legal issues that surround it.

We can define constitutional as any law that contains or embodies founding principles of a system. A constitutional law is one that is fully binding and fundamental to the operation of the system. For example, the discrepancy in how the *halakhah* is presented by the *Shulkhan Arukh* and *Mapah* may belie the consistent enforcement of the rule in such a way that would be considered "unconstitutional" under Dworkin's theory.

At the end of the previous chapter, we saw that the *Shulkhan Arukh* consistently applied the exemption rule to women's performance of time-bound positive *mitzvot* (given the exceptions to the rule explicitly listed in the Talmud). However, Moshe Isserles, in his

Ashkenazic additions to the code, offers a different view of women's exemption. In various places, Isserles contradicts the law stated by Karo, intimating the difficulty of applying the exemption in a consistent, universal manner. The *halakhot* we read at the end of the last chapter provide a clear example of this problem. Karo's portion of the code is in regular type; *Mapah* is in italics:

Women and slaves are exempt [from *tzitzit*] because it is a time-bound positive *mitzvah*.

But in every case, if they want to wrap [tzitzit] and recite the blessing over it they have the right to do so like all the other time-bound positive mitzvot (see also: Tosafot, Rosh, Ran). However, it looks like "yohura" (arrogance) therefore they may not wear tzitzit since they do not have the obligation of a man (see also egud siman 27). Further, there is no obligation to buy for him a talit because he would then be obligated for tzitzit, see chapter 19, which says that since a talit has four corners [it must have tzitzit].

Tumtum [a genderless person] and *androgynus* [an hermaphrodite] are obligated out of doubt. They wrap *tzitzit* without a blessing. *Tumtum* is not known whether it is male or female and an *androgynus* has both male and female elements.

But according to the custom for women to recite a blessing over time-bound positive mitzvot, they too should recite the blessing (his own words). (Shulkhan Arukh, O.H., 17:2)

The differences between Karo and Isserles reveal a number of major problems with the rule exempting women from time-bound positive *mitzvot*. From the perspective of contemporary legal theory, we may consider these to indicate "constitutional" problems relating to the application and practice of the rule. First, Isserles indicates a tension between law and actual practice. Women's practice and custom are contrary to the law stated by Karo. For example, Karo indicates women are exempt but Isserles tells us that women may fully participate in every aspect of the *tzitzit mitzvah* (blessing and wearing). The inconsistencies in the rule that we saw in just one *halakhah* beg us to revisit the rule

and ask whether or not it is constitutional. The answer is not so clear. This chapter will examine, in particular, how the talmudic sages attempted to resolve contradictions to the exemption so that both the rule and its exceptions remain consistent.

The attempts by various authorities to categorize and enumerate the *mitzvot* reveal the most significant challenge to the constitutionality of the women's exemption rule. There are numerous time-bound positive *mitzvot* that are incumbent upon women. In fact, if we look at Rambam's enumeration of the *mitzvot*, we see that he lists more time-bound positive *mitzvot* required of women than ones from which they are exempt.

At the end of *Sefer Ha-Mitzvot* (positive *mitzvot* section), Rambam lists *only eight* time-bound positive *mitzvot* from which women are exempt: reciting *shema*, wearing *tefillin* on the head, wearing *tefillin* on the arm, wearing *tzitzit*, counting the *omer*, dwelling in the *sukkah*, taking the *lulav*, hearing the *shofar*.¹ Of these eight *mitzvot*, only *shema*, *sukkah*, *lulav*, and *shofar* involve "explicit and uncontroverted Talmudic exemption."² *Tzitzit* and *tefillin*, as we saw in the previous chapter, generate significant debate and disagreement. Lastly, the Talmud does not contain an explicit reference to women's exemption from counting the *omer*. Rambam, it seems, relies on the general exemption rule in making his determination that women are exempt from *omer*.

On the other hand, the Talmud requires women to perform at least *ten* time-bound positive *mitzvot*.³

1. to rejoice on the festivals (Kiddushin 34a)

¹ Maimonides, *The Commandments (Positive Commandments)*, trans. Rabbi Dr. Charles B. Chavel (London: Soncino, 1967), 260.

² Berman, 13.

2. to participate in the seven year assembly (Kiddushin 34a)
3. to recite kiddush on Shabbat (Ber. 20a)
4. to eat matzah on first night of Passover (Pes. 43b)
5. to hear the *megillah* reading (Meg. 4a)
6. to kindle Hannukah lights (Shab. 23a)
7. to drink four cups of wine at the Passover seder (Pes. 108a)
8. to fast on Yom Kippur (Sukkah 28a)
9. to Sacrifice and eat the Passover lamb (Pes. 91b)
10. to Recite *Hallel* on Passover night (Sukkah 38a)

The talmudic sages used three principles to explain the fact that these obligations contradict the general exemption rule. The first principle applies to cases in which the Torah itself explicitly commanded women to observe a *mitzvah*. This principle operates, for example, in the biblical texts related to the *mitzvot* of “rejoice” and “assemble” (1-2 above). Both of the biblical passages for these commandments specifically mention women. Deuteronomy 16:14 reads, “You shall rejoice on your festival - you, your son, and your daughter.” Likewise, Deuteronomy 31:12 reads, “Assemble the people, the men, the women, the children, and the strangers in your community.” As we saw in the Kiddushin *sugya* in the previous chapter, such explicit inclusion of women in a time-bound positive *mitzvah* must be reconciled with the women’s exemption rule.

³ List compiled using: Berman, 12; Maimonides, *ibid.*, 256-260; Abudarham, *Sefer Abudarham*, Section III, “Blessings Before the Commandments,” in *Serving the Creator: A Guide to the Rabbinic Sources*, ed. Getsel Ellinson (Jerusalem: Dept. for Torah Education and Culture in the Diaspora, WZO, 1986), 44-45.

I will refer to the second principle as the “paired negative *mitzvah*” principle.

Through this principle, the sages argued that there is a negative *mitzvah* inherently linked to the positive *mitzvah* under discussion. We saw in *Mishnah* 7:1 (in the previous chapter) that women are obligated equally as men to fulfill all the negative *mitzvot*. The sages then argued that a person obligated to fulfill a negative *mitzvah* must also be obligated to fulfill any positive (even time-bound) *mitzvah* to which it is linked. The sages did not see women as equal to men regarding this obligation. Rather, they demanded that a woman fulfill certain time-bound positive *mitzvot* in order not to breach certain negative ones. For example, the sages made reciting Shabbat kiddush and eating matzah on Passover incumbent on women by pairing them with negative *mitzvot*. Third, the Talmud explains women’s obligation for *megillah*, Hannukah candles, and four cups of wine by arguing “*af hen hayu b’oto ha-nes*: they too were in that miracle.” This argument relates to ritual observances connected with a miracle in Jewish history that involved women as well as men. We are left with number of questions related to these principles, including whether than they can be legitimately called “principles.” Are these three explanations themselves rules that override the women’s exemption or are they “soft legal principles?”⁴ If any of these are rules themselves, when did they develop as such? How are they applied as rules (i.e. are they applied - or conspicuously not applied - to other cases not mentioned here).

Explicit Torah inclusion principle

⁴ David Kretzmer, “Demonstrations and the Law,” *Israel Law Review* 19 (1984), 47. And “The New Basic Laws on Human Rights,” *Israel Law Review* 26 (1992), 239, where he defines soft legal principles.

Let us now examine those cases in which the Torah specifically commands women to perform a time-bound positive *mitzvah*. Such Torah-explicit inclusion of women puts this principle at (or near) the top of the legal hierarchy. In other words, the Torah's explicit inclusion of women in a *mitzvah* like "rejoice" should supersede rules like the women's exemption from time-bound positive *mitzvot*, which does not have such explicit Torah status. A Torah explicit inclusion should presumably have the highest legal force within the system of Jewish law.⁵ Such explicit, "constitutional" law should also be, presumably, closed to interpretation because it is both explicit and at the highest level of legal authority.⁶ Despite such presumptions, the sages of the Talmud *do* interpret laws that fall under this first principle. For example, they reframe the explicit obligation for women to rejoice on the festival. They shift the onus of the *mitzvah* so that a woman's husband or another significant man in her life must cause her to rejoice on the festival. The Talmud reads (with Rashi's commentary inserted in italics):

Rather than deducing a *binyan av* for women's exemption based on *tefillin*, let us deduce an obligation based on "rejoicing." Abaye said: Regarding a woman, her husband must make her rejoice [*Rashi: There is no obligation upon her for rejoicing but on her husband that he should cause her to be rejoiced - as it says "v'samakhta" - (2.m.s)*]. What do we say about a widow? It refers to her "host." [*i.e. whoever takes care of her*]. (Kiddushin 34b)

Rovner argues that the rabbis contrive to take this *mitzvah* away from women and make it incumbent on men in order to answer a challenge in the Kiddushin *sugya* (cited above). There we see the suggestion that women should be required to perform all time-

⁵ Dworkin, *Freedom's Law*, 8, distinguishes between a "principle," such as the ambiguously worded freedom of speech in the First Amendment to the U.S. Constitution and such clauses as the explicit statement in Article 2 that the president must be at least 35 years old.

⁶ The minimum presidential age clause (cited above) leaves little room for interpretation or appeal.

bound positive *mitzvot* by developing a *binyan av* from “rejoice.” Rovner demonstrates that the Kiddushin *sugya* must ultimately prove such a suggestion impossible in order to establish the “constitutionality” of the exemption rule. By removing women’s obligation to perform the time-bound positive *mitzvah* of rejoicing on the festival, the Talmud removes the foundation of the suggested *binyan av*.⁷

Whether or not Rovner is correct about the original motivation for this shift away from women, the idea that rejoicing on festivals means men only gains general acceptance. This shift of the obligation onto men becomes a legal truth recognized in other places within the Talmud. An apparently later teaching from Pesakhim 109a demonstrates as much. This passage starts with the assumption that a woman is not obligated to “rejoice;” only a man is obligated to cause rejoicing on the festival. Accordingly, this passage turns to the next logical question: *how* does a man cause his family to be rejoiced:

The rabbis taught: a man must cause his children and his household to rejoice on the festivals, as it is written, ‘You shall rejoice on your festival.’ How does one make his household rejoice? With wine. R. Judah says: Men in their own ways and women in their own ways. Men in their own way - i.e. with wine. How does one make a woman rejoice? R. Joseph taught: In Babylonia with richly colored garments; in *Eretz Yisrael* with pressed garments of linen. (Pesakhim 109a)

Despite the hermeneutic wrangling of the rabbis, some of the later *halakhic* codes are less sanguine about shifting the onus of such an explicit, Torah-based obligation. Rambam, for example, rules that the *mitzvah* is incumbent on the woman herself. Rambam is perhaps less (if at all) troubled about keeping the Torah’s explicit instruction for women to “rejoice” because he faces no credible suggestion (as there was in the

⁷ Rovner, 212. He never uses the term “constitutional.” I am applying the term here according to Dworkin’s theory.

Talmud) that women's obligation to rejoice is tantamount to an obligation for all the time-bound positive *mitzvot*. Rabad, however, opposes this attempt to reverse the talmudic reading of the "rejoice" obligation.

Rambam: Three positive *mitzvot* were commanded upon Israel for each festival of the three pilgrimage festivals. They are: "Appearing," as it says, "All of your males shall appear..."; the "*Hagigah*" offering, as it says, "you shall make the festive offering to Adonai your God."; and "Rejoicing" as it says, "you shall rejoice on your festival.".... For the first two *mitzvot*, i.e. appearing and *hagigah*, women are not obligated for them. But for "rejoicing"... women are obligated for this *mitzvah*.

Rabad: "Women are obligated for this *mitzvah*," only if you say not for the sacrifice itself but only for rejoicing with her husband when she goes up [to Jerusalem] with him and *he causes her to rejoice*.⁸

Although there is disagreement among the sources and among contemporary scholars, we can begin to formulate some conclusions about the explicit Torah inclusion of women. First, the explicit Torah inclusion commands special authority by virtue of its link to divine revelation at Sinai. It sits at the top of the hierarchy of laws. As such, it supersedes rabbinic rules like women's exemption from time-bound positive *mitzvot* without making the exemption rule incoherent or void. But second, even such "constitutional" law as the Torah explicit inclusion of women in "rejoice" is subject to interpretation when it is put into practice.⁹

The "paired negative *mitzvah*" principle

The second principle employed by the talmudic authorities for reconciling exceptions to the women's exemption rule is the "paired negative *mitzvah*" principle. This principle arises in the context of conflicting rules (which occur in any system of law). It is

an attempt, at the least, to create the tools for reconciling these conflicts when they are identified. The sages argue that a positive *mitzvah* is linked with a negative *mitzvah* and therefore both are incumbent on women. Women's obligations to recite kiddush on Shabbat and eat matzah on Passover both fall under this principle. Regarding Shabbat kiddush, Berakhot 20b instructs:

R. Addah bar Ahavah said: women are obligated for sanctification of the day (kiddush for Shabbat), by explicit instruction of the Torah. Why? This is a time-bound positive *mitzvah* and women are exempt from all time-bound positive *mitzvot*... Rava said: Scripture says "remember [i.e. observe] and keep [i.e. do not violate] Shabbat." Anyone for whom there is a commandment to keep there is also a commandment to remember. And for women, since there is for them a commandment to keep Shabbat there is a commandment for them to remember Shabbat.¹⁰

Regarding the eating of matzah we find in the Talmud (Pesachim 43b):

R. Eliezar said: Women are obligated to eat matzah by explicit instruction of the Torah; for it is stated, 'you shall not eat anything leavened with it [the Pesakh offering] (Deut. 16:3). Everyone who is subject to the prohibition against eating leaven is subject to the commandment to eat matzah. Therefore these women are also included since they are subject to the prohibition against eating leaven they are also subject to the commandment to eat matzah.

In both of these cases, the rabbis begin by asserting that the Torah explicitly teaches women's obligation for the *mitzvah* under consideration. Both pericopes use the phrase "*davar Torah*" - "by explicit instruction of the Torah" to authenticate the use of the "paired negative *mitzvah*" principle that follows. Why the sages felt the need to indicate so strongly that their ruling was explicitly *de-oraita* remains unanswered in the *sugyot*

⁸ Rambam, *Hilhot Hagigah*; *Hasagot HaRabad*

⁹ Dworkin, *Law's Empire*, 410-413, on interpretation in the law.

¹⁰ *Shamor* (keep the Sabbath) is understood in rabbinic tradition as a negative commandment meaning "you shall not violate the Sabbath rules."

themselves. We could reasonably speculate, however, that without such explicit indication of their biblical authority we would have no basis for identifying the rulings as *de-oraita*. In any case, the rabbis sensed a need to distinguish these obligations from *de-rabbanan* obligations in order to sufficiently reconcile the conflict with the exemption rule. The question of a law's classification - *de-rabbanan* or *de-oraita* - is at the core of this principle.

The "paired negative *mitzvah*" principle, as the rabbis develop it, must involve two *de-oraita mitzvot*. The rabbis would not pair a negative, *de-oraita mitzvah* with a time-bound positive, *de-rabbanan mitzvah* in order to effect a woman's obligation. For example, this principle alone could not have been invoked to obligate women to light Hannukah candles (a *de-rabbanan* obligation). The rabbis also would not use a negative, *de-rabbanan mitzvah* to derive a woman's obligation for a time-bound positive one. Such pairings would lack sufficient legal force to supersede women's exemption from time-bound positive *mitzvot*.

There appears to be disagreement among *rishonim* about the efficacy (or legitimacy perhaps) of this principle. Tosafot (Kiddushin 34a, "*Ma'akeh*") presents a purely hypothetical discussion about this principle. Tosafot argues that even if the positive *mitzvot* of building a railing on the roof, returning lost property, and sending away the mother bird were time-bound, women would still be obligated to do them because each of those *mitzvot* has a paired negative *mitzvah*. In other words, Tosafot points out that, hypothetically speaking, those three *mitzvot* are cases where the "paired negative" principle would supersede the time-bound positive *mitzvot* exemption. The Tosafot is trying to explain why the talmudic sages chose those specific *mitzvot* for their list of

positive *mitzvot* incumbent on women. The Tosafists argue that, for each case, circumstances could arise that would suspend the negative *mitzvah*. Removing the “paired negative *mitzvah*” would then make the time-bound positive *mitzvot* exemption operative and the woman would also be exempt from the positive *mitzvah* in question. In order to prevent such incorrect exemption, the Talmud specifically lists these *mitzvot* so that the legal force of the obligation on women would not rely on the “paired *mitzvah*” principle. The entire Tosafot argument is based on the assumption that the “paired *mitzvah*” principle is legitimate and operative.¹¹

Ramban, commenting on the same section of Kiddushin, presents a different argument. He says that in each of the three *mitzvot*, the negative *mitzvah* does not operate independently of the positive *mitzvah*. The negative *mitzvot* serve only to strengthen observance of the positive *mitzvah*. In other words, Ramban reverses the hierarchy of the pair: it is *not* that the positive *mitzvah* is paired with and secondary to the partnered negative one; rather, the negative *mitzvah* is paired with and secondary to a positive one. Ramban argues, regarding the hypothetical case of Tosafot, that even if railing, returning lost property, and sending away the mother bird were time-bound positive *mitzvot*, women would not be obligated to do them despite their pairing with negative *mitzvot*. In this sense, Ramban’s theory of “paired *mitzvot*” is a “soft legal principle” (if even that) because it does not supersede the time-bound positive *mitzvah* exemption.¹²

Af Hen Hayu B'oto Ha-nes (Women too were in that miracle)

¹¹ Schottenstein Talmud (Artscroll), Kiddushin 34a1, note 6.

¹² *Hidushei HaRamban Hashalem*, Kiddushin 34a

The talmudic authorities explained three of the time-bound positive *mitzvot* required of women by the principle, "*af hen hayu b'oto ha-nes* - they too were in that miracle." This principle represents a significant departure from the strategies and legal requirements that we have examined thus far. With the "*af hen*" principle, the sages depart from the technical reading of the Torah as a law code that they so successfully and thoroughly demonstrated in Kiddushin 34a. The sages now try to reconcile Jewish law with the Torah narrative. The narrative contents of the Torah distinguish it from the American Constitution, which does not contain any of the narrative related to its own creation and history. This creates one of the major differences between secular (at least American) law and Jewish law. Developments and interpretations under Jewish law must be reconciled with both the technical legal reading of the Torah as a code and with its narrative contents as well. That reconciliation with the narrative drives the "*af hen*" principle.¹³

They apply this principle to hearing the *Megillah* reading, kindling the Hannukah lights, and drinking four cups of wine at the Passover seder. All of these *mitzvot* involve observances that commemorate moments of miraculous national deliverance in Jewish historical tradition. The following analysis will seek to answer why this rule is applied for these miracle observances and not others. We may find within the same holiday (ostensibly derived from the same miracle) that only one *mitzvah* is required of women. For example, all women are required to drink four cups of wine on Passover but not recline. An examination of the talmudic texts that present the "*af hen*" principle and related commentaries will provide us some insight.

¹³ Which explains, to a large degree, the origin of such aggadot as Jacob wearing kippot or Isaac studying

R. Yehoshua b. Levi said: Women are obligated to hear the *Megillah* reading, because they too were in that miracle. R. Yehoshua b. Levi said: A person is obligated to read the *megillah* at night and to repeat it in the daytime. (BT Meg. 4a)

Bar Kappara said: one must read the *Megillah* in the presence of women and children, because they too were in doubt of surviving. R. Yehoshua b. Levi would do the following: he would assemble his children and his 'household' [his wife] and read the *Megillah* in their presence. (Jerusalem Talmud Megillah 2:5)

R. Yehoshua b. Levi said: Women are obligated to kindle Hannukah lights, because they too were in that miracle. (BT Shab. 23a)

R. Yehoshua b. Levi said: Women are obligated to drink four cups of wine [at the seder], because they too were in that miracle. (BT Pes. 108a-b)

Rashi and Rashbam, in their commentaries on the Talmud, present one theory of the "*af hen*" principle. They argue that, in each case where the Talmud uses this principle, women were causative agents of miraculous national delivery. Women's central role in each miracle therefore requires them to perform the *mitzvot* attached to the commemoration of those miracles. Rashi and Rashbam fail to explain why, if women's actions caused the exodus from Egypt, women would not be required to perform all the *mitzvot* associated with Passover, instead of just one of them. Rashi's commentary to Pesakhim 108b reads: "We all were redeemed [from Egypt] for the sake of the righteous women of that generation. Likewise for the reading of the *Megillah*, because we were redeemed on account of the actions of Esther. Likewise for lighting the Hanukkah candles."

at a *halakhic* academy.

Tosafot disagree with Rashi and Rashbam's interpretation of "*af hen hayu b'oto ha-nes*." Tosafot argues that women were not causative of the miracles; they were simply there. The Tosafot responds directly to Rashbam:

Rashbam [like Rashi] understands that the Israelites were redeemed from Egypt by the actions of the women, likewise for the *Megillah* reading because of the actions of Esther, and for Hannukah because of the actions of Yehudit. But this is problematic. The use of the word "*af*" indicates that they were not primary agents [in the miracles]. Furthermore, the Jerusalem Talmud reads: "because they too were in doubt of surviving," meaning they faced the same danger [from the decree, as phrased in *Esther* 3:13,] "to destroy, to kill, and wipe out." (Tosafot, Pesachim 108b: "they too were in that miracle.")

The Tosafists' understanding of the "*af hen*" principle, particularly the notion that women do not need to be causative but merely present at the miracle, has the potential to significantly widen the corpus of *mitzvot* incumbent upon women. They balance this potential expansion by noting a second condition for applying *af hen*: the principle was only applied to *de-rabbanan mitzvot*. Therefore, women could only be required for the time-bound positive *mitzvot* associated with the commemoration of a miracle under two conditions. First, women were present and affected by the miracle and second, the associated *mitzvah* must be *de-rabbanan*. Otherwise, *af hen* principle could not apply. The issue of *de-rabbanan* versus *de-oraita*, as we also saw with the previous principles, proves to be fundamental to the entire discussion of women's exemption or obligation. The Tosafot says:

As for the ruling that women are exempt from dwelling in the *sukkah*, even though they too were in that miracle - i.e., "I made the Israelites dwell in booths," (Lev. 23:43) - that *mitzvah* is a positive *mitzvah de-oraita*. But, drinking four cups of wine at Passover is *de-rabbanan*. They decreed it also for women because they too were in that miracle. (Tosafot Pesachim 108b: "they too were in that miracle.")

The development of the *halakhot* of the seder guides us regarding which elements of observance are required of women once we apply *af hen hayu*. First, as we saw above, this principle is only used to make *de-rabbanan mitzvot* obligatory on women. This explains how the Talmud could remain consistent in principle while teaching that women are both obligated and exempt from different Passover *mitzvot*. This also explains why, for example, women's obligation to eat matzah, a *de-oraita mitzvah*, is not justified by means of "*af hen*" but by the "paired negative" principle.

The codes continue developing these legal principles so that women are ultimately required to perform even more *mitzvot*. The codes reflect an attempt to apply the set of legal principles described above to all the festival observances. Passover provides a lucid case for our study. I will present a number of *halakhot* in chronological order to highlight the historical development.

The *Shulkhan Arukh* instructs: "Women are obligated to drink four cups of wine and to fulfill all the other mitzvot customary on this night." (O.H. 472:14). Later authorities enumerate and explain women's obligation to the *mitzvot* beyond the four cups. As early as Isserles (contemporary with Karo), these authorities discuss women's obligation for one of the central (albeit time-bound positive) *mitzvot* of the seder night: the telling of the Passover story. The discussion in the *Rema* (O.H. 473:6) emphasizes the spirit of this expanded set of obligations: "One should recite [the *haggadah*] in a language that the women and children understand, or explain its meaning to them. R. Jacob of Londri's custom was to recite the entire *haggadah* in his native tongue so that the women and children would understand."

We find, into the twentieth century, *halakhic* authorities agreeing with women's obligation to recount the exodus story. *Mishnah Berurah* (473:64), for example, uses paradigmatic cases to adumbrate the minimum standard for a woman to fulfill her obligation. Even a woman of low status, who has other obligations incumbent upon her simultaneous with the seder, must hear a certain minimum of the *haggadah*:

Women too are obligated for [all] the *mitzvot* of the [seder] night and for the reciting of the *haggadah*. Accordingly, the obligation is also upon a female, Jewish servant that she should sit at the table and listen to the entire *haggadah*. If she must leave to do the cooking, she is obligated at least to hear kiddush. And when they reach the section that begins, "R. Gamliel says anyone who does not mention," she should come in to hear....

The twentieth century was not simply one of opening more *mitzvot* to women. Rabbi Ovadia Yosef, for one, is less liberal than the *Shulkhan Arukh* and others regarding women's obligations for the seder night. He hedges his instruction: women should perform the *mitzvah*, but not in the same way as men. He wrote:

Women too are obligated to recount the events of the exodus. A woman who cannot read can fulfill her obligation by listening to the reading.... But, since there are differing views as to whether a woman's obligation is from the Torah or rabbinic, it is proper that she should not recite the *haggadah* on behalf of a man.¹⁴ (*Siddur Hazon Ovadiah, Procedure at the Seder, Maggid* (translated in Gittelson, 64))

At the core of Rabbi Yosef's ambivalence sits an issue that has appeared throughout these attempts to reconcile the rule with its exceptions: the *de-rabbanan* versus *de-oraita* classification of the law. Rabbi Yosef's ruling challenges the "af hen" principle and its focus solely on the narrative. He emphasizes the hierarchical nature of

Jewish law and the need to respect that hierarchy first and foremost. Rather than reconciling contradictions solely in terms of their narrative or statutory character, Rabbi Yosef rules that the Torah or rabbinic origin of a *mitzvah* must inform our decisions regarding its application and enforcement. If we cannot clearly determine whether an obligation is one or the other, we must (as he does) “hedge” our rulings. This study will now turn from the specific principles put forth in the Rabbinic sources to examine the ways in which the question of *de-oraita* versus *de-rabbanan* appears or does not appear in the literature.

The question of whether a *mitzvah* or exemption is *de-rabbanan* or *de-oraita* runs through all three principles we have seen so far in this chapter. The *de-oraita* character is obviously the central issue in the first principle. In fact, this principle is characterized by the fact that it is totally *de-oraita*, based completely on explicit Torah statements.

The two uses of the “paired *mitzvah*” principle that we examined above both conspicuously claimed their authoritative *de-oraita* status - a claim belied by the debate over the rule’s efficacy and legitimacy. This rule is based on a mix of *de-rabbanan* and *de-oraita* elements. The negative *mitzvah* is always *de-oraita* in this rule. The rabbis claim the positive *mitzvah* is also *de-oraita*, but the entire enterprise seems to rest on rabbinic hermeneutics.

Finally, all the *mitzvot* incumbent upon women under the “*af hen hayu b’oto ha nes*” rule are *de-rabbanan*. It is based totally on *de-rabbanan* authority. Tosafot, in fact, note this issue in relation to women’s obligation for four cups. We read there, “*Af Hen* -

¹⁴ Rabbi Ovadia Yosef, *Siddur Hazon Ovadiah*, “Procedure at the Seder: Maggid,” in *Serving The*

They too' - And if this was not given as a reason they would not be obligated, because women are exempt from time-bound positive *mitzvot*. Even though four cups of wine are *de-rabbanan* it is established as if it were *d'oraita*."¹⁵

The Talmud *sugya* exempting women from dwelling in the *sukkah* (Sukkah 28a) provides a good case study for the issues we have seen in the preceding analysis, especially the debate over *de-rabbanan* - *de-oraita* classification. The *sugya* examines an apparent contradiction between the derivation of the *sukkah* exemption and the derivation of the obligation for women to fast on Yom Kippur. Women are excluded from the *mitzvah* of sitting in the *sukkah* based on the following midrash. Leviticus 23:42 reads, "All the citizens (*ha-ezrah*) of Israel shall dwell in *sukkot*." The Talmud then presents the following interpretation:

"If the text said 'citizen (*ezrah*)' this would mean any citizen, but the usage of 'the citizen (*ha-ezrah*)' excludes women. [The Talmud then raises the following challenge:] "Could you possibly say that 'citizen (*ezrah*)' means both women and men? We have learned in a *baraita* that the usage of 'the citizen (*ha-ezrah*)' [in Leviticus 16:29]¹⁶ serves to include citizen women such that they are obligated to afflict themselves [i.e. with fasting] on Yom Kippur. In that case the term 'citizen (*ezrah*)' means only men (otherwise we would not need the definite article to indicate women's inclusion).

Rabbah said: They are law as a tradition [*"halakhah"*]¹⁷ - and the rabbis supported them both on scriptural verses¹⁸. But which of these

Creator, ed. Ellinson, 64.

¹⁵ *Tosafot*, *Pesakhim* 108b, "*Af hen*".

¹⁶ Lev. 16:29 reads, "These shall be for you an eternal law: in the seventh month, on the tenth day of the month, you shall afflict yourselves and you shall not do any labor - the native (*ha-ezrah*) and the stranger among you."

¹⁷ Adin Steinsaltz, *The Talmud: The Steinsaltz Edition, A Reference Guide*, (New York: Random House, 1989), 114, offers the following explanation: "There is no reference to this *halakhah* in the written text of the Torah, but it is part of accepted tradition handed down orally from generation to generation since the giving of Torah at Sinai."

¹⁸ Steinsaltz, 149, offers the following explanation of *asmakhta*: "Sometimes the Rabbis in the Talmud explicitly state that the biblical verse cited as the basis for a law is merely an allusion to the law rather than its actual source; in such cases the verse is called an "*asmakhta*" - 'support' - for the law. Since laws of this kind do not actually derive from the biblical text..., they are generally Rabbinic decrees."

originates in a biblical verse and which is “*halakhah*” as a tradition. Furthermore, why do I need a verse and why do I need a tradition at all? After all, *sukkah* is a time-bound positive *mitzvot* and women are exempt from all time-bound positive *mitzvot* and the Yom Kippur obligation would emerge from the rule of R. Yehuda who taught in the name of Rav. For R. Yehuda taught in the name of Rav, and a *baraita* was also taught in the academy of R. Ishmael: the verse [Numbers 5:6] says, ‘[when] a man or a women [shall commit any of the sins of man]’ (i.e. men and women are equally obligated and liable for negative *mitzvot*).¹⁹

The *sugya* raises the possibility that one of these teachings is scripturally based while the other is a tradition (*halakhah*) that, according to the sages, has explicit scriptural evidence (*asmakhta*). The sages, at this point, raise the problem that women should be exempt from sitting in the *sukkah* because it is a time-bound positive *mitzvah*. Why then do we need a “*mi’ut*” (or any other rabbinic exegesis) to determine women are exempt? Likewise for Yom Kippur, the Talmud identifies fasting as a negative *mitzvah* and, if women are obligated to perform all the negative *mitzvot* (according to “R. Yehuda’s rule”), why do we need a *mi’ut* here? The talmudic authorities continue:

Abaye said: In truth, the *sukkah* exemption is the law as a tradition and [the *mi’ut*] is needed [in addition to the exemption rule] lest you may have thought the scriptural use of ‘you shall dwell (2.pl)’ implies: in the same way you dwell at home. Just as a man and his wife dwell there, so too in the *sukkah* a man and his wife dwell. Thus the [*mi’ut*] informs us [that women are exempt].

There is a second reason given for the *mi’ut*: “Rava said, the *mi’ut* is necessary lest you think to say; ‘let us derive the law from a *gezerah shava* drawn between fifteenth of the month for Sukkot and fifteenth of the month for Passover. Just as women are obligated there (for Passover), so too they are obligated here (for Sukkot). Thus it (the

¹⁹ B.T. Sukkah 28a.

mi'ut) comes to inform us.” Having explained the need to read this verse as a *mi'ut*, the *sugya* then turns to the Yom Kippur example. After again asking why we need the verse to include women in the fast, the Talmud answers: “We don’t need the *ribu'i* except for the additional (evening period) of affliction.”²⁰ Lest you may have thought to say, since the Merciful One excluded the additional evening period of affliction from punishment and a prohibition, women are not obligated for the additional period at all. Thus the Torah informs us.”²¹

The discussion from B.T. Sukkah 28a indicates two significant problems that have been underlying all the principles we looked at earlier in this chapter. First, we see in Sukkah 28a that there are two biblical verses that can be applied either to include women (like for Yom Kippur) or to exclude them (as in the *sukkah*) based on the different readings of the same exact word (“ha-ezrah”). The problem we face how to determine (or understand how the sages determined) which verse would be applied towards which ends. Second, we must ask how does tradition (“*halakhah*”) interact with biblical sources. In this case, women are exempt from dwelling in the *sukkah* because of a received tradition. The biblical verse including the word, “ha-ezrah,” reinforces that tradition. On the other hand, the sages read same word in another location in Torah to have the opposite result. The Talmud raises the possibility of reading the law in a way that tends to include women. By including both interpretations, however, and even calling attention to the apparent

²⁰ The Yom Kippur affliction command - as it originates in Torah according to an orthodox understanding - applies to Yom Kippur day. *Yoma* 81a-b teaches that there is an additional obligation to afflict oneself starting on the night before Yom Kippur. We need a *ribu'i* to include women in this nighttime affliction.

²¹ The *mitzvah* of Yom Kippur carries a punishment of *karet* and its observance includes both positive and negative *mitzvot*. The additional period, however, has no punishment assigned and no negative *mitzvot*. Therefore one may think it is a time-bound positive *mitzvah* only and therefore women are exempt.

contradiction, this discussion indicates (as Rabbi Yosef did above) that the matter remains unsettled even through generations of *halakhic* discourse.

There is a fundamental question about interpretive authority underlying the development of the principles used to reconcile the women's exemption rule with the various time-bound positive *mitzvot* that women must fulfill. The above analysis of these principles ultimately leads us to the issue of the classification of the law as biblical or rabbinic. In other words, each of the principles, and thereby the application of the women's exemption rule, ultimately rests on whether a specific obligation is determined to be of rabbinic or biblical origins.

The question of interpretive authority and the determination of a law's status as *de-oraita* or *de-rabbanan* ultimately leads us to a most fundamental question of Jewish law: what is God's will as understood by the legal authorities. If we think of law as based on a larger narrative or *nomos* then we must ultimately look at the core of the narrative - what I will call "the constitutional narrative."²² In Jewish Law, that narrative is Sinai and our question is ultimately about women's experience at Sinai. How does the legal tradition understand women at Sinai? We turn to this question in detail with the next chapter.

²² Dworkin, *Freedom's Law*, "Introduction," talks about the principles underlying the narrative and making the narrative coherent. Also, Rachel Adler, *Engendering Judaism: An Inclusive Theology and Ethics* (Philadelphia: The Jewish Publication Society, 1998), 25 (especially note 15 which refers the reader to Robert Cover's legal theories).

Chapter Four

This study now turns to questions of constitutional integrity from a historical perspective (at least in the traditional understanding). So far we have seen that the rabbis formulate a rule exempting women from time-bound positive *mitzvot*. We have also seen, in the previous chapter, the ways in which the rabbis and later authorities debated the coherence of that rule. It became clear in that chapter that the central question of their debate was whether or not certain laws and principles were *de-oraita* or *de-rabbanan*. This debate, I have argued, points to the possibility that the issue of women's obligation to perform *mitzvot* entails questions of biblical, "constitutional" interpretation. That being the case, we now turn to Sinai, the central element of that "constitutional narrative."

This chapter will examine the issue of women at Sinai because that issue sits at the heart of any discussion about women's exemption from time-bound positive *mitzvot*. Joel Roth describes Sinai as the *grundnorm* for the entire legal system. The authority of the law, in traditional, orthodox Judaism, rests not on its morality or logic. The authority of the law rests on its divine origins and the miraculous nature of its revelation.¹ Not only does the question of women's exemption from time-bound positive *mitzvot* raise questions about the substantive interpretation of Torah norms, it challenges the Sages to determine whether women take part in the covenant with God. This challenge requires them to

¹ Roth, *The Halakhic Process*, 9.

reconstruct the circumstances of the theophany at Sinai. In other words, the issue of women's exemption is not merely about the interpretation of specific rules of Torah (regarding *tzitzit*, *tefillin*, etc.). Rather, it is about the application of the entire corpus of Jewish law directly to women, and about the nature of women's inclusion in Jewish life. This chapter is dedicated to the Sages' attempt to address this challenge.

Some authorities argue that women are inherently unequal to men vis-à-vis Sinai while others argue that women are fully equal to men in their experience of and inclusion at Sinai. The issue of *de-rabbanan* versus *de-oraita* again plays heavily into this discussion. When given interpretative license, how have past authorities understood the foundational moment in the Jewish "constitutional narrative?"

I will use two texts to provide conflicting interpretations of that central moment in the narrative. The first text, *Shemot Rabbah* 28:2 (commenting on Exodus 19:3) presents different perspectives on the idea that women were not fully included in the divine address at Sinai.² The second text is a responsum from *Mishpatei Uziel* by Rabbi Ben-Zion Uziel, who served as Sephardi Chief Rabbi in Israel from 1939 to 1953. Rabbi Uziel's responsum is significant because, in answering a question about women's exemption from time-bound positive *mitzvot*, he explicitly refers to the larger question of women's inclusion or exclusion from Sinai.³

I. *Shemot Rabbah*

² I used the text of *Shemot Rabbah* from "The Judaica Classics: Deluxe Edition" CD-ROM (1991-97) which uses Standard Vilna (*Margliot*) edition. Translations are my own.

³ Rabbi Ben-Zion Meir Hai Uziel, *Mishpatei Uziel*, vol. 3: *Hoshen Mishpat*, General Principles #4, "Time-bound Positive Commandments," (Jerusalem, 1940).

The midrash from *Shemot Rabbah* presents a number of interpretations of Sinai and women's experience at Sinai. While there are different voices within this one midrash, all start from the understanding that men and women had different and distinct revelation experiences at Sinai. Women, this midrash holds, are not included in the divine revelation of Torah in the same way or to the same extent as men. The questions are: first, were women at all present at the moment of theophany and did they experience its full impact? Second, regardless of their experience, does the legal force of divine revelation apply to women in a manner comparable to that of men?

In answering these questions, the midrash points to two kinds of textual difficulties in the biblical narrative. First, the rabbis want to know why the divine instruction to Moses in Exodus 19:3 mentions both *beit ya'akov* ("the House of Jacob") and *b'nei yisrael* ("the 'sons' of Israel"). One term or the other alone would have been sufficient. The rabbis read those terms not as synonyms but as references to two different groups of people. Second, the rabbis seek to know why *beit ya'akov* precedes *b'nei yisrael*. If, as the rabbis interpret, they are not the same groups of people, what is the significance of putting one before the other?

The first section of this midrash interprets that "House of Jacob" refers to Jewish women while "Sons of Israel" refers to Jewish men. The midrash argues that God intentionally revealed different things to men and women at Sinai based on inherent differences between them. Specifically, the midrash holds that women are, by nature, intellectually inferior to men. Women's natural intellectual inferiority determines (limits) the content of revelation to them at Sinai. Because they cannot comprehend the details of

the law, women are not even included in the full scope of revelation at Sinai. The midrash says:

Say this to the House of Jacob... (Exodus 19:3) - these are the women. God said to [Moses], "tell them the main ideas of this revelation as that is what they can understand. ...*And tell the sons of Israel* (ibid.) - these are the men. He said to him, "tell them the minute details of this revelation as that is what they can understand."⁴

The practical legal implications of this view of women, not to mention the philosophical or theological implications, cannot be overemphasized. This view *does* recognize women's participation at Sinai and women's inclusion in at least part of the revealed divine will. However, if the constitutional narrative intimates that the divine will was not fully addressed to women then it would be consistent to argue that women are likewise not included in all of the *halakhic* obligations that are founded on the revelation.

Rabbinic literature and the rulings of the *rishonim* develop the practical ramifications of this view of women. In many *halakhic* texts we find this idea of women's intellectual inferiority expressed with the phrase, "*da'atan kalah*." It is given, for example, as the reason why women should be prohibited (not just exempt) from Torah study. The same reasoning underlies some rulings that women cannot serve as witnesses.⁵

The midrash, as noted above, contains multiple voices. Because these voices may contradict each other, any translation or understanding of those voices faces an immediate difficulty. The next "voice" in this midrash, introduced by the

⁴ *Shemot Rabbah*, 28:2.

term "*davar aher*," says: "Another matter: Why the women first? Because they encourage (*mizdarzot*) the [observance of the] *mitzvot*. Another answer: so that they will inculcate their sons with Torah study."⁶

It is possible that this voice views women as superior to men vis-à-vis *halakhah* and *halakhic* observance. The Hebrew text tells us women (assuming *beit ya'akov* means women) were addressed before men at Sinai because they, "*mizdarzot ba-mitzvot*." One could interpret this to mean that women are eager to perform the *mitzvot*. The implication of such a reading is that women respond more admirably to the *mitzvot* than men and therefore deserve status of first position in receiving those *mitzvot*. The other possibility is to read "*mizdarzot*" as encouraging. The implication of such a reading is that women are enablers. They do not necessarily perform the *mitzvot* themselves but engage the *mitzvot* vicariously (however admirably) through their husbands and sons. The second reading is probably more accurate and certainly more consistent given the negative, restrictive view of women contained in the rest of the midrash. The next sentence, for example, indicates that the divine wish is for women to produce sons who are immersed in Torah *and not, conspicuously, daughters*.⁷

The midrash then presents the argument that women are a threat to men. This line of argument takes the form specifically of a sexual threat - '*erva* - in the writings of some

⁵ On witnesses: *Sifre Devarim*, *Piska* 104, section 109; M. Shavuot 4:1; and B.T. Shavuot 30a. On *da'atan kalah*: B.T. Kiddushin 80b, Shabbat 33b.

⁶ *Shemot Rabbah* 28:2.

⁷ Such a reading is also consistent with other rabbinic teachings that admirable women enable their sons and husbands to study Torah. I.e., "In what lies the merit of women? In bringing their sons to the synagogue and in letting their husbands go to the *beit hamidrash*..." B.T. Berakhot 17a.

of the *rishonim*.⁸ While not specifically mentioning a sexual threat or threat of impurity, *Shemot Rabbah* presents the view that women are simply bad, especially vis-à-vis *halakhic* requirements. They are, from their very origin, likely to reject the Torah and thereby a source of curse to the entire world. Unlike the previous argument (that women were simply not smart enough to understand their obligation), this section presents women as perhaps willful in their rejection of *halakhah*. The midrash says:

R. Tahlifa of Kisran said: the Holy One of Blessing said, "When I created the world I did not command anyone but the first man. Afterwards, Eve was commanded but she transgressed and cursed the world. Now, if I do not call to the women first they will neglect the Torah." Thus it [first] says: *Say this to the House of Jacob*.⁹

When we read Rabbi Tahlifa in conjunction with the previous voices, the midrash offers a severe, negative view of women. As we read earlier, they lack the intelligence even to be included in all aspects of the divine will and here we see that they simply cannot be trusted with that divine will anyway. Such a view of women is not only consistent with the exemption from time-bound positive *mitzvot*, it bespeaks a "constitutional" demand that women must be kept outside the sphere of most legal obligations.

The final voice in this midrash presents, again depending on our interpretation, the idea that women did not experience the revelation at all. The midrash ends: "R. Yohanan said: *Say this to the House of Jacob*... This refers to the Sanhedrin. As it says: *House of Jacob, Come let us walk in the light of the Lord*. (Isa. 2:5)" In this reading, Rabbi Yohanan understands *beit ya'akov* not as a reference to women but to the great rabbinical court. He offers no new interpretation for *b'nei yisrael* so we are left with the previous

⁸ For a discussion of *erva* in relation to women reading publicly, see Alfred Cohen, 31-32.

⁹ *Shemot Rabbah*, Ibid.

understanding that this refers to Jewish men only. Women are nowhere to be found in this reading of Sinai.

The ideas presented in this midrash are not isolated exceptions to an otherwise inclusive interpretation of women in Jewish tradition. Akin to the exclusion from Sinai we saw above, there are texts that argue women are not included in the covenant or the promise to inherit the land of Israel. Some striking examples of these exclusionary interpretations arise in the context of the talmudic debate over women's obligation to recite *birkat hamazon*.¹⁰ According to Rashi, women's obligation to recite *birkat hamazon* is not *de-oraita* because the bible commands (Deut. 8:10), "you shall bless the Eternal One your God for the good land that He gave you." Rashi argues that since the land was distributed to males only in the biblical account, women were not given the land and thus not subject to the obligation imposed by Deuteronomy 8:10. Tosafot agrees with Rashi's classification of women's obligation for *birkat hamazon* as *de-rabbanan* but disagrees with his explanation. Instead, Tosafot argues, women are exempt because they are not sealed in the covenant and not taught or included in the scope of the obligation to study Torah. The blessing after meals thanks God, "for the covenant You have sealed in our flesh and Your Torah You have taught us." Tosafot then argues that since women are not circumcised and not taught Torah, they are excluded from the voice of this blessing.

This exclusionary view of women, however, is not the only view in Judaism. In fact, there is another school that holds this interpretation as invalid. For example, contemporary Modern Orthodox Rabbi Eliezer Berkovitz grasps the full significance of this tradition of biblical interpretation. He writes of such exclusionary teachings, "One

cannot help wondering how such ideas could have entered the minds of the talmudic authorities who made these statements! Is it really conceivable that... the covenant was not concluded with all Israel, but only its male members?... the Torah was given only to the men?"¹¹ Here, Berkovitz does not challenge the technical reading of the biblical narrative; the issue is not the specific terms like *beit ya'akov* and *b'nei yisrael*. Berkovitz challenges the very notion that women are excluded from the divine covenant. The presumption that women are included informs his reading of the biblical narrative. This same difficulty is at the heart of Rabbi Ben Zion Uziel's examination of women's exemption from time-bound positive *mitzvot*.

II. *Mishpatei Uziel*

Rabbi Uziel's responsum is particularly significant for this study because it addresses a question about women's exemption from time-bound positive *mitzvot*. Rabbi Uziel was asked if a woman may recite the blessing before performing a time-bound positive *mitzvah* from which she is exempt. The potential problem that precipitated this question lies in the standard formulation of blessings over *mitzvot*. The woman would have to recite the words, "who has commanded us" to perform the particular *mitzvah*. If a woman is exempt from time-bound positive *mitzvot* then her recitation of such a formula is perhaps inaccurate or, even worse, a blessing in vein.

Rabbi Uziel recognizes that fundamental issues lie at the core of this question and thereby at the core of the women's exemption rule. What do we mean by "exemption?"

¹⁰ Berakhot 20b debates whether or not women's obligation to say birkat hamazon is *de-oraita* or *de-rabbanan*.

¹¹ Eliezer Berkovits, *Jewish Women in Time and Torah* (Hoboken, NJ: Ktav Publishing House, 1990), 5.

And, even more basic, are women equally commanded as men in Jewish law? Rabbi Uziel begins his response, "one must investigate the foundation of this exemption. Is a woman, in the context of these *mitzvot*, similar to a non-Jewish slave who is in no way commanded to do these *mitzvot* or is she similar to [male] children who are commanded to perform the *mitzvot* but the Torah exempts them until they reach the age of majority?"¹²

The question of women's exemption and inclusion in the *mitzvot* is ultimately one of biblical interpretation at the most fundamental level: were women full and equal participants and recipients of the divine will at Sinai? If the answer to that question is "no," as in the *Shemot Rabbah* midrash, then we need not look any further for an explanation of women's exemption from time-bound positive *mitzvot*. If the answer is "yes," as Rabbi Uziel argues, then there must be an explanation that reconciles the exemption rule with an account of women's full inclusion at Sinai. I will first examine Rabbi Uziel's response to the basic question about Sinai then shift to the various issues that arise in the course of his explanation.

Regarding women at Sinai, Rabbi Uziel simply says: "All Israel and their souls until the end of all generations stood at Mt. Sinai." R. Uziel then explains women's exemption from time-bound positive *mitzvot* within the constraints of the premise that women experienced full inclusion in the divine will at Sinai. He continues, "However, the same part of the soul that is carried in the body of a woman is exempt from these *mitzvot* according to the teachings of the Torah." In other words, men and women (and children for that matter) stood together at Sinai and received the same revelation, both fully

¹² *Mishpatei Uziel*, *ibid.*

included in the corpus of law. Women are included in the obligations of the law but then granted exemption from those obligations.

The difference between men and women, in Rabbi Uziel's interpretation, is not one of origins but one of outcomes.¹³ There is a distinction, drawn by Rabbi Uziel, between one's inclusion among those commanded to a certain duty and the subsequent exemption from that obligation based on certain criteria. He writes, "the blind person and one who is occupied with a *mitzvah* are exempt from another *mitzvah* not because they are not commanded to do it but because the Torah excuses them."¹⁴ Women are not the only group to enjoy exemption from certain categories of obligation in Jewish law. Male children also serve as an example of this. As Rabbi Uziel indicates, Jewish boys are unlike converts. A convert (before converting) is completely outside the scope of Jewish legal obligations and their force. Jewish boys, on the other hand, technically are included in the body of people for whom the *mitzvot* are required. The law, however, recognizes that their immaturity dictates that they not be held legally responsible for fulfilling certain obligations. Jewish law becomes fully obligatory for converts only upon conversion to Judaism. Jewish boys need not convert; they become automatically vested with their legal obligations when they reach the age of majority. Although the outcomes are the same for the non-Jew before conversion and the minor boy, the difference of origins is important.

In his responsum, Rabbi Uziel clearly describes the two sides of the argument over women's exemption in terms of their talmudic origins. He writes,

¹³ Dworkin, *Freedom's Law*, 13. Uziel, seen through the lens of Dworkin, offers a reading of Sinai that "insists that the constitutional narrative means what its language is intended to say." It thus reflects principles and not outcomes, i.e. men and women were both at Sinai in principle. This is opposed to an originalist reading that insists that the constitution means what the language would do, i.e., it is concerned with outcomes only.

“Let us say that the first side holds that certainly a woman does not recite a blessing over these *mitzvot* because they are not at all commanded to do them. And, let us say that the second side holds that it is good for her to recite the blessing because she is commanded along with all Israel - but Torah excuses her.” He then locates a similar debate among talmudic rabbis: R. Yehuda on the one hand and R. Yose and R. Shim’on on the other (this debate is found in B.T. Rosh Hashanah 33a). Their disagreement in the Talmud stems from their different interpretations of the biblical phrase “speak to *b’nei* [the sons of] Israel,” (in Leviticus 1:2-4 regarding the *olah* sacrifice). The rule exempting women from time-bound positive *mitzvot* (as we saw in chapter 2) is likewise based on a specific reading of the word “*b’nei*,” this time in regard to Torah study. In both cases, one side argues that “*b’nei*” is an exclusionary, gender specific term for Jewish males.

In contemporary legal terms, the question Rabbi Uziel then addresses is this: the rabbis formulated a legal rule exempting women from time-bound positive *mitzvot* based on an interpretation of the Hebrew word “*b’nei*” that excludes women. Is it constitutionally valid to interpret that rule as prescriptive and proscriptive (i.e. women are exempt and they may not choose to perform the *mitzvot*)? If not, how should we understand the rule? Citing the strong legal precedents of Rabbenu Tam, Rambam, Joseph Karo, and Abudarham, as well as the constitutional narrative itself (as we saw above), Rabbi Uziel determines that a proscriptive reading of the exemption rule is not warranted.¹⁵

¹⁴ *Mishpatei Uziel*, *ibid*.

¹⁵ For Rabbenu Tam’s opinion see: Tosafot, R.H. 33a, “*ha rabbi yehuda*.”

While this element of the *Mishpatei Uziel* responsum has great significance, there is equal significance in Rabbi Uziel's analysis of some major issues that have arisen in the *halakhic* literature. There are many reasons why a person who is obligated under a law may be granted exemption from that rule of law. In the course of reaching his decision, Uziel examines some of the major reasons that have been offered in the past. He refers to and often challenges the opinion of previous, well respected authorities.

Rabbi Uziel dismisses *halakhic* arguments that cite social practice and custom as the basis for women's exclusion. These arguments are based on a legal bifurcation similar to the one Uziel draws between obligation and exemption. The texts, however, argue that women are theoretically obligated for a certain law but prohibited from that law as a matter of social practice. This issue is expressed in *halakhic* literature with reference to "yohura" or "k'vod hatzibur."¹⁶ The first thing Rabbi Uziel tells us is that these rulings are logically inconsistent and therefore not legally enforceable. He specifically cites Rambam and the *Shulkhan Arukh* as indefensible for that very reason. He writes:

Rambam and the authorities of *Shulkhan Arukh* ruled according to R. Yose. Despite this, however, they ruled that it is not permissible [for women] to recite the blessing.¹⁷ These statements need explanation because according to what was said [above] one thing hinges on the other and inasmuch as they are permitted [to do the *mitzvah*] they recite the blessing, and what is the difference from a blind person who can not see the light of day yet recites the blessing.... I say this to explain (in response) to Rambam's words. In reality the opinion of Rabbenu Tam seems better clarified as *halakhah*.

¹⁶ See for example, *Mapah* to *Shulkhan Arukh*, O.H. 589:1.

¹⁷ Rambam, *Hil. tzitzit*, 3:5, and *Shulkhan Arukh*, O.H. 17:2 and 589

Rabbi Uziel also addresses the argument that women's exemption is a product of their status and the fact that, especially when married, "the authority of another is upon her." We saw this argument first presented in the *Tosefta* (see chapter 2). The idea is adopted and expanded by the *rishonim*. For example Rashi (commenting on B.T. Menahot 43b) says, "For a woman is a servant to her husband as a slave is to his master," and Abudarham argues, "A woman is exempt from time-bound positive *mitzvot* because she is bound to her husband, to attend his needs..."¹⁸ This argument is still commonly cited today in various forms.¹⁹ Uziel responds to such arguments: "But there is a rebuttal in the foundation of this reason - a day worker is subservient to the boss but is not exempt from the *mitzvot* and so we learn: 'the craftsmen recite [*shema*] in the tree tops or on top of a wall,' (B.T. Berakhot 16a)." Uziel does not reject the existence of hierarchies of authority and degrees of obligation dependent on one's position in the hierarchy. As we shall see, he objects to the idea that human position or status could trump the status of the Divine.

Rabbi Uziel starts from the idea that women's status vis-à-vis their husbands does not supersede their obligation to the divine will (which is fully inclusive of women based on his Sinai argument). He combines that idea with the traditional notion that women have a prescribed role different from men. Some traditional *halakhic* sources make the argument that women are exempt from time-bound positive *mitzvot* because their natural (or more appropriately "divinely assigned") role is in the private, domestic sphere. This argument is often supported with reference to "*kol kevudah bat melekh penimah* - all the glory of a king's daughter is inside" (Psalm 45:14). This argument finds similar form in

¹⁸ Abudarham in *Serving the Creator*, 186, 40.

Saul Berman's article in *Tradition*, which attempted to glean a social principle encouraged but not mandated by the exemption rule.²⁰

Rabbi Uziel takes these two traditional arguments about women - subservience to men and separate spheres - and develops them to a new level. He simultaneously acknowledges a woman's full equality in the regime of divine will along with her special identity as a woman (and all the obligations and demands that come with such a role). A woman's special role therefore obligates her to uphold *mitzvot* so important that they supersede other *mitzvot*. Uziel does not dismiss status and subservience as factors in women's exemption from time-bound positive *mitzvot*. The exemption, however, is not out of subservience to her husband and not out of intellectual inferiority. He argues that women are really subservient to TIME and it is their status *as women* that puts them in such a position. He writes: "To me it seems the reason for the exemption is because of [women's] nature and function in life. *They are subservient to time in doing housework and raising children and babies, and so it is time that does not allow them permission (authority)....*"

The significance of this development cannot be overemphasized. Rabbi Uziel explicitly reads human constructed gender hierarchy out of this section of law. The reasons he offers for the exemption from time-bound positive *mitzvot* have nothing to do with gender power per se. In fact, he uses justifications that appear elsewhere in *halakhic* literature to explain the exemption of certain categories of men from various *mitzvot*. In other words, women are not unique *halakhic* creatures who therefore require or precipitate the creation of unique legal principles. They do have specific and unique

¹⁹ See for example: Berman, *Tradition*.

halakhic obligations unlike those of men. However, the principles and rules that guide women's obligations under Jewish law are the same principles and rules that guide men's interaction with the law. Rabbi Uziel writes:

From these reasons it can be determined as a general rule that women are included with all Israel in principle for all these *mitzvot* but that Torah excuses them from on the grounds of "occupied in another *mitzvah*" and "overly burdensome." Therefore, return the ruling that whoever acts according to Rabbenu Tam serves well and it is not at all within the scope of a vain blessing.

Rabbi Uziel is sweeping and resolute in his conclusion. He does not limit or otherwise couch the implications of his decision but writes plainly, "This goes for all the *mitzvot*.... You shall not be shaken from this ruling."

Lastly, Rabbi Uziel distinguishes *lulav* and *shofar* from all other time-bound *mitzvot* in a section that goes further than anything else previously in the responsum. He writes, "The exceptions to this ruling are *lulav* and *shofar* because they are intimations of the unity of heart of all Israel to their Father in Heaven and of their recalling before Him and women [explicitly] belong in this." This point in his ruling is so significant because it explicitly rules as invalid two teachings from the Talmud not immediately connected to the question at hand.

The *sugya* from *Kiddushin* identifies *lulav* and *shofar* as time-bound positive *mitzvot*. According to Rabbi Uziel's interpretation thus far, that means women were included in these two divine commands but granted exemption from the obligation unless they chose otherwise. Here, however, he argues that women do not have exemption regarding these time-bound positive *mitzvot*. In so ruling,

²⁰ Berman, 12-13.

he completely overturns these two talmudic rulings. In all the other cases he does not challenge the midrashic interpretations that read the Torah as exempting women from the *mitzvah* at hand. He simply argues that "exemption" indicates the right to exemption if individual women choose to exercise it. In the case of *lulav* and *shofar*, however, he goes so far as to say that the rabbinic rule that women are exempt is wrong. As justification he argues that these particular *mitzvot* are qualitatively linked to the principle of women's inclusion in the divine will. Performance of those two *mitzvot*, Rabbi Uziel argues, is all about inclusion in the divine will whereas the other *mitzvot* serve very different meanings such as remembering a miracle.

Rabbi Uziel reads the exemption rule as indicating that women are included in the full scope of revelation but not required to fulfill all the elements of that revelation. He uses a theory of law that distinguishes between being technically subject to a law but excused from upholding that law and from the punishments that come with violating that law. He allows a system of equal religious opportunity for women that is based on dignity, i.e. the *mitzvot* are available to a woman as a source or matter of dignity, but she need not do them if they would be a source of indignity. The most significant potential critique of this argument is that men are not allowed the same opportunity for dignity preservation as women. Berger and Lipstadt, in their article, make a similar point. They argue that women's exemption is not, in its origin, about motherhood or domestic duties

because men who are widowed or otherwise suffering the same daily domestic and parental duties do not enjoy the exemption.²¹

Before concluding, it must be emphasized that the issue of women's exemption from time-bound positive *mitzvot* is not about equality. In particular it is not about equality of opportunity or equality of outcomes. Such a focus on equality is a post-enlightenment issue. Many contemporary scholars and commentators, misguidedly however, focus their analysis and discussion on it. Furthermore, the issue is also not only theological. The issue is a legal, and specifically in terms of legal theory, a "constitutional" one. Uziel is not a theologian, he is a jurist. He asks a "constitutional" question: is this rule, formulated by the rabbis, a legally valid rule? And he ultimately rules that any reading of the rule as a prohibition is not "constitutional." His ruling is informed by theology and informed by history. But ultimately his ruling is based on a specific "constitutional" reading of Sinai that, as Berkovitz noted, simply cannot fathom the suggestion that women were not included.

One important lesson that *Mishpatei Uziel* teaches us is that the question as to whether or not women are allowed to perform time-bound positive *mitzvot* is simply a moot question. The real question we must face is whether or not women are included in the expression of the divine will at Sinai. It is a simple yes or no question, the answer to which guides us in all our questions about the permissibility of women doing the *mitzvot*. In other words, before we address questions of outcome we must settle the questions of origin.

²¹ Michael S. Berger and Deborah E. Lipstadt, "Women in Judaism from the Perspective of Human Rights," in *Human Rights in Judaism*, ed. Broyde, 88-89.

Conclusion

The status of women in Jewish Law is a matter too large and complex to address sufficiently in a single study. Indeed, the issue of women's exemption from time-bound positive *mitzvot* is itself so complex that one cannot find agreement as to its meanings and implications among scholars and rabbis throughout the history of *halakhic* discourse. The sheer volume of material written on this subject and its persistence as a topic of major interest even today bespeak its difficulty, its importance, and relevance. Although not all scholars agree with this conclusion, it is clear from the *halakhic* sources that there is a legal rule exempting women from time-bound positive *mitzvot*. That is to say that women's exemption from time-bound positive *mitzvot* is not merely a description of the social reality at various points in Jewish history. The exemption from time-bound positive *mitzvot* is a rule. It is, in and of itself, a reason for which women do not need to perform certain *mitzvot* that men must perform.

Although the exemption is a normative rule, there are several factors that complicate its application and enforcement. These factors and different interpretations of their implications precipitate the great amount of legal material written about the exemption from time-bound positive *mitzvot*. The first two factors deal with the development of the rule in the legal writings while the next two complicating factors relate specifically to the meaning of the rule and its interpretation.

First, the exemption is not an explicit rule in the Torah itself. Rabbinic authorities, instead, formulated the rule based on their reading of the Bible. Second, the exemption is not a widely enforced rule in the *tannaitic* sources. It is applied only sparingly and almost always in the name of only one authority, R. Shim'on. The exemption becomes more widely enforced as a normative rule by the time the Babylonian Talmud is redacted. Indeed, as we have seen, much of the talmudic material discussing the exemption attempts to establish the biblical status of the exemption as a norm. Third, no rationale is ever given for the rule as a rule. The sources derived the exemption strictly based on midrashic hermeneutics. There is no *aggadah* or narrative provided in explicit connection with the rule. Existing *aggadic* stories about women performing time-bound positive *mitzvot* appear outside the context of the technical, legal discussions about the rule. Fourth, the talmudic authorities themselves problematize the rule. The Kiddushin *sugya* that establishes the rule makes clear that, on one hand, women are exempt from several positive *mitzvot* that are *not* time-bound (like Torah study), while on the other hand, they are obligated to perform several of the positive *mitzvot* that are time-bound (like reciting *kiddush* on Shabbat). In fact, as Rambam's listing of the *mitzvot* indicates, there may even be *more* time-bound positive *mitzvot* incumbent upon women than those from which they are exempt.

The codes and responsa literature reflect the complex issues related to the exemption rule in novel ways because of inherent differences between the Talmud and this post-talmudic legal writing. While the *Mishnah* and Talmud often cite specific *mitzvot* as paradigm cases in the course of hypothetical discussions, the codes, by their nature, seek

to be comprehensive in their scope regarding Jewish Law. Accordingly, the codes and responsa apply the women's exemption rule to observances that were not specifically mentioned in earlier rabbinic sources. For example, the Talmud does not specifically address women's obligation or exemption from reciting *havdalah* at the end of Shabbat. The codes however, must resolve the questions regarding the categorization of *havdalah* (is it time-bound, etc.) and the applicability of the rule. Second, the codes and responsa must determine practical applications of the rule. For the codes, the question of whether or not women must recite *havdalah* is not just a legal, theoretical question; it is their primary question.

The codes and responsa, because of these factors, develop and pursue several issues related to the exemption. One of the major issues to occupy the attention of these authorities is whether or not the exemption from time-bound positive *mitzvot* is prescriptive or proscriptive in its application. As we have seen already the sources generally provide three answers to this issue: women may perform any of the time-bound positive *mitzvot* and recite the blessing before doing so, women may perform the action but not recite the blessing beforehand, or proscriptively, they may not even perform the action. The extent of this debate in the literature indicates the degree of disagreement over what the exemption rule actually means (specifically, how we understand the Hebrew word *patur*).

The second major issue that develops and reappears throughout the post-talmudic material relates to the impact of social norms and customs on the interpretation and application of the exemption rule. This issue generally appears in three forms. Some texts refer to the display of arrogance as a reason why women should not perform an action

even though the letter of the law would allow. Other texts cite *k'vod hatzibur* (respect for the public's social norms) for the same reason. Lastly, many texts will present the law followed by a statement that "our practice" or "custom" is to do something different. Uziel specifically responds to the illogic of such statements in his responsum cited in chapter four.

Both the Talmud and post-talmudic, *halakhic* literature devote significant space to discussing the ways in which such answers are reconciled with the rule itself and with the corpus of Jewish Law. We saw, in chapter three, the various, detailed ways in which the Talmud reconciles the rule with its exceptions. The responsa and *halakhic* commentaries likewise develop answers to the contradictions and complexities that arise in applying the exemption rule. Following the trend that we saw in chapter three regarding the Talmud, the post-talmudic literature often turns to issues of *de-rabbanan* versus *de-oraita* status. In other words, so long as legal discussions about the exemption rule continue, authorities continue to probe the legal weight of the rule and its applications in language that refers explicitly to its literary-historical categorization (biblical, rabbinic, contemporary, etc.).

The themes and issues that occupy so much of this legal literature ultimately indicate a subsurface debate over broader questions of *mitzvot* and divine will. The literature's emphasis on the proscriptive versus prescriptive nature of the exemption points to this larger issue. The question of whether or not women can recite the blessing, "who has commanded us [to do...]" or whether they can even perform the associated actions is, in fact, a question of whether or not women were ever included in the revealed divine will upon which the performance of the given *mitzvah* is based. The question of *de-rabbanan*

versus *de-oraita* is likewise related to inclusion in the divine will as opposed to the rabbinic will.

These questions of divine will and the scope of women's inclusion in that revealed will ultimately lead to Sinai. The problem is that, even from an orthodox perspective, we can never reconstruct what "happened" at Sinai or even what our texts intend to teach us about Sinai, the extent of the covenant that springs from it, and the meaning of that covenant for daily life. I propose, however, that we can gain new insights by using Dworkin's legal theory as a tool to help us read the *halakhah* as progressive Jews. Using such theoretical models, for example, we can better determine when certain readings of the exemption rule are more viable than others.

I base my use of Dworkin's theory on the idea that Jewish law is a constitutional system with the Torah as the foundational document. The terms *de-oraita* and *de-rabbanan* reflect attempts to discern where within the hierarchy of the law a particular norm falls. They point directly to this "constitutional" character of *halakhic* discourse. Dworkin calls his theory a "moral reading" of the constitution. It is first and foremost a reading strategy; it is a prism through which we can see new or previously under-emphasized elements of the legal literature. The theory's moral character appeals in particular to a progressive Jewish reading of *halakhah* inasmuch as we refuse to submit to Jewish law simply because it has the mythological claim to divine revelation. In other words, we refuse to follow orders if those orders are immoral, even though others claim the orders have divine imprimatur. At the same time, however, we must take our legal and literary heritage seriously. We must "own" it with all of its flaws and faults. In that

sense, Dworkin's emphasis on constitution is important. His theory never allows us to reject or nullify the law simply because we feel it is offensive or anachronistic.

Dworkin's moral reading always demands that we actually read the constitutional document as the basis for making moral determinations regarding the law. *How* we read that document is the instructive core of this theory. In that sense, my use of Dworkin's theory rests on an important theological presupposition: God is ultimately good and the laws and practices that we enforce must ultimately reflect that goodness. Put simply, Jewish law has force for some progressive Jews because of its mythological origins *and* because it is right (in those situations where morality is an applicable standard).

Accordingly, any reading or application of the exemption rule as proscriptive - either women cannot do something because they are legally prohibited or women are allowed technically to do something but are kept from doing so because of social pressures - is "unconstitutional." Rabbi Uziel's responsum (although he lived decades before Dworkin) exemplified the kind "moral reading" that Dworkin proposes. Women stood at Sinai and the revelation of divine will included them in its scope. Jewish law, at the biblical level, did not hold women and men equal or offer them anything like equal rights (in our contemporary understanding of the term). It is within a moral reading of the Torah to say as a rule that women are exempt from time-bound positive *mitzvot*. But to read them outside the scope of divine will because of the exemption rule is, from a Reform perspective, to misread *halakhah* and the greater theological implications contained in it.

A sidebar on equal rights

I offer this brief sidebar because so many contemporary scholars focus on the issue of equal rights (or their lack) in Jewish law. Judith Plaskow, in her seminal book *Standing Again at Sinai*, was partially correct. The right question is to focus on the core issue of Sinai, not independent legal outcomes (i.e. whether women can wear *tefillin*) when looking at women in Jewish law and tradition. The core of the problem of women's exemption from time-bound positive *mitzvot* is not one of egalitarianism. As Rachel Adler has argued, the point is not to simply make women into "honorary men."¹ The question of equality, in fact, is the misguided direction of most contemporary critics of women's status in traditional Jewish law.

The Torah, as I noted above, did not view women as equal to men. It is clear that women are not given the same status and privileges as men. However, to hold up an unelaborated standard of equal rights as the means by which one can dismiss Jewish law often misses some fundamental points about equality and equal rights. Maimon Schwarzschild's work on equality can help us better understand the limits and implications of equal rights ideals in the context of Jewish Law. He points out that egalitarianism in current American legal practice is based on the idea that "equality is a matter of individual rights, rather than of group outcomes." It is not enough to show, for example, that men and women fare unequally under the law because the American courts focus on intention rather than outcomes. Any given law is ruled discriminatory only based on its purpose.

¹ Judith Plaskow, *Standing Again at Sinai: Judaism From a Feminist Perspective* (San Francisco: Harper and Row, 1990).

"After all," Schwarzschild reminds us, "the sexes fare unequally under many laws, perhaps most of them."²

Even the U.S. courts, "stop short of holding that sex ... can never be a relevant difference that might justify different legal rights and duties."³ Egalitarianism in current American legal practice is based on the idea that "equality is a matter of individual rights, rather than of group outcomes." We can apply a similar approach to the study of women in Jewish law - in particular to the two texts we have looked at in the last chapter. Rabbi Uziel's interpretation of Sinai reflects an egalitarian intent inasmuch as he argues that women and men were equally included at Sinai and equally commanded for all the *mitzvot*. The intent of *Shemot Rabbah*, on the other hand, is to show that men and women were not equal *from Sinai*.

On one level, to focus on equality as an issue facing women specifically vis-à-vis women's exemption from time-bound positive *mitzvot* is not appropriate. There is much to point to in Jewish tradition that indicates women are not equal to men. On the other hand, however, such a focus may not be totally misguided. There are elements of equality and inequality found in almost every law and every legal system. There is equality in that any general rule applies equally in equal cases. There is also inequality because most rules, and certainly the women's exemption rule in Jewish law, classify people and make distinctions between them.⁴

Schwarzschild's model offers one way of assessing the women's exemption rule in terms of equality. Since laws, by nature, classify and involve certain inequalities, he

² Maimon Schwarzschild, "Constitutional Law and Equality," in *Blackwell Companion to the Philosophy of Law and Legal Theory*, ed. by Dennis Patterson (Cambridge, Mass.: Blackwell, 1996), 159.

³ *Ibid.*, 159.

argues that we must instead assess a rule based on the idea of equality that means "treating likes alike." Schwarzschild offers a suggestion:

...Consider how the classification corresponds to the legitimate purpose of the rule. To take an example that most Americans are now ashamed of: if the purpose of the internment of Japanese-Americans during World War II was to round up disloyal people, the round-up was both "over-inclusive" since the overwhelming majority of Japanese-Americans were loyal, and "under-inclusive" because members of the German-American Bund, say, were not rounded up.⁵

When we apply this standard to the women's exemption rule, specifically to different explanations that I have presented in previous chapters, we gain a strong, theoretical basis for identifying their strengths and weaknesses. The oft-cited rationale, that women are exempt from time-bound positive *mitzvot* because they are obligated to other *mitzvot* and overly burdened in their domestic responsibilities, makes the rule both over and under inclusive.⁶ The rule is over-inclusive in that it exempts unmarried, childless, and independent women along with married mothers. The rule is under-inclusive in that it does not exempt single fathers or other men who are the primary caregivers in their families.

Rabbi Uziel's explanation that the exemption is best understood as a kind of immunity that can be waived at the individual woman's behest hints at an equality of dignity that informs the application of the rule in a way most in line with progressive Jewish approaches to Jewish law. According to this understanding, the rule is only over

⁴ Ibid., 160.

⁵ Ibid., 161.

⁶ A rationale cited both by Rabbi Saul Berman and Rabbi Ben Zion Uziel as well as many others.

or under inclusive to the extent that a woman over or under includes herself.⁷ This equality of dignity principle means that the fulfillment of or exemption from time-bound positive *mitzvot* should be seen as a means to dignity for Jewish women. Women may perform the *mitzvot* if they find that such religious observance adds something to their life. Women for whom these *mitzvot* would be too burdensome and for whom these additional obligations would be a potential source of indignity are relieved of that burden and threat to their dignity. In adopting this theory-derived approach to the time-bound positive *mitzvot*, we allow Reform Jews to follow moral, post-Enlightenment sensibilities while also maintaining a strong connection to the Jewish classical texts as the primary vehicle through which we explore and apply those sensibilities.

⁷ This is not to deny that women face very real and strong social pressures that inform their decisions. I am *not* arguing that women make their own decisions and must bear full responsibility for any indignity they suffer under this rule.

Bibliography

Primary Texts

Mishnah

Berakhot 3:1, 3
Horayot 3:7
Kiddushin 1:7

Tosefta Kiddushin 1:10

Sifre Bamidbar, Shelakh, Piska 9

Sifre Devarim, Section 46

Mekhilta de-Rabbi Shimon bar Yohai, Bo 13:9

Babylonian Talmud:

Berakhot 17a, 20b
Eruvin 27a-b, 96b
Hagigah 4a
Kiddushin 29a-35b
Megillah 4a
Pesachim 43b, 91b, 108a-b
Sotah 20a-b
Sukkah 28a-b
Shabbat 23a-b
Shevuot 20b
Yevamot 85a

Jerusalem Talmud. Kiddushin 1:7

Rif (R. Yitzhak Alfasi), Kiddushin 14b

Maimonides. *Mishneh Torah*.

Avodat Kokhavim 12:3
Talmud Torah 1:13
Hagigah 1:1; 2:1

Maimonides. *The Commandments (Positive Commandments)*. [*Sefer Ha-Mitzvot*].

Translated by Rabbi Dr. Charles B. Chavel. London: Soncino, 1967.

Sefer Mitzvot HaGadol (Semag), *Mitzvot Aseh*, 26 (*Tzitzit*) and 12 (*Talmud Torah*)

Shulkhan Arukh (with *Mapah* and *Mishnah Berurah*)

O.H. 17:2; 470:1; 472:4; 589:1-6

Y.D. 240:17; 246:6; 261:1

Shemot Rabbah from "The Judaica Classics: Deluxe Edition" CD-ROM (1991-97) which uses Standard Vilna (*Margliot*) edition.

Hirsch, Samson Raphael. *The Pentateuch Translated and Explained*. Vol. 3, Leviticus (Part 2). Translated by Isaac Levy. 2d. ed. Completely Revised. New York: The Judaica Press, 1971.

Ellinson, Getsel. *Serving the Creator: A Guide to the Rabbinic Sources – Women and the Mitzvot*. English version of *Bein Ha-Ishah L'yotzrah* by Mendell Lewittes and Avner Tomaschoff. Jerusalem: Department for Torah Education and Culture in the Diaspora, The World Zionist Organization, 1986.

Uziel, Rabbi Ben-Zion Meir Hai. *Mishpatei Uziel*, vol. 3: *Hoshen Mishpat*, General Principles #4, "Time Bound Positive Commandments." (Jerusalem, 1940).

Secondary Sources

Adler, Rachel. *Engendering Judaism: An Inclusive Theology and Ethics*. Philadelphia: The Jewish Publication Society, 1998.

_____. "The Jew Who Wasn't There: Halacha and the Jewish Woman." *Response* 7:2 (Summer 1973): 77-82.

Berkovits, Eliezer. *Jewish Women in Time and Torah*. Hoboken, NJ: Ktav Publishing House, 1990.

Berman, Saul J. "The Status of Women in Halakhic Judaism." *Tradition* 14:2 (Fall 1973): 5-28.

Biale, Rachel. *Women and Jewish Law: An Exploration of Women's Issues in Halakhic Sources*. New York: Schocken Books, 1984.

Blumenthal, Aaron. "The Status of Woman in Jewish Law." *Conservative Judaism* 31:3 (1977): 24-40.

Brayer, Menachem M. *The Jewish Woman in Rabbinic Literature: a Psychohistorical Perspective*. Hoboken, NJ: Ktav Publishing, 1986.

Broyde, Michael J., and John Witte, Jr., eds. *Human Rights in Judaism: Cultural, Religious, and Political Perspectives*. Northvale, NJ: Jason Aronson, 1998.

- Bulka, Reuven. "Woman's Role – Some Ultimate Concerns." *Tradition* 17:4 (Spring 1979): 27-40.
- Cantor, Aviva. *Jewish Women/Jewish Men: the Legacy of Patriarchy in Jewish Life*. San Francisco: HarperCollins, 1995.
- Carlebach, Alexander. "Af Hen Hayu B'oto Ha-Nes: Minhagim hakeshurim b'skhar nashim tzidkaniyot." *Shanah b'shanah*. The Yearbook of Heichal Shlomo, Jerusalem. (1973): 246-251. [Hebrew]
- Cohen, Alfred S. "Women and the Reading of the Megilla." *The Journal of Halacha and Contemporary Society* 30 (Fall 1995): 25-41.
- Dorff, Elliot N. "Custom Drives Jewish Law on Women." *Conservative Judaism* (Spring 1997): 3-21.
- Dworkin, Ronald. *Law's Empire*. Cambridge, Mass.: The Belknap Press of Harvard University Press, 1986.
- _____. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge, Mass.: Harvard University Press, 1996.
- _____. *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge, Mass.: Harvard University Press, 2000.
- Elon, Menachem. *Jewish Law: History, Sources, Principles*. Translated by Bernard Auerbach and Melvin Sykes. Philadelphia: The Jewish Publication Society, 1994.
- England-Schaffer, Naomi Y. "Review Essay on Blu Greenberg's Women and Judaism: A View From Tradition." *Tradition* 21:2 (Summer 1983): 132-145.
- Falk, Marcia. *The Book of Blessings: New Jewish Prayers for Daily Life, the Sabbath, and the New Moon Festival*. San Francisco: HarperSanFrancisco, 1996.
- Falk, Ze'ev. "Can Judaism Incorporate Human Rights, Democracy, and Personal Autonomy?" In *On Liberty: Jewish Philosophical Perspectives*, ed. Daniel H. Frank, 112-128. New York: St. Martin's Press, 1999.
- Feldman, Emanuel. "Women and Judaism: Review Essay." *Tradition* 21:3 (Fall 1984): 98-106.
- Friedman, Joan. "Women and Time-bound Positive Commandments: An Comparison of Alfasi, Maimonides, and the Tosafists." Rabbinic Thesis, HUC-JIR, New York, 1980.
- Golinkin, David. "May Women Wear Tefillin?" *Conservative Judaism* (Fall 1997): 3-18.

- Gordon, Leonard. "Toward a Gender-Inclusive Account of Halakhah." In *Gender and Judaism: The Transformation of Tradition*, ed. T. M. Rudavsky, 3-11. New York: NYU Press, 1995.
- Gottlieb, Lynn. *She Who Dwells Within: A Feminist Vision of a Renewed Judaism*. San Francisco: HarperCollins, 1995.
- Greenberg, Blu. *On Women and Judaism: A View from Tradition*. Philadelphia: The Jewish Publication Society, 1981.
- Greenberg, Simon, ed. *The Ordination of Women as Rabbis: Studies and Responsa*. New York: The Jewish Theological Seminary of America, 1988.
- Grossman, Avraham. *Hasidot U-mordot*. [Hebrew]. Jerusalem: Zalman Shazer Center, 2001.
- Grossman, Susan, and Rivka Haut, eds. *Daughters of the King: Women and the Synagogue*. Philadelphia: The Jewish Publication Society, 1992.
- Halbertal, Moshe. *People of the Book: Canon, Meaning, and Authority*. Cambridge, Mass.: Harvard University Press, 1997.
- Harlow, Jules. "Feminist Linguistics and Jewish Liturgy." *Conservative Judaism* 49:2 (Winter 1997): 3-25.
- Harris, Jay. *How Do We Know This? Midrash and the Fragmentation of Modern Judaism*. Albany: SUNY Press, 1995.
- Heschel, Susannah, ed. *On Being a Jewish Feminist*. New York: Schocken Books, 1983.
- Holtz, Barry W. *Finding Our Way: Jewish Texts and the Lives We Lead Today*. New York: Schocken Books, 1990.
- Hyman, Paula E. "The Other Half: Women in the Jewish Tradition." *Response* 7:2 (Summer 1973): 67-75.
- Jackson, Bernard. *Essays in Jewish and Comparative Legal History*. Leiden: Brill, 1975.
- Katz, J. "Rabbinic Authority and Authorization in the Middle Ages." In *Studies in Medieval History and Literature*, ed. Isadore Twersky, 41-59. Cambridge, Mass.: Harvard University Press, 1979.
- Kraemer, David. *The Mind of the Talmud: An Intellectual History of the Bavli*. New York: Oxford University Press, 1990.

- Kress, Ken. "Coherence." In *The Blackwell Companion to the Philosophy of Law and Legal Theory*, ed. Dennis Patterson, 533-551. Cambridge, Mass.: Blackwell, 1996.
- Kretzmer, David. "Demonstrations and the Law." *Israel Law Review* 19 (1984): 47ff.
- _____. "The New Basic Laws on Human Rights." *Israel Law Review* 26 (1992): 239ff.
- Lightstone, Jack N. "Form As Meaning in Halakhic Midrash." *Semeia* 27 (1983): 23-35.
- Meiselman, Moshe. "Women and Judaism: A Rejoinder." *Tradition* 15:3 (Fall 1975): 52-68.
- Millen, Rochelle L. "An Analysis of Rabbinic Hermeneutics: B.T. Kiddushin 34a." In *Gender and Judaism: The Transformation of Tradition*, ed. T. M. Rudavsky, 25-37. New York: NYU Press, 1995.
- Neusner, Jacob. *Sifra: An Analytical Translation*. Atlanta: Scholars Press, 1988.
- _____. *Introduction to Rabbinic Literature*. The Anchor Bible Reference Library. New York: Doubleday, 1994.
- _____. *How the Rabbis Liberated Women*. Atlanta: Scholars Press, 1998.
- Plaskow, Judith. *Standing Again at Sinai: Judaism from a Feminist Perspective*. San Francisco: Harper and Row, 1990.
- Ross, Tamar. "Can the Demand for Change in the Status of Women Be Halakhically Legitimated?" *Judaism* 42:4 (Fall 1993): 478-491.
- Roth, Joel. *The Halakhic Process: A Systemic Analysis*. New York: The Jewish Theological Seminary, 1986.
- Rovner, Jay. "Rhetorical Strategy and Dialectical Necessity in the Babylonian Talmud: The Case of Kiddushin 34a-35a." *Hebrew Union College Annual* 65 (1994): 177-231.
- Schwarzschild, Maimon. "Constitutional Law and Equality." In *The Blackwell Companion to the Philosophy of Law and Legal Theory*, ed. Dennis Patterson, 156-171. Cambridge, Mass.: Blackwell, 1996.
- Steinsaltz, Adin. *The Talmud: The Steinsaltz Edition, A Reference Guide*. New York: Random House, 1989.

- Strack, H.L., and Gunter Stemberger. *Introduction to the Talmud and Midrash*. Translated and edited by Markus Bockmuehl. Minneapolis: Fortress Press, 1992; Second printing with emendations and updates, 1996.
- Umansky, Ellen M., and Dianne Ashton, eds. *Four Centuries of Jewish Women's Spirituality - a Sourcebook*. Boston: Beacon Press, 1992.
- Urbach, Ephraim E. *The Sages: Their Concepts and Beliefs*. Translated by Israel Abrahams, 2d enlarged ed. Jerusalem: Magnes Press, 1979.
- _____. *The Halakhah: Its Sources and Development*. Translated by Raphael Posner. Ramat Gan: Massada, 1986.
- Valler, Shulamit. *Women and Womanhood in the Talmud*. Translated by Betty Sigler Rozen. With a Foreword by Judith Hauptman. Atlanta: Scholars Press, 1999.
- Wegner, Judith Romney. *Chattel or Person: The Status of Women in the Mishnah*. New York: Oxford University Press, 1988.
- Yongeraiz, Benyamin. "Mitzvot ashe she-haz'man garmah." *Beit Yitzkhak*. An Annual Devoted to Studies in Halacha Issued by the Student Organization of Yeshiva R. Isaac Elchanan Theological Seminary. 10 (1961): 85-89. [Hebrew]
- Zavin, Shlom Yosef. "Nashim b'mitzvot aseh." *Torah She-b'al Peh* 12 (1970): 19-25. [Hebrew]

