

# Circle, Arrow, Spiral: Exploring Gender in Judaism

by Miriam Kosman

## Chapter 22

### Witnesses

The same push and pull between two different voices that we discussed in earlier sections of this book can be discerned in the law disqualifying women from testifying in a Jewish court under certain circumstances.

Before we begin to trace this parallel, however, it is important to clarify what exactly this disqualification entails.<sup>1</sup>

In general, the many laws determining the eligibility of witnesses make it clear that the concept of two witnesses is a technical necessity of the court system in which other factors are at play besides credibility. For example, not only must there be two witnesses, but they must have both seen each other. And if there was an invalid witness with them, he invalidates their testimony. While the witnesses can be close friends of each other or the litigant, they cannot be relatives.

Indeed, disqualification of witnesses can be seen as a *gezeirat hakatuv* (a Torah decree that is binding just because it is part of Torah, and not because it necessarily lends itself to human logic). The laws surrounding witnesses are the legal technicalities for making a decision—not necessarily a way to determine truth.

Thus, even if one were to see a man walk into a room with a knife and a venomous look in his eye, hear terrible screaming, and then see the person with the knife walk out of the room leaving a corpse with a knife in its heart, the suspect could not be convicted of murder unless there were two kosher witnesses who actually saw what happened.<sup>2</sup>

Indeed, *Tosafot* makes the point that while some people are disqualified as witnesses because of lack of credibility, others are disqualified for technical

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<sup>1</sup> Most of the explanations about witnesses and women's disqualification in this chapter are drawn from Meiselman, *Jewish Woman and Jewish Law*, 73–81.

<sup>2</sup> See Tractate Shevuot 34a.

reasons that do not reflect on their credibility at all.<sup>3</sup> *Tosafot* brings the example of Moses and Aaron, who would not be allowed to be witnesses because witnesses are not permitted to be related to each other and they were brothers. Quite clearly, credibility in that case would not be the disqualifying issue.

In the same vein, a woman's disqualification as a witness when two witnesses are required by Jewish law does not reflect on her credibility. Proof of this is that in any situation whose purpose is not to convict but to ascertain truth—where one witness is enough—a woman's testimony is valid.<sup>4</sup>

Consider the following interesting situation. *Cheilev*, a type of fat that is prohibited from eating, looks just like regular fat, and the only way to know which is which is to observe which part of the animal it comes from. In a scenario where a person was accused of eating *cheilev* and only a woman knew for certain whether what he ate was *cheilev* or regular fat, the prosecution would depend on her testimony. Since determining the kashrut of an item requires only the testimony of one trustworthy individual, her testimony would be accepted. But, in order to convict him, it would take two kosher (male) witnesses to testify in court that they *had seen* the man eating the *cheilev*. In other words, conviction requires not trustworthiness but the fulfillment of an entire set of technical qualifications.

In support of the fact that woman's exemption does not imply lack of credibility, note that the deaf-mute, the gambler, and mentally disabled person, who also may not testify (but because of their lack of credibility), are not qualified to take an oath in court, while a woman *is* qualified to take an oath.

The second very important point is that a woman's disqualification as a witness does not remove her voice (or the voice of any other technically disqualified witness) from the legal process. While she may not serve as a witness within the technical legality of two kosher witnesses, Jewish law and sensibilities would require that she (and any other technically disqualified witness) be allowed to be heard in court if what she has to say weighs on the situation.

Imagine a scenario where a woman (or one man who was by himself, or two relatives, all of whom are disqualified as witnesses) was witness to a terrible crime. The Jewish court could not convict the suspected criminal based on their testimony, but as a system charged with the welfare of the community and with

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<sup>3</sup> *Tosafot*, Tractate Zevachim 103a.

<sup>4</sup> Tractate Ketubot 72a. See also Maimonides, *Mishneh Torah*, *Hilchot Sanhedrin* 24:1, *Shulchan Aruch*, *Choshen Mishpat* 35:14.

administering justice the court would be allowed, and even required, to listen to her (or to the single man's or two relatives report), determine whether they seem to be telling the truth, and act accordingly to protect society (whether that would involve incarceration or other protective measures).<sup>5</sup> Thus her disqualification, while having practical ramifications, is not designed to silence her or to prevent her from influencing legal proceedings.

## **SO WHY CAN'T SHE TESTIFY?**

As a matter of fact, there is no definitive answer given in the primary sources for the question of why a woman can't testify. Some categories of people cannot be witnesses, and the reasons aren't always intuitive even when we assume they are. We may speculate that relatives are not allowed to be witnesses because their loyalties might interfere with their desire for truth, but then we are left wondering why close friends are permitted to be witnesses.

Various possibilities have been suggested to explain women's disqualification, but they remain speculation. It has been suggested that being grilled and cross-examined might be in conflict with a woman's innate modesty—much as a king is disqualified as witness because it does not befit his honor to be cross-examined. Others wonder if the reason women are disqualified is similar to her exemption from time-bound mitzvot—the Torah did not allow her to testify because then she would be obligated to engage in this potentially time-consuming commitment, despite other familial obligations.<sup>6</sup>

While these considerations may be part of the equation, our androgynous ideal points to a more holistic explanation. Witnesses in court demand a very specific orientation. It is an orientation which is necessary in a Jewish court of law, but it is not necessarily the most morally developed.

Testimony in court requires entering into a focused, true-or-false mode. When asked, “Did you see Joe kill Bob?” the appropriate answer in court is either “yes” or “no.” But there is a perfectly legitimate answer that is neither a yes nor a no—it is an answer that takes into account much more than the black-and-white, justice-oriented end result.

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<sup>5</sup> See *Derashot HaRan* 11 for the role of a king vis-à-vis the court system in creating a stable society.

<sup>6</sup> Meiselman, *Jewish Woman*, 78–79.

“Yes, Joe did kill Bob, but let me explain why he did it. If you would have seen what Bob did to Joe first...or how much pressure Joe was under...” This second answer represents a more holistic, relationship-focused perspective of the circle/female force. Yet in a courtroom, it is not a valid response.

A fascinating example of the clash between perfect justice and a more holistic perspective is found in the classic *Les Miserables* by Victor Hugo. Inspector Javert, who demands that Jean Valjean be punished for the “crime” of stealing a loaf of bread for his starving family, represents the yes-or-no, “justice” mode. There is only one acceptable answer to the question “Did you or did you not steal?” Yet most people resonate with Jean Valjean, the supposed criminal, and sense that demanding this kind of fact-oriented justice is cruel and unjust. This example is not relevant to Judaism because stealing to save a life is permitted—may even be required—and the horrific punishment that Victor Hugo wanted to impose is completely out of line with Jewish law, but it does illustrate the crash between these two forces and how crucial it is to have a balance between them.

## **DIFFERENT BUT EQUAL**

Carol Gilligan, in her groundbreaking book *In a Different Voice*,<sup>7</sup> uses reactions to Lawrence Kohlberg’s famous example of a classic moral dilemma to explore gender differences in moral development. Kohlberg’s moral development theory did not address differences in gender, but Gilligan used his gradations of moral development as a springboard to probe the differences between gender in attitude towards morality.

Here is the story: A man named Heinz has a wife who is dying, and he can’t afford to buy her medicine. Would breaking into the pharmacy to steal the drug that could save her life be the right thing to do?

Gilligan uses two children she interviews, a boy named Jake and a girl named Amy, to explore the difference between the male and female voice in issues of morality. While Jake describes the dilemma as a “sort of math problem with humans,” and addresses the issue by analyzing the prioritizing of values, Amy takes a completely different tack. Instead of trying to figure out if stealing is right or wrong, she wonders if Heinz might end up in jail for stealing, and then who

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<sup>7</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Boston: Harvard University Press, 1982), 26.

would take care of his wife? She asks if perhaps Heinz could borrow the money or talk to the pharmacist and see if he can come up with some kind of solution.

The first step in taking this problem abstractly is to accept its terms. Alternatives are sharply defined: to steal or not to steal. This sharpness also characterizes some answers that are standardly proposed by the people presented with the dilemma. For example, respondents typically cite the principle that a life is worth more than property.

When a dilemma is abstractedly defined and its abstractions accepted, the listener is not meant to consider alternatives that fall outside the stated terms. It is as if no social or personal options exist—the husband can't talk to the druggist, the wife doesn't consider going to a public hospital where drugs are available. Nor is there any mention of consequences. Respondents aren't meant to ask what will happen to Heinz, what legal or psychological or moral trial will he undergo if he steals or lets his wife die?

Amy doesn't get it. She doesn't realize that the dilemma is meant to foreclose options, so that no "extraneous" considerations blur the picture.

While Jake sees the problem in terms of conflict between Heinz and the pharmacist, or Heinz and his value system, Amy sees the world through the lenses of interdependence, relationships, and communication.<sup>8</sup>

## **A WORLD OF TRUTH**

Is one perspective right and the other one wrong? The purpose of the court system is to determine a course of action based on the legal structure of Judaism. But living a rich, harmonious life, as we all know, has much less to do with who is right and who is wrong, and much more to do with how we relate to each other.

To look at a situation abstractly is to make a judgment about a situation or to take a course of action on the basis of such a judgment without considering the "human consequences" of that course of

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<sup>8</sup> Ruddick, *Maternal Thinking*, 93.

action, the specific and detailed effects which that course of action might have on other human beings. Or it is to make a judgment which is “distanced” in some way from the actual or potential experienced reality which would be the consequences of such a source of action. Concreteness requires that one experience, or vividly imagine such consequences,<sup>9</sup> either to oneself or to others, and judge on the basis of that awareness.<sup>9</sup>

Excusing a woman from participating in a process which on some level betrays her very essence may, at its deepest roots, be a validation of the female perspective. Yes, justice is important and truth must be ferreted out, but you, woman, who bring to the world the gift of the circle—the gift of interdependence and the gift of relationships—do not have to participate in the process. We respect your voice enough that we don’t insist on dragging you into the boxing ring.

In Jewish law, if one is able to testify, one must—there is no option of choosing whether you feel comfortable testifying or not. By disqualifying a woman from the whole process, there seems to be a message here: the bare facts may be relevant in a court of law, but they are not the whole truth—and those who have access to that “other voice” should not be required to distort it.

Box:

Though a woman is disqualified as a witness when two witnesses are required by Jewish law, her credibility is not in question. Proof of this is that when the purpose is to determine truth—not to convict—her word is trusted. In addition, while others who have been disqualified as witnesses because of their lack of credibility are not allowed to take an oath in court, she is.

Testimony in court requires entering into a focused, true-or-false mode. This is because the purpose of the court system is to determine a course of action based on the legal structure of Judaism. But living a rich, harmonious life has much less to do with who is right and who is wrong, and much more to do with how we relate to each other.

Excusing a woman from participating in a process that silences her more-relationship-than-justice focused perspective maybe an acknowledgment of the vested interest Judaism has in not destroying her voice and perspective.

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<sup>9</sup> Jean Grimshaw, *Feminist Philosophers*, 205.

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<sup>i</sup> אור חדש: כי האשה גובר בה כח המדמה.