

Women, *Tefillin*, and the Halakhic Process¹

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Preface: *This is the third time in the last few years that I've written or co-authored an article in light of a raging debate that followed controversial actions within the Orthodox community. The first, "Homosexuality and Halakha: Five Critical Points," published in the Jewish Press, was written after a YU student panel on Orthodox and homosexuality. The second, "Orthodox Women Rabbis? Tentative Thoughts that Distinguish Between the Timely and the Timeless," published in Hakirah, was written after the controversy over the ordination of the first Rabbah. In both cases, the goal was to set a proper halakhic framework for continued dialogue within the Orthodox community about controversial matters, with the belief that no serious conversation can take place unless it is rooted in halakha. This latest controversy, regarding the donning of tefillin by women, which has largely revolved around questions of gender and rabbinic authority, has only further convinced me of the necessity of rigorous halakhic discourse to begin all discussions. Yet it has also made me acutely aware of the fact that there is an additional need to respond to broader intellectual critiques and challenges (found even within the Orthodox community) regarding sexuality and gender within these contexts. Elsewhere I have respectfully deemed a [different gender-based argument](#) as "unproductive," and my hope is that in the future I will be able to expand this draft to properly address those types of concerns, in addition to more traditional halakhic questions. Yet I remain utterly convinced that the current conversation needs to be re-calibrated (or restarted) around halakhic discourse and must ultimately include something like the analysis offered below. As such, I hesitantly offer this initial draft with the hope that it will help reframe the discussion, noting my great fear that the tempo and tone of contemporary debates in the internet age does not allow for sufficient feedback, reflections, and corrections before publication. שגיאית מי יבין. At the very least, I hope to harness the new technology by welcoming feedback and suggestions toward the final draft at [Facebook.com/RabbiShlomoBrody](https://www.facebook.com/RabbiShlomoBrody) or shlomo.brody@facebook.com*

Introduction

Much discussion has arisen in the past few weeks about the permissibility of women donning *tefillin*. This brief essay will attempt to survey the halakhic material and providing clarification regarding the historical relationship between women and *tefillin*. While the essay will offer various halakhic approaches to this question, it is not intended to address the specific decision that engendered this controversy, of which I have no stated opinion.² Instead, its main goal will focus on how to properly examine the historical development of this law and to elucidate proper procedure in contemplating potential changes within *halakha*.

When dealing with questions of contemporary law and gender (or any other halakhic dilemma), our approach should encompass case-by-case analysis of each *halakha*, exploring the law from the Talmud through *rishonim* and *acharonim* (medieval and modern commentators) until contemporary *poskim* (legal decisors). We may then see the nature of the law, explore the rationales and interpretations given to it over the eras, and ask whether an

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² This is for two major reasons: 1) I have not spoken with either of the two heads of school, who are both very respected educators who I personally like and respect very much, and it would be entirely inappropriate for me to comment on anything without speaking to them. 2) School situations, as I will note toward the end of the paper, raise unique circumstances that require additional thoughts, and in any case I cannot pass judgment on a situation with which I am not familiar.

argument can be made to expand the ritual options for women, should the community desire such a change. It is this model which I propose in the following pages.

In this regard, the essay will present various models from different eras with rabbinic literature regarding women and *tefillin*. In an attempt to keep various rabbinic positions clear, I have used different numerology to enumerate halakhic positions for different eras. Arabic numerals 1-3 have been used for the rabbinic era, the letters a-c for medieval opinions (*rishonim*), and roman numerals i-vi for later authorities (*achronim*).

I. Women and *Tefillin*: 3 Primary Models in Talmudic Literature

Talmudic literature includes three primary models toward the possibility of women donning *tefillin*:

1. Women are *obligated* to wear *tefillin*: This is the opinion attributed to two prominent *tannaim*, R. Meir and R. Yehuda, as cited in multiple Talmudic passages (see, for example, *Kiddushin* 35a and *Eruvin* 96a-b). According to the final construction of their rationale given in the Gemara, they believed *tefillin* are not positive time-bound commandments and therefore women are obligated in this commandment.
2. Women are *exempt* from wearing *tefillin* because it is a positive time-bound commandment: This is the stated position of the *mishna* in *Brakhot* (20a-b) and elaborated upon by the Talmud in *Masekhet Kiddushin* (34a). According to this approach, *tefillin* fit into the general prescriptive rule regarding such commandments (like dwelling in a sukkah) that women are exempt.³
3. Women are *exempt* from wearing *tefillin* because only people who are obligated in the mitzvah of learning Torah (*Talmud Torah*) are obligated in *tefillin*. This is the stated rationale in the *Mekhilta* and the *Yerushalmi* (*Brakhot* 3:2). A later compilation of Palestinian origins, the *Pesikta Rabati*, also quotes the *Yerushalmi*'s account. (The analogy is also stated in the *Bavli Kiddushin* 34, but is a highly marginalized consideration in that passage).

According to approach #1, women are obligated to wear *tefillin*.

According to approach #2, they are exempt but may wear *tefillin*, as seen from their refusal to protest the actions of Michal the daughter of Shaul, who donned *tefillin* "and the rabbis did not reprove her" (*Eruvin* 96). This is in accordance with the Talmudic position, deemed normative within subsequent Jewish law, that there is no general objection to performing mitzvot when not commanded.

According to sources that cite approach #3, women are exempt but may be allowed to wear *tefillin*. The sources that use this model report conflicting traditions about the response of the Sages to Michal's actions. The *Mekhilta* states that the Sages did not protest, while the *Yerushalmi* and the *Pesikta* record that position and then Amoraic rejections of it.

I stress the importance of this schematization because contrary to popular impression, the dominant position within the Talmudic literature – and particularly within the Babylonian Talmud, the accepted authoritative legal text of the halakhic community for well over a

³ As the Gemara itself notes, there are many counter-examples to this rule, and women are indeed obligated in many positive time-bound positive commandments, a fact which I hope to discuss in the more comprehensive version of this article.

millennium – is that women can indeed don *tefillin*, either out of obligation (model #1) or out of choice (model #2). Even in model #3, the fact that both positions are recorded suggests that they were reached for reasons independent of the *Talmud Torah – Tefillin* connection.

II. Normative *Halakha* Assumes that Women are Exempt from *Tefillin* because it is a Positive Time-Bound Commandment

Yet ultimately, the normative position accepted within the *halakha* was model #2 – women are *exempt* because *tefillin* is a positive time-bound commandment. As such, this became the deciding rationale of the case, what legal thinkers call the *ratio decidendi*. The other models remained academically interesting, but for legal purposes became the *obiter dicta*, arguments that were not essential to the decision and was not deemed to establish any logical precedent for future deliberations on this question. Law evolves, and while in theory those models might have become dominant, Jewish law went in a different direction.⁴ As such, at least with regard to the exemption of women from donning *tefillin*, the connection between Tefillin and Talmud Torah became largely sidelined in subsequent rabbinic literature.

Some legal theorists have called this process of determining the deciding rationale of a disputed ruling the "path-dependence" of the law: when certain precedents have been set, the path of subsequent legal discourse is determined by this logic. Later decisions thus rely on (and become restrained by) this earlier decision, and legal change becomes difficult except in limited time periods when new legal issues or crises arise. Subsequent legal discussion, therefore, revolved around the question of whether women could perform positive time-bound commandments in general and tefillin in particular.

III. May Women Voluntarily Wear *Tefillin*? Three Medieval Approaches

Having established the Talmudic approach to this question, let us now turn to how medieval scholars dealt with the Talmudic legacy.

There are three major approaches to this question in medieval literature:

- a) Women *may* wear *tefillin* like all other positive time-bound commandments
- b) Women *may not* wear *tefillin* for ancillary reasons.
- c) Women *may not* wear *tefillin* for reasons relating to other requirements for donning *tefillin*.

a) As noted earlier, model #2 was seemingly the dominant position that emerged from the *Bavli*, and as such was adopted by the majority of medieval commentators. The vast majority of medieval figures believed that in general, women could legitimately choose to positive time-bound commandments. In fact, they cited the example of Michal as a strong precedent.⁵ Consequently, many scholars explicitly stated that women could indeed don *tefillin* – these include the *Rashba* (*Shu"t Ha-Rashba* 1:123), the *Sefer Ha-Chinuch* (*Mitzvah* 421), and R. Shimshon of Coucy (known as the Sar me-Coucy, cited in *Haghot Maimoniyot Tzitzit* 3:9),

⁴ Some later authorities occasionally mention model #3 when they discuss the origins of women's exemption from *tefillin*, but it does not play a role in their halakhic rulings whether women can in fact wear *tefillin*. The connection between *tefillin* and torah does play a role in other halakhic contexts, only further highlighting its irrelevance for the discussion regarding women, where it does not play a role.

⁵ They did debate whether they could also recite the complementary blessings. This is a major disagreement, with Rabbenu Tam being the most famous advocate for women to be permitted to recite the blessings, and Maimonides opposing him. This remains an ongoing dispute in contemporary times, with Ashkenazim following Rabbenu Tam, and Sephardim divided over the question.

who asserted that the refusal of the rabbis in the Talmud to protest Michal's actions indicated their approval of this pious act. There were rumblings within medieval literature⁶ that the Sages did not protest her action but also did not approve it (which is why the Talmud used the negative formulation – "they did not protest"). This strand of thought, however, gained little traction.

As my friend the historian Prof. Elisheva Baumgarten has noted in a forthcoming book,⁷ we have little explicit evidence of women actually donning *tefillin*. One notable exception is recorded by Rabbi Avigdor Ha-Tzarfati (13th century Vienna),⁸ who notes that a few pious women in his time period donned *tefillin*. Nonetheless, many decisors argued that women could indeed don *tefillin*, and this is the opinion which is implicitly recorded by Rabbi Yosef Karo in the Shulchan Aruch (OC 38:3).

b) A second strand emerged in medieval times which argued that women could not don *tefillin* for ancillary reasons, even though they agreed that women could generally choose to perform time-bound positive commandments. At least two rationales varied for this position, noted in the endnote.⁹ We will not focus on them because these positions received almost no attention historically.

c) A third position contends that women may not wear *tefillin*, even though they generally should be able to perform this positive time-bound commandment, because they do not meet a different unique requirement for this commandment. This position was initially contemplated by the famed Tosafist, R' Yitzchak of Dampierre (*Tosafot Eruvin* 96a d.h. *Michal*), as an explanation for the *Pesikta*, and was later adopted and expanded by R. Meir of Rottenburg (Maharam). R"l, trying to explain the opinion recorded in some Talmudic literature (like the *Pesikta*) that the Sages disapproved of Michal's action, suggested that this was because women may not maintain a "*guf naki*" (body hygiene), classically understood to prohibit flatulence and other hygiene violations (according to *Bavli Shabbat* 49a, but see below). R"l did not definitely or unambiguously adopt this position. It was Maharam who explicitly adopted this ruling (but without explicit reference to the *Pesikta*) and expanded this concept, as we shall see. Maharam writes:

Women are exempt from *tefillin* and *tzitzit* because both are positive time-bound commandments. After all, *tefillin* are not donned on the Sabbath and *tzitzit* are not worn at night. However, one should not protest if [women] wrap themselves in *tzitzit* and recite the blessing for them (because [women] can take on obligations, as stated

⁶ Cited in *Ramban Kiddushin 31a* and *Chidushei Ha-Ran Rosh Hashana 33b*.

⁷ *Practicing Piety in Medieval Ashkenaz: Men, Women and Everyday Religious Observance* (Philadelphia: University of Pennsylvania Press, forthcoming fall 2014). See also the chapter on Maharam in Avraham Grossman, *Ve-Hu Yimshol Bakh?*, Merkaz Zalman Shazar, p. 318-319. He cites in full the statement of Rav Avigdor Ha-Tzarfati.

⁸ See his *Perushim uPesakim, Parashat Emor*, #213, p. 172. The myth that Rashi's daughters donned tefillin is debunked in "[What's the Truth about Rashi's Daughters?](#)", *Jewish Action*, Summer 2011. See his discussion about other historical reports.

⁹ Rabbi Isaiah of Trani II (the Riaz) offered an interesting explanation which asserted that the donning of *tefillin* by women would appear as if we were rejecting the authority of the Sages in their interpretations of the Torah (*Shiltei Giborim* Rosh Hashanah, 9b in Rif). Another contended that the contact of *tefillin* with women's hair might be problematic since the normally covered hair is deemed as *ervah* in consistency with the position that women's hair should be covered for modesty reasons (*se'ar ishah ervah*). In cases where the performance of an optional act might lead to any element of a transgression, we instruct women not to perform this mitzvah (*Haghot Maimoniyot Hilchot Tzitzit* 3:9). I should note that I have, to date, only found one statement of clear evidence that connects the prohibition of women donning *tefillin* and the medieval practice of women not entering a synagogue while they are a *niddah*, as discussed in Rama OC 88:1. It is, however, relatively late, found in *Eshel Avraham Tanina* to Rama OC 38:3. Medieval historians have told me that they have not found medieval sources connecting these issues. More thought and research is required on this question.

in BT Kiddushin [32a–b]). **However, they should not put on tefillin because they don't know to keep themselves pure (*tahara*).**¹⁰

As such, according to Maharam, women may choose to wear clothing with *tzitzit* but cannot don *tefillin*. Although it is not entirely clear why he believes this to be the case, his language (referring to *tahara*) seems to indicate that the concern is for menstrual blood or other discharges. The term that is used when he is cited by the *Kol Bo* – "*neki'ut*" (cleanliness) – might indicate dirtiness that women might encounter from both menstruation and childcare (e.g. in an era without proper diapers).¹¹ The nature of his ruling, moreover, is somewhat unclear: is he declaring this to be a bona fide normative law, or just a general directive based on contemporary observation? Does he have a source for this opinion? These questions will be asked repeatedly throughout the generations, as we shall see. In any case, the position of Maharam was adopted by a few late Ashkenazic figures and ultimately by R. Moshe Isserles, the Rama, in his glosses to the Shulchan Aruch (OC 38:3).

Some may immediately wonder: If Maharam is so concerned with *guf naki*, then why do we allow boys or young men to wear *tefillin*? This, in fact, is a reasonable question, and the answer given by Maharam (*Tshuvot Maharam* 1:142) and those who followed him¹² represented a deep departure from Talmudic law. We *don't* allow minors (below the age of bar mitzvah) to wear *tefillin*, and restrict it from being worn until they are more mature. This is a remarkable conclusion, however, since the Talmud (*Sukkah* 42a – see also *Sukkah* 26b) seems to explicitly state that fathers must purchase *tefillin* for a *katan* (i.e., *minor* children below the age of Bar Mitzvah), as they similarly do for a *tallit katan* / *tzitzit*.¹³

As such, Rabbi Yosef Karo and other authorities rejected this ruling of Maharam because they believed that we should train young men to control their bodies and thoughts as a part of their education, and that exempting them from this commandment might cause them to entirely neglect it even at a later stage. In fact, R. Karo (OC 37:4) argues that we should continue to follow the Talmudic dictum which would allow minors to wear *tefillin* even below the age of Bar Mitzvah, on condition that they can maintain the *guf naki* requirements.¹⁴ This continues to be the practice in some Sephardic circles, who start a year or two before the boys become 13. The Rama, however, once again, followed the strict position of the *Maharam* and ruled that we only allow minors to wear *tefillin* once they reach their *bar mitzvah* day (but not beforehand) which, as the Bach explains, was a position that he adopted because of *guf naki* considerations. In short, the Rama adopted a position which asserted that we don't allow members of these two groups (women and minors) who are not obligated in the *mitzvah* of *tefillin* to choose to put on *tefillin* because of *guf naki* concerns.

¹⁰ Translation from Elisheva Baumgarten's forthcoming book. Maharam's teaching is recorded in his *Psakim* #34 (volume 1 in Mossad Harav Kook edition) and is also recorded by his student Rabbi Shimshon ben Tzadok, *Sefer Tashbetz*, #270. (In a new edition, it is #13).

¹¹ As Prof. Yehuda Galinsky emphasized to me, the attempt to interpret statements by Maharam is exceedingly difficult since his teachings were largely recorded by his students and, moreover, they frequently differ in their formulation of his position.

¹² *Kol Bo* Siman 21 and the ruling of the Maharil, Rabbi Yaakov ben Moshe Moellin, *Minahgim*, Hilkhos *Tefillin*, #10. Maharil even discusses the idea that one should not wear *tefillin* until they are married, although it's not clear from the context what age he thinks young men become betrothed. It is possible that he believes that this is true even after *bar mitzvah* age.

¹³ See *Bet Yosef* OC 37:3 and 38:4

¹⁴ In fact, even in the 17th century, the Bach (OC 37:3) ruled that minors may begin wearing *tefillin* at an earlier age, with some even allowing it from the age of 10 (*Be'er Hetev* 37:4). This was on the condition, however, that they are mature enough to learn Torah and can understand the importance of giving respect to *tefillin*, including only wearing them while they are careful for *guf naki*. Many Sephardim continue with this practice today (*Yabia Omer* OC 6:3). Most Ashkenazim, however, only begin wearing a month or two before they become a bar mitzvah (Aruch Ha-Shulchan 37:4).

IV. Where Did *Guf Naki* Come From? The History of *Tefillin* Observance

The position of the Maharam regarding women was also challenged by some authorities, including Ashkenazic figures such as the *Orchot Chaim* (*Hilchot Tefillin* #3, 14th century Provence), who wondered why the Talmud itself did not mention the factor of *guf naki* regarding women. This, indeed, is a serious challenge, and led the *Orchot Chaim* to side with the Rashba and others that women may don *tefillin*.

In response, R. Yosef Karo suggested that perhaps he was adopting the position of the *Pesikta*, as was interpreted by the R"l. Yet if this was Maharam's logic, this is a difficult jump – to rule like the *Pesikta* against the *Bavli* – and seemingly led R. Yosef Karo and others before him to reject this opinion in his *Shulchan Aruch*.¹⁵ As we shall see, many who followed the position of Maharam gave different answers to this question and were divided whether or not his position was based on the *Pesikta* (which, as we noted, was not actually mentioned by Maharam).

How did *guf naki* emerge as a reason to forbid women from donning *tefillin*? Interestingly, the notion of *guf naki* is mentioned in the *Yerushalmi* and *Pesikta* as an explanation for why some men do not or should not don *tefillin*. This is one of the many historical references, well-documented by Rabbi Prof. Ephraim Kanarfogel¹⁶ and others, to the fact that the mitzvah of *tefillin* was tragically neglected in many locations throughout the early medieval period and likely earlier. This problem went well beyond not following the Talmudic practice of wearing *tefillin* throughout the day, but included not wearing *tefillin* at all – during prayer or any other time of the day. The problem was so bad, in fact, that in some Geonic writings, it was discussed whether one may publicly don *tefillin* since it would be seen as act of religious hubris (*yuhara*).¹⁷ As Rabbi Menachem Kasher has documented,¹⁸ this deviation received many explanations: it was necessary to hide from persecutions, people believed that *tefillin* only applies to Torah scholars or exceptionally righteous people, that the commandment in the Torah was meant to be a metaphysical or metaphorical statement, that people were embarrassed to wear them publicly because of its appearance, and finally, that the Jewish people are lazy.

One of the more common explanations was that people (errantly) felt that if they feared maintaining the *guf naki* requirements, then they should not don *tefillin* at all.¹⁹ Focus on this factor was natural since as opposed to many of the other justifications or explanations, the requirement of *guf naki* to don *tefillin* was a normative mandate found in both the *Yerushalmi* and the *Bavli*. This term, however, received various interpretations. In some sources, like the *Pesikta*, it refers to a person's spiritual piety, i.e. a person should not wear *tefillin* if they are not righteous because it appears that they are tricking people and it is an act of false piety. In other places, such as *Shabbat* 49a, the term clearly refers to bodily hygiene,

¹⁵ For purposes of clarity, we should stress that while the *Bet Yosef* invokes the *Pesikta*, he does so only for the purposes of explaining the position that would state that women should not don *tefillin*, even though they may normally perform positive time-bound commandments, based on *guf naki* considerations. Neither he nor the R"l, however, are invoking the *Pesikta* to revive the *tefillin-Talmud Torah* model (model #3 above).

¹⁶ "Rabbinic Attitudes toward Observance and Non-Observance in the Medieval Period," in *Jewish Tradition and the Non-traditional Jews*, ed. J. J. Schacter (Montvale, N. J., 1992), 3-35.

¹⁷ See, for example, *Teshuvot Ha-Gaonim Ha-Hadashot* (Ofek) #161 and the sources discussed in the articles by Rabbi Kasher and Prof. Kanarfogel.

¹⁸ *Torah Shlemah* Vol. 12 p.260-268

¹⁹ Early opposition to this errant justification can already be found in the 8th century. See as well *Tosafot Shabbat* 49a.

avoiding flatulence, and cleanliness,²⁰ and by the 13th century this explanation became the dominant potential justification for not wearing *tefillin* in many halakhic sources.

During this time of relative upheaval for the observance of *tefillin*, in which many neglected the *mitzvah* entirely, the scholarly consensus emerged that men must wear *tefillin* but only during a certain part of the day. The law then essentially asserted, "Men must wear *tefillin* daily only when we are confident they can maintain *guf naki*," which became manifested with many wearing *tefillin* but only during the limited period of *tefillah*, when they could be expected to maintain proper decorum, in both mind and body. *Guf Naki*, therefore, became the dominant explanation for why men (errantly) didn't wear *tefillin* at all and (correctly) don't wear it all day, with the consequent solution to wear *tefillin* only during *tefillah*.²¹

Maharam was certainly one of the many *rishonim* who in this context was very sensitive to the *guf naki* factor. He extended this consideration to assert that A) Given their menstrual cycles (and perhaps their childcare duties, in the context of a lack of running water and advanced female hygiene products and diapers), women should not don *tefillin* out of concern for *guf naki*. B) Minors should not don *tefillin* since they do not maintain proper mental and physical decorum and therefore should not try until they reach the age of 13.

How do we explain this change in the law (according to these authorities) given that the Talmudic record (at least as recorded in the *Bavli*) seemingly asserts differently? Let us recall our explanation earlier of the "path-dependence" of the law, which asserted that certain precedents restrain change - unless new legal issues or crises emerge. Because of the historical neglect of the law, a new series of discussions were held on this statute, many of which focused on the concept of *guf naki* and led to the limitation of donning *tefillin* to prayer. According to Maharam and others, this focus also came (through ambiguous methods discussed below) to limit the donning of *tefillin* by women and minors.²²

However one explains this phenomenon, the problem with these conclusions is that they went against the seemingly clear directives of the Talmud *Bavli*. With regard to minors, some asserted (*Ba'al Ha-Ittur*) that the Talmud in fact was only stating to give your bar-mitzvah age child to wear *tefillin*, an interpretation which many believed was forced since *katan* is the term always used for minors. With regard to women, R. Yosef Karo suggested that Maharam was following the *Pesikta*, but he himself ruled against the Maharam. As we shall see shortly, many authorities followed the ruling of the Maharam but gave a different explanation as to how we can reconcile this ruling with the *Bavli*.

²⁰ See, for example, the requirements listed by Meiri Brakhot 14b d.h. *mah*.

²¹ You can see this notion in many 13th century Ashkenazic texts, such as the preacher Rabbi Moshe of Coucy's *Smag* (*Aseh* #3), in which he exhorts his listeners to obey the mitzvah of *tefillin*. In that context, he assures them that the concern for *guf naki* can be overcome:

עוד זאת דרשתי להם כי מה שאמרו רבותינו (שבת מט, א) תפילין צריכין גוף נקי כאלישע בעל כנפים שלא ישן ושלא יפיה בהם, זהו באדם שמניחן כל היום כולו כמצותן פן ישכחם עליו ויעשה בהם דבר שאינו הגון, אבל בשעת תפילה אין לך רשע שלא יהא ראוי לתפילין, קל וחומר מספר תורה שהוא מקודש יותר שיש בו כל התורה כולה ובתפילין אין בו כי אם ארבע פרשיות שהם בתוך עור, והכל אוהזין בספר תורה בשעת תפילה שהכל יכולין להתנהג בטהרה בשעת תפילה:

²² As noted later, I am not surprised that the requirement for *guf naki* during prayer was first stated by the Rosh, a student of Maharam. See *Tur* 80:1.

V. Can We Abandon the Position of the Rama?

At this stage, some might argue that despite our full respect for the Maharam and the Rama, we can abandon this position in favor of the position held by *Rashba*, the *Chinuch*, Rabbi Shimshon of Coucy, the *Orchot Chaim*, Rabbi Yosef Karo and others who allowed women to don *tefillin*, just as Michal did. Indeed, this approach was taken by Rabbi Eliezer Berkovits z"l, who in his work *Jewish Women in Time and Torah* (p. 73) argued that women may reject the concerns for *guf naki*, which are anachronistic because of greater educational opportunities and hygiene advances, and simply follow the position of Rabbi Yosef Karo.²³

The notion of abandoning the position of the Rama (model c above) to follow Rabbi Karo (model a above) is not unprecedented,²⁴ especially in cases when prominent later figures rejected the Rama. Yet in this case, this seems to be a far-reaching position, because in the subsequent years following the debate between Rabbi Karo and the Rama, almost every known *posek* has ruled that the law follows the Rama and we protest if women desire to don *tefillin*. This includes not only Ashkenazic decisors, but also Sephardic scholars, some of whom agreed to Maharam's argumentation (*Birkey Yosef* 38:1) and others who were influenced by later kabbalistic writings which rejected the notion of women donning *tefillin* for mystical reasons.²⁵ Once again, the "path-dependence" model helps us to understand this phenomenon. In the 13th century, the Jewish map included scholars prohibiting women from wearing *tefillin* (Maharam), allowing women to don *tefillin* (Rashba), and even a few pious women actually donning *tefillin* (R. Avigdor Ha-Tzarati). By the 17th century, however, a major shift occurred, and in the subsequent centuries, all Jewish decisors (more or less, as seen below) ruled that women should not don *tefillin*.

Jewish law, as liberal Orthodox figures certainly contend, can and does evolve. In this case, it evolved to almost universally ban women from donning *tefillin*. In fact, the position was so universal that one prominent 19th century decisor, the Maharam Schick (*Shu"t Maharam Schick* OC 1:73), argued that women who don *tefillin* would violate the prohibition of *mihzei ke-yuhara*, acting in a manner that would be perceived as religious pretentiousness. Others, as documented below, further asserted that *tefillin* had become male-clothing, *begged ish*, and therefore women who donned *tefillin* would additionally violate the Biblical prohibition of cross-dressing. As such, even if one would believe that it would be positive to allow women to don *tefillin*, the notion of choosing to abandon 500 years of halakhic rulings seems somewhat far-reaching for those who respect the historical development of *halakha*. This might be especially true in cases where there is no widespread consensus that contemporary exigencies require a change in this law, as I will discuss later.

VI. Did All Later Authorities Absolutely Ban Women from Wearing Tefillin?

That said, it pays to closely examine the reason that different post-Rama decisors gave for prohibition women from donning *tefillin*. While they might have reached the same conclusion, the rationale which they give can lend itself to different implications. In particular, we should examine how these authorities resolved the tension that Maharam's

²³ It should be noted that in general, Rabbi Berkovits z"l had little respect for the codification of the *Shulchan Aruch* when it contravened his view of Jewish ethics, as I hope to show in a forthcoming study of his legal philosophy

²⁴ It is certainly not the equivalent of abandoning the Bavli's position (Model #2 above) to adopt the position of R. Meir and R. Yehuda (model #1), which would contravene the final decision of the Bavli, a text that has been canonized within Jewish law.

²⁵ See Rabbi David Yosef's *Halakha Berura* OC 38:1.

ruling raises with the conclusion of the *Bavli* that women may indeed wear *tefillin*, as exemplified by the fact that the Sages did not protest Michal's actions.

I should stress, however, that my goal is to write for the sake of Torah Study (*halakha ve-lo le-ma'aseh*) and to clarify how halakhic change may theoretically occur, as opposed to the methods suggested earlier. As I will explain later, a very strong argument could be made that the *halakha* should not change in this case, and even if one thinks it should change and believes that a sound halakhic argument could be made, I would not do so without the approval and leadership of a bona fide *posek*. I am a firm believer that halakhic changes should occur under the guidance of major scholars, which I am certainly not. Nonetheless, it is important to explore, from a methodological perspective, the arguments that one might make both for and against halakhic change, given the various interpretations of the Maharam's position in the post-Shulchan Aruch era.

There are 6 major positions in the post-Rama era regarding women wearing *tefillin*. It is at times difficult to interpret which decisor falls into which camp, as some of the texts are a bit cryptic. I will not elaborate on careful read of every major figure because this is not the forum and I hope that this will be elaborated upon in a follow up essay or by wiser, more distinguished scholars, who are also thinking deeply about these questions. Instead, I will try to delineate 6 representative positions,²⁶ identify the implicit questions that bothered them, and then discuss the implications for pious women to don *tefillin* in our era.²⁷

Model i: To understand the different interpretations of the Rama's ruling, we begin with the claim of the only prominent commentator to the Shulchan Aruch who explicitly challenged the Rama: R. Shmuel ben Yosef of Cracow, the author of *Olat Tamid* (OC 38:4), a relatively early commentator to the Shulchan Aruch who wrote in the 17th century.²⁸ The *Olat Tamid* interpreted the Rama as adopting the opinion of the *Pesikta* in light of the concern for *guf naki* (i.e. the interpretation of the Maharam suggested by the *Bet Yosef*). Yet he challenges the Rama since this concern was not raised in the *Bavli*, which only stated that women were merely exempt because *tefillin* is a positive time-bound commandment, and the *Bavli* further records that the Sages did not protest against Michal's actions. He hesitantly answers that the *guf naki* rationale was not offered in the Talmud because that wouldn't explain the exemption of slaves (who can maintain *guf naki*). Therefore the rationale of positive time-bound commandments was stated to cover both women and slaves, even though *guf naki* remains an additional issue for women. Yet the *Bavli* clearly asserts that this problem can be overcome, since the Sages did not reprove Michal.²⁹ As such, he asserts that any woman who knows that

²⁶ In the footnotes I will also add other initial thoughts regarding some significant scholars. Since this is only an initial draft, and I want to get feedback from other scholars, I have largely only cited passages that can be found in the most recent versions of the Shulchan Aruch, which include collations of less available commentaries.

²⁷ The careful reader will notice that I do not elaborate upon the position of the *Mishna Berura*. In MB 38:13, he simply states the explanation that women are not fastidious, which is likely a quotation of the first words of the Magen Avraham. Yet it is interesting that he does not quote the continuation of the Magen Avraham, and the logic given is equivalent to the Taz (which might very well be the same). His actual rulings on *tefillin* regarding those who are generally exempt is a bit of a quagmire since there are numerous typographical errors in the few notes that he offered to this question. See MB 38:12-13, MB 37:12, and *Bi'ur Halakha* 39:3 d.h. *kasher*. In an early draft of a forthcoming article, Rabbi Michael J. Broyde notes that scholars missed the fact that the *Mishna Berura* was regularly citing, amongst others, the *Olat Tamid* (also known as *Olat Shabbat*) since a typographical error led to the writing of *Tosafot Shabbat*, as opposed to *Olat Shabbat*. (This has now been corrected, at least partially, in some of the newer editions of the *Mishna Berura*). I am thankful to Rabbi Broyde for sharing this draft with me.

²⁸ Magen Avraham's glosses to the Shulchan Aruch regularly critiqued and ultimately overshadowed *Olat Tamid*'s position. Fortunately, the *Olat Tamid* has now been properly printed in one of the newest printings of the Shulchan Aruch, and one can more correctly understand the Magen Avraham (as in this case) once one has seen the statement of the *Olat Tamid*.

²⁹ See *Bi'ur Halakha* 39:3 d.h. *katav*, who states that the *Olat Tamid* believed that Maharam's ruling was a "*chumra be-alma*," a general stringency, but not a definitive rule, and therefore women could take upon themselves to don *tefillin* if they are fastidious

she can maintain *guf naki*, such as someone who is post-menopause, or a slave,³⁰ who does not have special *guf naki* concerns, could don *tefillin*. He makes similar statements regarding a deaf-mute (*Olat Tamid* 37:1) and minors under the age of 13 (37:4), all of whom he allows to don *tefillin* if they believe they can maintain a *guf naki*.

In short, the *Olat Tamid* rejects the Maharam/Rama because he believes, like Rabbi Yosef Karo, that we follow the *Bavli* over the *Pesikta*, as exemplified by their approval of Michal's actions. As such, anyone who is normally exempt from *tefillin* – women, boys under 13, slaves, and deaf-mutes – may choose to don *tefillin*, but only if they are confident that they can maintain a *guf naki*.

Nearly all post-Talmudic commentators, however, rejected the position of the *Olat Tamid*, at least in part.³¹ Their rationales, however, were very different and have important implications.

Model ii: One novel answer was offered by the Vilna Gaon.³² He asserted that women are strictly forbidden from donning *tefillin* because the *Bavli* in fact agrees with the opinions in the *Yerushalmi/Pesikta* that we do protest women who don *tefillin*. He contended that the position cited in the *Bavli* that the rabbis did not protest Michal's behavior was only according to the Talmudic opinion that stated women were obligated in *tefillin* (R. Meir and R. Yehuda, model #1). Thus according to the Gr"a, the prohibition of women donning *tefillin* is absolute.

Model iii: The *Pri Megadim* (*Mishbetzot Zahav* OC 38:2) and *Ma'amar Mordechai* (OC 38:3) asserted that we do not allow anyone who is not obligated in *tefillin* to wear them because of concerns of *guf naki*. As such, since women are exempt from *tefillin*, they are forbidden from choosing to perform this mitzvah, just as a minor under 13 is similarly forbidden.

Their logic is as follows: Many have *guf naki* concerns, which is a condition stated in the *Bavli*, but these concerns must be overcome for those who have a bona fide obligation to don *tefillin*. Women, however, do not have such an obligation, and that being the case, we do not allow them to don *tefillin* because a) there is no reason for those who are not obligated to take any chance (*Ma'amar Mordechai*)³³ or b) those who are not obligated in this strict commandment do not fastidiously follow this requirement (*Pri Megadim*).³⁴ According to this logic, there is no room for exception – no one who is exempt may don *tefillin*.

Consequently, in the *Mishbetzot Zahav*, the *Pri Megadim* explicitly rules that slaves may not don *tefillin*.³⁵ Significantly, the Maharam and Rama had not discussed the possibility of slaves, yet based on their statements regarding women and minors, it is a reasonable

in maintaining a *guf naki*. (He goes on to state that even according to the *Olat Tamid*, a woman could not write a *tefillin* scroll because she is not fully obligated in the commandment.)

³⁰ The discussion regarding slaves in this essay is obviously (and thankfully) theoretical as it is in many of these sources. The theoretical example nonetheless remains significant because it provides important statements about the ability of people to choose to fulfill this commandment.

^{31,32} The disagreement between the *Olat Tamid* and others might also have implications for whether women may put on *tefillin* to carry them out of a public domain on Shabbat to save them from ruin or disgrace, an issue which is originally discussed in *Tosefta Eruvin* 8:15, *Eruvin* 96b and *Shabbat* 62a. See the ruling of the *Magen Avraham* in OC 301:54 and the discussion of these implications in *Shu"t Yad Eliyahu* #9. See also the commentaries of the *Or Sameach* and *Sha'ar Ha-Melekh to Mishneh Torah Hilchot Shabbat* 19:23. But see as well *Shut Rav Pe'alim* OC 1:23 who argues that the rules regarding Shabbat are entirely dependent on contemporary practice (i.e. do women in practice don *tefillin*), as opposed to whether the law actually allows or does not allow a woman to don *tefillin*.

³² *Be'urei Ha-Gra* OC 38:4, as elaborated upon by his commentator *Damasek Eliezer*.

³³ It is interesting to note that the *Ma'amar Mordechai* calls the whole concern for *guf naki* a "*chashash be-alma*."

³⁴ As opposed to those who are obligated and therefore are careful about *guf naki*, as stated by the *Magen Avraham*.

³⁵ This has been reported to have been the position of Rabbi Joseph B. Soloveitchik, zt"l, who argued that a blanket prohibition was imposed across the board – minors under 13, women, and slaves (*Me-Peninei Ha-Rav* p. 22-23).

interpretation to assume that they believed this should also apply to slaves, i.e. the other major category that the mishna states are not *chayav* to don *tefillin*.³⁶ In other words, the Maharam/Rama declared a legal principle or an across-the-board ruling that we do not allow anyone who is exempt to don *tefillin*.

How did the Maharam and the Rama make such a declaration, if this goes against the *Bavli*'s statement that the Sages did not reprove Michal? Interestingly, the *Pri Megadim* and the *Ma'amer Mordechai* do not explicitly address this question. There are two potential answers:

- a) They had a source: We rule like the *Pesikta*, based on the *Bet Yosef*'s interpretation of the Maharam (which itself had possible precedent from the interpretation of the R"i).

The problem with this approach, however, is it does not explain the departure of the Maharam from the Talmud with regard to a minor under 13 (*katan*). Yet it could be that Maharam accepted the interpretation (noted earlier) of the Talmud's reference to a *katan* as being someone who is 13 (or some similar alternative).

- b) They didn't have a source but they made a legal declaration: One might argue that figures like the *Pri Megadim* adopted a different explanation for Maharam that was independently offered (implicitly) by the *Eliya Rabba* (OC 38:2) and (explicitly) by *Magen Giborim* (comments to *Bet Yosef* 38:3).³⁷ They assert that over the generations, some women were not able to adhere to the *guf naki* requirement and therefore a prohibition developed not to allow any women to don *tefillin*. As such, since *some* women can't meet the standard, Maharam/Rama prohibited *all* women from risking to wearing *tefillin*. Thus today, we do not allow any women (even someone like Michal) to don *tefillin* because many women were not fastidious or able to observe *guf naki*, and therefore we banned all women from donning *tefillin* lest it lead to a halakhic mishap. While they do not explicitly state this regarding minors, one might argue the same process occurred: since many minors could not keep a *guf naki*, Maharam prohibited all from donning *tefillin*. This approach thus interprets the Rama as respecting the *Bavli*'s historical ruling (which allowed Michal to don *tefillin*) yet asserting that by Maharam's time we adopted a general prohibition in light of the difficulty in maintaining the Talmudic requirement of *guf naki*.

As a whole, this model is an attractive explanation because it explains the Maharam / Rama as creating a clear, principled legal approach toward the issue: all those who are exempt may not don *tefillin*.

Model iv: A fourth approach asserts that Maharam's ruling was not based on legal principle, but was based on observations from reality: *in practice*, women and minors under 13 are not able to maintain a *guf naki* and therefore we do not allow them to don *tefillin*.

This approach has the immediate advantage because it allows the Maharam and Rama to follow the *Bavli*. In theory, women and minors can choose to don *tefillin*, but they (like men)

³⁶ The *Pri Megadim* (in *Mishbetzot Zahav*) also asserts that slaves might also have additional concerns since a) they are not generally believed (*ne'emanut*) in regard to rituals, as opposed to women who are believed, as in the case of their *nidda* status and b) slaves who wear *tefillin* create potential confusion regarding their lineage and status.

³⁷ *Magen Giborim* explicitly asserts that Maharam ruled like the *Bavli* and not like the *Pesikta* (against the *Bet Yosef*'s interpretation), which in any case, he believed, only recorded the Sages' protest against women from reciting the blessings, but not from actually wearing the *tefillin* themselves. (That explanation of the *Pesikta* was also offered but ultimately rejected in *Birkey Yosef* 38:1.)

have to maintain the *Bavli's* requirement of *guf naki*. Since in practice we find that they do not maintain a *guf naki*, we assert that they should not don *tefillin*.

Based on this logic, however, there is no blanket prohibition against all those who are exempt from donning *tefillin*. As such, one may theoretically argue that slaves (the category not discussed by Maharam/Rama) or deaf-mutes may don *tefillin* if one believes that, *in practice*, they can maintain *guf naki*. In other words, people generally exempt from *tefillin* who maintain a *guf naki* may choose to don *tefillin*, just like those who are obligated to don *tefillin* exert themselves to ensure that they maintain *guf naki*.

Moreover, since the Maharam's ruling is a subjective assessment based on contemporary practice, other sages can disagree with their ruling and assert that the members of these exempted groups may in fact choose to don *tefillin* should they be able to maintain *guf naki*. As noted earlier, this was the claim made with regard to minors not only by the *Bet Yosef* and *Olat Tamid*, but also figures like the *Bach* and other later authorities who ruled that we allow some minors to don *tefillin* (see, for example *Ba'er Hetev* OC 37:4) if they are already engaged in Torah study (i.e. learn about keeping mitzvot) and know how to maintain their *guf naki*.³⁸

Which rabbinic categories fall into the model of those who assert that the Rama's ruling is based on practical evaluation? This appears to be the opinion of the *Taz* (OC 38:2), as interpreted (and rejected) by the *Pri Megadim* in *Mishbetzot Zahav*. The *Taz* does a very careful read of the relevant passage in the Shulchan Aruch.

שו"ע אורח חיים להג:
נשים ועבדים פטורים מתפילין מפני שהוא מצות עשה שהזמן גרמא:
הגה: ואם הנשים רוצין להחמיר על עצמן מוחים בידן (כל בו):

Rabbi Karo, as noted earlier, simply states that women and slaves are exempt because *tefillin* is a positive time-bound commandment. Rama then adds that if women want to be stringent and perform this commandment, we reprove them.

The *Taz* (implicitly) asks two basic questions: why do we reprove women and what is the law regarding slaves, who (by omission) the Rama seemingly states we would not reprove?

ט"ז אורח חיים סימן לה ס"ק ב מוחין בידם. - לפי שאינן זריזות להזהר

His 4-word answer is short but simple: women are not fastidious to be careful [about *guf naki*]. In other words, both women and slaves are exempt, but we reprove women who would want to be stringent since in practice they do not or cannot maintain *guf naki*. This is not a problem for male slaves since they do not menstruate, and therefore they may don *tefillin*.

The *Mishbetzot Zahav* criticizes this opinion since he believes that slaves, like women, cannot be trusted since we have an across-the-board legal rule: those who are not obligated in the commandments are not allowed to don *tefillin* since we fear that they will not be fastidious to maintain this *guf naki* requirement. As such, *Mishbetzot Zahav* rules that a slave, like a woman, cannot choose to don *tefillin*.

³⁸ See Rabbi Ovadia Yosef, *Shu"t Yabia Omer* OC 6:3 where he cites scholars who asserted that the discrepancies in practice in different Jewish communities simply stem from the different assessments of the ability of minors to maintain *guf naki*.

Yet the *Taz* believes that the Maharam's rulings were empirical claims based on what occurs in practice: women (and minors) do not maintain *guf naki*, while slaves can. How did he explain the example of Michal? He doesn't say, although we will see possible suggestions shortly. The larger point, however, is that the *Taz* felt that Maharam had asserted that based on observation, women, *in practice*, are not fastidious or able to maintain a *guf naki* for these purposes. In other words, beyond their general exemption from this commandment as a positive time-bound commandment, women do not have the option (as they normally do) to do this mitzvah because in practice they have difficulty fulfilling its requirements (i.e. *guf naki*). Slaves, however, who do not have special *guf naki* concerns from menstruation, may don *tefillin*, should they so desire, if they are confident that they can keep their body clean, just as other (Jewish) men do because they are obligated in the commandment.

To be clear, *Taz* rules that we protest against women who would don *tefillin* because *in practice* they do not maintain *guf naki*. The *logic* of his claim, however, could be construed to argue that in theory, if a woman could maintain a *guf naki*, she could don *tefillin*, just like slaves can.

While the *Taz* does not explicate this potential logical conclusion explicitly, this idea was explicated by the *Aruch Ha-Shulchan* (OC 38:6). He details the history of *tefillin* observance and how we generally have minimized the amount of time that people wear *tefillin* because of the practical concern for *guf naki*. Men, who are obligated, generally wear *tefillin* only when they pray, while we protest against women who want to don *tefillin* since there is no need for them to enter a risky situation if they are not obligated. That being the case, he asks, how do we explain the case of Michal, since the *Bavli* clearly asserted that Sages did not reprove her? She was different, he answers, because we do not protest against a righteous woman (i.e. who is meticulous about mitzvah observance) like Michal who asserts that she can maintain *guf naki*, just as we do not protest against slaves who choose to don *tefillin*.³⁹ Slaves may don *tefillin* because they do not have extra *guf naki* concerns, while pious women like Michal may don *tefillin* if they are confident in maintaining *guf naki*, because the entire prohibition was only because of Maharam's general empirical claim that women do not, in practice, maintain *guf naki*.

One might claim that perhaps the *Aruch Ha-Shulchan* believed that Michal was *sui generis* or somehow unique and therefore cannot provide any precedent for other pious women. This interpretation, however, seems incorrect because within this same passage (38:6), *Aruch Ha-Shulchan* asserted that the law for *tefillin* for women even during times of prayer is analogous to that of males donning *tefillin* during the rest of the day (as many did in Talmudic times).

³⁹ This is also the interpretation of the *Aruch Ha-Shulchan* given by Rabbi Melamed, cited below. One might also plausibly claim that the Maharshah (*Yam Shel Shlomo Kiddushin* 1:64) should be included within this group. He likewise rejected the use of the *Pesikta* as the basis for Maharam's position (although even according to that interpretation, he feels that Maharam was simply being "*choshesh*" for that opinion). Instead, he argued that in accordance with the *Bavli*, and explains that the Sages did not reprove Michal since a) she was very righteous, i.e. she was meticulous in her mitzvah observance b) she was the daughter of the king, i.e. she had access to water and amenities to stay clean, and c) she did not have any children, which seemingly means that she was less likely to have discharges and/or she was less likely to become dirty from childcare. Maharshah, like others, emphatically declares that women should not don *tefillin* – yet his logic might imply that should other women have similar amenities and qualities as Michal, they too could don *tefillin*. (Alternatively, he might be merely asserting that Michal was entirely different and serves as no precedent, which is also a plausible read of the text). See also *Ma'aseh Rokeach* who asserts that we only protest *lechatchila* because we are afraid that women have not sufficiently habituated themselves to guard for *guf naki*. After the fact, however, we do not protest, since we recognize that some women can maintain *guf naki* – and this is exactly what happened in the case of Michal!

What is the *Aruch Ha-Shulchan's* position regarding the ability of men to choose to don *tefillin* outside the context of prayer? In *Aruch Ha-Shulchan* 37:3 (which he explicitly references in 38:6), he asserts - against the *Magen Avraham* - that we allow pious men to keep their *tefillin* on after prayer, and that a few exceptionally pious men still even have the practice of donning them throughout the day. As such, the law is the same: pious men who are fastidious in *guf naki* may choose to keep on their *tefillin* outside the context of prayer (37:3), just as pious women (as *exemplified* by Michal but going beyond her)⁴⁰ may choose to don *tefillin* during the context of prayer.

This interpretation of the *Aruch Ha-Shulchan* is further proven by his statements (37:4) regarding a minor donning *tefillin* before the age of 13. He initially notes that the contemporary practice is to begin donning *tefillin* 1 month before the age of 13 (or minimally beforehand). Yet he then states that this practice - which follows the opinion of the Rama (which originated in the Ittur's novel interpretation of the Gemara) - is against the clear Talmudic law, which clearly stated that a younger minor can don *tefillin*. This is the *ikar hadin*, the initial and baseline rule, which was appropriate in Talmudic times when minors were fastidious. Today, however, the practice has changed, since we can't trust any minors in *guf naki*, and even post bar-mitzvah teenagers can barely keep these laws after they are 13! In other words, the law changed in accordance with the perception of the contemporary reality.

Writing toward the very end of the 19th century in Novordhok, the *Aruch Ha-Shulchan* clearly ruled that we generally state that women should not don *tefillin*. Yet he also states that the prohibition is based on the general assessment of contemporary reality - the average woman does not maintain *guf naki* standards - not an across-the-board statement in theory or law. For this reason, he does not protest against slaves, pious men who don *tefillin* after prayer, or pious women like Michal who are fastidious in maintaining *guf naki*.⁴¹ For the same reason practical concerns, he does protest against minors donning *tefillin*.

If this interpretation is correct, then one might argue that because of the incredible advances in hygiene within recent eras (including constant access to running water and a multi-billion dollar female hygiene industry), women today may, in practice, more easily maintain a *guf naki*.⁴² If (and only if) they are pious and committed to being fastidious about these rules, then we should not protest against their choice, given the changes in contemporary resources.⁴³ This, indeed, is the interpretation and (somewhat reluctant) conclusion of Rabbi Eliezer Melamed, as discussed below.

⁴⁰ As such, when he states in 38:6 that we cannot learn from Michal, he means that we cannot state anything about Michal with regard to average women (who are the subject of this passage), but not to pious ones like herself.

⁴¹ Another example of *Aruch Ha-Shulchan's* position regards a *cheresh*, a deaf-mute, whom he states, in practice, cannot maintain proper sanctity to don *tefillin*. Yet others disagreed - see *Be'er He-Teiv* OC 37:1 and *Mishna Berura* 37:13, who are citing the *Olat Tamid* - because they had a different assessment, which the *Aruch Ha-Shulchan* would respect in principle even he disagreed with their specific evaluation. (Today, many people classified as "deaf" or "hearing-impaired" do not fall into the classic *cheresh* category and are obligated in *tefillin*, as discussed in *Nishmat Avraham* OC 38:8).

⁴² For a list of *poskim* who have noted the impact of new female hygiene products in a somewhat related matter, see footnote #372 in Aryeh Frimer and Dov Frimer, "Women, *Keri'at Ha-Torah*, and *Aliyot*," *Tradition* 46:4 (2013). It is interesting to note that advances in hygiene products now make it possible for men with catheters or bladder problems to still be able to don *tefillin*. See the sources cited in *Pitchei Teshuvot* 78:1. In Rabbi David Yosef's *Halakha Berurah* OC 38, p. 208, he states that the general rule is that one's outer garments should remain clean and that there should be no odor at all. See also his discussion to OC 78:1. With men, of course, these rulings allow those who are obligated to still be able to fulfill this mitzvah, a rationale which would not help women according to the models ii and iii, but it should help according to the logic of model iv. To understand what a world looks like (even in the 21st century) without proper female hygiene products, see Thomas Friedman, "[Cellphones, Maxipads, and Other Life Changing Tools](#)," *NY Times*, April 6, 2007. To see a (somewhat crude) chart of how female hygiene products have advanced in the last 100 years, see [here](#).

⁴³ This logical deduction would be true unless one adds additional ancillary arguments specifically applied to women, as in category v below, that were not mentioned by *Aruch Ha-Shulchan* and many other decisors.

Model v: Women may not don *tefillin* for different or additional reasons beyond *guf naki*:

This group includes: a) the *Kaf Ha-Chaim* 38:9 and others (for kabbalistic reasons)

b) the *Beit Hillel* (*Yoreh De'ah* 182:2) and the *Levush* (OC 17:2), who argue that *tefillin* have become men's clothing and therefore violate the prohibition of cross-dressing, based on the *Targum Yonatan Devarim* 22:5. According to this position, we accept the law of the Rama – women may never don tefillin - but the rationale that is offered is supplemented or different.

It should be noted, however, that many scholars rejected the concern for cross-dressing, arguing that this prohibition only applies to articles of clothing worn for style or appearance, not for fulfilling a commandment.⁴⁴ Moreover, kabbalistic arguments women and tefillin were not regularly quoted in many halakhic works, especially (but not only) by those who do not share that orientation.

Model vi: Women may don *tefillin*

While these opinions are not very well known, 2 later authorities, besides the *Olat Tamid*, disagreed, at least in theory, with the Maharam/Rama.

The first statement is found in a responsum written in 1610 by Rabbi Binyamin Salnik (*Shu"t Masat Binyamin* #62). It comes within the context of a responsum in which he defends the right for those who have become blind (including himself) to get called to the Torah for an *aliyah* even though they cannot read. This is a passionate essay in which he argues that this is justified under the letter of the law, and that moreover, it must be allowed in sensitivity to those who are not fully obligated in all mitzvot (like the blind). To support this claim, he cites the fact that the Sages did not reprove Michal for donning *tefillin*, even though women cannot properly maintain *guf naki* and therefore this act might be unbecoming and disgusting (*mekhu'ar*). Nonetheless, he asserts, the Sages did not protest her actions in sensitivity to her desire to take part in accepting the yoke of heaven (i.e. performing mitzvot) and to provide for her religious satisfaction (in accordance with same principle that allows women to perform optional commandments in general). While he does not state explicitly that he ruled, in practice, against the Rama (who was one of his teachers), it does appear that he thinks the Sages and subsequent scholars should acquiesce to women who desire to don *tefillin*, in spite of the *guf naki* concerns. This stems from the logic of his argument: just as we are sensitive to women like Michal, so too we should be sensitive to blind men. This responsum, however, received little further attention, at least with regard to its implications for women and *tefillin*, most probably because he did not fully state practical applications, *le-ma'aseh*, for this question.

Another dissent to the Rama's ruling was asserted by Rabbi David Ortenburg, *Tehilla Le-David* (OC 38:1), who noted that a *guf naki* is required as well to pray (OC 80:1), and yet women are obligated to do so despite that concern. If they can pray with a *guf naki*, he reasons, they can also don *tefillin* at the same time. He therefore speculates that Rama in fact only intended to ban women from donning *tefillin* throughout the day, but not during prayer, when they maintain a *guf naki* anyway to fulfill their obligation to pray. He notes, however,

⁴⁴ *Shu"t Maharam Schick* OC 173, *Yesodei Yeshurun* Vol. 1 p. 92, *Yalkut Yosef* OC 17 (p.229) and OC 38.

that the *Pri Megadim Eshel Avraham*⁴⁵ had pondered and rejected this possibility. [One possible answer to his question is that the requirements and standards for *guf naki* during prayer, which is of medieval origins, are less stringent during prayer than they are for donning *tefillin*. See footnote.]⁴⁶

As with the example of Rabbi Salnik, it is unclear if he in fact rules that women can actually follow this approach, *halakha le-ma'aseh*.

Obviously, more research and writing must be done to properly interpret the opinions of these and many other authorities, but I believe that these six categories fairly represent the basic schematization of post-Rama opinions regarding women and tefillin.

VII. What Are the Positions of Contemporary *Poskim*?

Before discussing the potential halakhic implications of these 6 positions, we should also note that the actual question (*le-ma'aseh*) of whether women may voluntarily don *tefillin* has been discussed in recent decades. I have found 3 approaches in contemporary *poskim*:

a) Rabbi Moshe Feinstein (*Igrot Moshe* OC 4:49) *zt"l* adamantly opposed any attempt to allow women to don *tefillin*. In a responsum written in 1975, he asserted that those who seek to introduce such reforms in the name of feminism are not only violating the strictures of the Rama and subsequent authorities, but are also challenging the value structure of the Torah. As such, they are the equivalent of heretics who must be adamantly opposed.

It is interesting to note that with regard to *tzitzit*, Rav Moshe was theoretically willing to contemplate a way in which one might allow women to wear them. Yet he doesn't seem to think that this is a theoretical possibility in *tefillin*, and in any case, he is not interested in discussing the matter because of the alleged motivations of the women in question. It is impossible to know how Rabbi Feinstein would respond 40 years later, but similar statements have been made by many other decisors in recent years.⁴⁷ In any case, it could very well be that even if he felt such women were as pious as Michal, he would not allow them to don *tefillin*, in accordance with the opinion of the Rama, Gr"a (model ii), *Pri Megadim* (model iii), *Levush* (model v) and the long-term normative ruling and practice.

b) Rabbi Yehuda Herzl Henkin *shlit"l* (*Shu"t Bnei Banim* 2:3), who is certainly one of the prominent legal decisors most sympathetic to gender concerns within *halakha*, was asked by a woman if she may don *tefillin* or *tzitzit* for the sake of personal spiritual elevation. Rabbi Henkin allowed her to don *tzitzit* in private, but advised her not to wear *tefillin* in accordance with the position of the Rama. Instead, he suggested that she should seek other outlets for religious growth. Rabbi Henkin does not elaborate on his position, but I assume that he simply believed we should follow the practice established by almost every decisor in the post-Rama era (and certainly the well-known figures) who ruled that we should protest against women who don *tefillin*.

⁴⁵ Yet this case is seemingly problematic for the *Pri Megadim*, since he is working within the Magen Avraham's rationale who clearly stated that when people are *chayav*, then they are fastidious. Thus the *Tehilla Le-David* makes the following argument: If they are already being fastidious for the sake of prayer, then they are, by default, concurrently fastidious for *tefillin* as well.

⁴⁶ This is made clear in the initial source of this requirement, a responsum of the Rosh (*Klal* #4:1), where it is noted that the *guf naki* requirement for *tefillin* stems from the Talmud. The origins and standards of *guf naki* for prayer are highly disputed and caused great disagreement regarding whether this medieval ruling might even come to prevent the recitation of *Kri'at Shema*, a Biblical commandment. See the commentaries to 80:1 and the discussion in R' David Yosef's *Halakha Berura* 80:1. As noted earlier, it is not surprising to me that the *guf naki* requirement for *tefillah* was first stated by a student of Maharam.

⁴⁷ See, for example, *Yalkut Yosef* OC 17:6 p. 229.

c) Rabbi Eliezer Melamed, *shlit" a* ([Peninei Halakha](#) (hyperlinked), *Likutim I*, p. 212-214) surveyed the relevant sources and ruled that generally speaking we should follow the position of the Rama. As such, if asked by a pious woman who genuinely sought religious growth, he advises telling her that she is not allowed. Yet if she is insistent, Rabbi Melamed argues, then one should not protest in accordance with those positions who rejected Maharam like the *Orchot Chaim* (model a) and *Olat Tamid* (model i), as well as the *Aruch Ha-Shulchan* (model iv), who would allow righteous women to don *tefillin*. He makes a further methodological point that when righteous women seek such avenues of growth, we should not protest when they have "what (i.e. proper halakhic argumentation) to rely upon."⁴⁸ He adds, however, that they should only do so when they are not menstruating and in private (to protect their privacy of when they are menstruating and to ensure that their intent is *leshem shamayim*, for the sake of Heaven).

Rabbi Melamed then continues to assert that in the case of women who are genuinely not strict about modest dress and other mitzvot, and only desire to don *tefillin* for a feminist agenda, we should protest this behavior since their actions are not "for the sake of heaven" and mitzvot observance should not be used as a weapon in social wars.

VIII. Can One Make a Halakhic Argument for Change?

As Rabbi Melamed claims, a legitimate halakhic argument can be made to allow woman to don *tefillin*.⁴⁹ The argument would go as follows: Even though we rule like the Rama, the rationale accepted for his ruling by leading scholars (model iv) such as the *Aruch Ha-Shulchan* dictates that the concern for *guf naki* is based on empirical observation. As such, in our era, should righteous women - who care about meticulous mitzvot observance - assert that they can keep *guf naki* (because of their knowledge of their bodies and because of the contemporary resources for female hygiene), then we may allow them to do so, or at least should not protest this practice. This is especially since a couple of later scholars (model i and seemingly model vi) assert that this position is normative, in consonance with the many *rishonim* who felt this way as well (model a), based on the simple read of the *Bavli* (model 2) and the example of Michal, before the innovative approach taken by the Maharam and the Rama.

In my mind, this is a legitimate halakhic model because it takes into account the full history of the topic and bases its position on major groups of figures within Chazal, *rishonim*, and *acharonim*. It is modest in its claims – acknowledging the weight of figures and practice that go against this tradition – but argues that the halakhic process has produced a legitimate strand to allow for dispensations for pious women who maintain *guf naki*. Moreover, especially if done in private, this would allay fears of *michzey ke-yuhara* (religious

⁴⁸ With regard to *tzitzit* (p.184), Rav Melamed makes a similar argument, although there he asserts that we should not protest even if women don a tallit (and not just a *tallit katan*) in public, unless they do so for the sake of promoting their social agenda. I thank my friend Rabbi David Silverstein for suggesting that I look in Rav Melamed's book.

⁴⁹ It appears to me that my own teacher, *Mori Ve-Rabbi* Rav Aharon Lichtenstein, shlit" a, also believes that a halakhic argument could theoretically be made to allow women to don *tefillin*. See his remarks in "Hands Across the Ocean," *Jewish Action*, Spring 2010. However, it is clear that he was making a general point about the halakhic process and critiquing his interlocutor's strident objection to such a possibility, but not actually making an argument for change or making such a ruling in practice (*le-ma'aseh*). As he writes toward the end of his remarks, "For my part, I would submit that given the complexity— rather than the supposed simplicity— of the issue, we can readily and emphatically agree with Rabbi Feldman's judgment, to the effect that traditional prevalent practice should be sustained. But let the basis of that position be clearly understood, and let us beware of passion infringing upon precision. Assuredly, we can emulate the model cited in the Gemara (Ketubot 83a-84b), and common in legal practice, of accepting juridic conclusion, but for different reasons."

pretentiousness) or that the intent is to make a public show for the sake of some social agenda.

The counter legal argument, however, might claim that a) many prominent scholars like the Vilna Gaon (model ii), Levush (model v), and others felt strongly that women should absolutely not wear *tefillin*; and b) many others felt that the Rama would uniformly ban even pious and fastidious women from donning *tefillin* either because we don't allow the non-obligated to don *tefillin* or because we are afraid that their example will lead to mishaps with other women (model iii). This fear might be further elevated in our era when some might be tempted to don *tefillin* because it is revolutionary, and not for the sake of their service to God; c) even those whose opinions might logically allow for change (model iv) in the contemporary era still made clear rulings against women donning *tefillin*. Moreover, they seem to stress that women who don *tefillin* should portray exceptional piety, an application that would not apply to everyone; and d) the long-standing tradition goes against this practice, since nearly every *posek*, whatever their logic, ruled in practice over the last 500 years that women should not don *tefillin*, and we have little precedent from centuries beforehand of women actually donning *tefillin*, despite the fact that many *rishonim* allowed it.

IX. Even If One Can Make a Legitimate Halakhic Argument, Is This Change a Good Idea?

Beyond the legal argumentation, one must ask an additional question: Even if one should conclude that a change is halakhically feasible, should we actually make that change? One might argue that since breaking with the traditional practice is a serious matter, we should only contemplate change when a) women express interest in such change for their personal and religious development, and b) there is a perceived communal need for this change.

For example, there are many educated and talented women who want leadership roles in the community, and the community is in need of good leaders. There are many religious women who want to go to the Israeli army, and the army, because of demographic factors and expected needs in human resources, would like more female soldiers in their ranks. In both of these cases, moreover, there is no long-standing tradition within Jewish law with regard to learned / educated women or women soldiers, since these possibilities basically did not exist in previous eras. As such, in these cases, it is worthwhile to explore the halakhic possibilities within the halakhic tradition. This would be a dialogue under the leadership and ultimate authority of our *poskim*, in conversation with scholarly and lay figures (of both genders), that would produce open communal discourse about whether change is possible or wise.

Regarding *tefillin*, however, it is hard to argue that there is a broad demand by Orthodox women to wear *tefillin*, or that the broader community believes that this change is necessary for some given reason. Quite simply - for better or for worse - there is no overwhelming feeling that somehow women are missing out on an important religious experience, or that the inclusion of women in this ritual will somehow elevate the broader community. In such situations, one might argue that the contemporary practice should remain, and this is especially so since the basically universal halakhic tradition for over 500 years has ruled that women do not don *tefillin*.

One might counter this claim, however, by arguing that small demand for this change in fact allows for individual dispensations since the overall impact will be minimal, especially since

tefillin, by its nature, is a ritual which most directly affects the person performing the mitzvah. Moreover, one might argue that even if there is no broad demand or perceived communal benefit, we should not protest the desires of the limited group of women who simply believe that this will bring them spiritual benefit. If accepted, however, this argument might lead to the suggestion of Rabbi Melamed: if you insist, don *tefillin* in private – and this is only if you are sincere and pious and will take the requirements seriously. Some might also add that in the absence of many women expressing such change or a perceived communal benefit, we should not issue individual dispensations when we fear these changes stem from (or will be perceived as) imitations of non-Orthodox movements, along the lines of Rabbi Moshe Feinstein's argument and Rabbi Melamed's caveat.

These arguments also raise the question of whether legal rulings (particularly those of great social sensitivity) can and should take into account individual situations, which may (or may not) impact a given ruling. Rabbi Melamed and Rabbi Henkin discuss one potential situation: where a generally pious woman insists that this would be beneficial for her religious growth and is willing to don *tefillin* in private. Other complex situations might include school or other educational environments, pluralistic institutions like Hillel Houses, potential *kiruv* opportunities or challenges,⁵⁰ keeping someone from leaving Orthodoxy, and a host of other questions. One could argue that all *psak* (legal rulings to specific questions) must remain local and individualized, thereby preventing a given individual's needs from being overlooked in the face of a larger legal and social battle (in which the individual may have no stake or interest). One might counter, however, that in our hyper-connected world, the notion of a fully individualized *psak* is not feasible, especially in sensitive areas of *halakha*. One must assume that any *psak* given to an individual will be (mis?)interpreted as a global statement or taken as a precedent for others. The brouhaha created in the current case points to the great difficulty of issuing individual rulings, particularly when *tefillin* are worn in a public context.

X. Concluding Thoughts

My goal is not to take a stand in one direction or another, but to give models of what a proper halakhic argument might look like, at least with regard to a general ruling, and what types of considerations should go into this process. I should stress, however, that I am very much not stating that this is simply a question of public policy. To the contrary, the halakhic argument here should be at the front and center, with policy considerations only entering at a later stage and in light of the halakhic discussion. The notion that "once any argument can be made in favor of change, the entire discussion is a matter of public policy" is an affront to legal thought and should be abhorred by those who revere Jewish law and take the halakhic process and its historical bearers seriously.

The Orthodox community continues to suffer from immense and emotional disagreements over matters of gender and *halakha*. That is very regrettable and dangerous. Clarifying proper halakhic procedure is essential to ensuring that our stances remain within the halakhic

⁵⁰ In the spring of 1996, I travelled to Poland with a large group of post-high school yeshiva and seminary students. Almost all of the represented institutions were Orthodox, with the exception of one group that included both Orthodox and non-Orthodox students. On the first morning in Poland, one of the female students from that group donned *tefillin* and *tallit*, raising the ire of several of the students (male and female) and their teachers. The trip organizer quickly turned to a distinguished *rosh yeshiva* and known political figure that happened to be accompanying us on our trip, who told him not to say anything to the student. I do not know his reasoning, but my guess is that he felt that her actions were far from horrifically non-halakhic and that protesting her behavior would cause great insult, thereby ruining the wonderful educational opportunity of spending a week in Poland with a group of hundreds of enthusiastic Orthodox students. I have no idea what he would say or what one should say if they know about this situation in advance. My point is only to give an example of the type of case that raises interesting questions.

framework, which will in turn allow us to continue to have a shared language of rational and respectful discourse, *le-shem shamayim*, for the sake of Heaven.