

Reviewing Rabbinic Oversight: A Response to Rabbi Jeffrey Fox

1. Introduction

The recent publicized scandal involving a prominent Washington D.C. Rabbi hiding cameras in in the *mikvah* prompted a discussion as to the gender-power dynamics involved in the *mikvah*. In particular, new attention has been placed on the role of the supervising Rabbis regarding the ritual immersion of a female convert.¹ Specifically, according to the predominant practice, when a woman wishes to convert, her immersion in a *mikvah* is witnessed by three Rabbis, usually in the same room.² Even though precautions are taken such that the officiating Rabbis cannot see the naked body of the woman, such as setting up a translucent screen, adjusting the lighting in the *mikvah*, or having the woman wear a loose fitting robe,³ the very situation of men being in the same room and conversion with a naked woman can create discomfort for the woman and appears to contradict the popular religious conceptions of modesty.

* Updated 12/15/2014 for typos and grammatical errors.

¹ See for example R. Ethan Tucker's "Immersion, Dignity, Power, Presence and Gender." Space and context does not permit me to review his article as well at this time, but I will be referencing it in the footnotes as it provides a useful contrast in approaches and style. All references to page numbers are based on the document available for download here: <https://www.scribd.com/doc/245558581/Immersion-Dignity-Power-Presence-and-Gender>

² The connection between the Washington D.C. voyeurism scandal and the procedures for conversion appears to be based on general themes of a gender power imbalance more than a direct cause-effect argument of prevention since none of changes currently being discussed would have prevented anyone hiding cameras in the *mikvah*.

³ For any ritual immersion to be valid according to Jewish Law, there cannot be any separating obstruction (*חציצה* / *batzitzah*) between the person or object being immersed and the water (B. Eiruvim 4b, Rambam Hilkhos Mikva'ot 1:12). Thus any robe worn by a convert must be loose enough so as not to impede the water from covering the entire body.

To address this issue, Rabbi Jeffrey Fox, currently the Rosh Yeshiva at Yeshivat Maharat, recently published a *teshuva* arguing for modifying the current conversion procedure for female converts, ultimately offering three acceptable alternatives:⁴

1. The woman is in a robe and the male **בית דין** stands outside a door that is open just enough for them to witness only the back of her head while she immerses.
2. The woman is in a robe and the male **בית דין** stands outside a door that is open just enough to let sound travel and could even be closed if they can hear through the closed door.
3. In a situation in which there is no door close enough for them to see her head, the male **בית דין** stands a few feet away while the mikvah attendant assists the woman into the water with a robe. The men must stand with their backs to the mikvah waters and insure that they can hear the water. It is my strong preference for the men to be outside of the room and I would recommend that mikvaot be built with this in mind. If that is not an option, a temporary room divider should be brought for female conversions (15).

As mentioned above, some of these precautions such as the wearing of a robe or a dividing screen are commonly used today, as is the presence of a female *mikvah* attendant.⁵ However, R. Fox emphasizes removing the Beit Din from the *mikvah* room entirely, going so far as to suggest modifying the *mikvah's* architecture. If the Beit Din is situated outside of the *mikvah*, they may still be able observe the woman completing her immersion, but if for whatever reason the Beit Din must be in the *mikvah* room, they should not visually observe the immersion at all, but rely on simply hearing the sound of immersion.

⁴ All page references correspond to the English version of R. Fox's *teshuva*, available here: <https://static.squarespace.com/static/5348363de4b0531dce75bc53/t/546b6d75e4b010246118bdac/1416326517618/MaleBeitDinattheImmersionofaFemaleConvert1.pdf>

⁵ I cannot comment on every single conversion experience, but I can attest that in every conversion in which I have participated such precautions were taken such that at no time could the officiating Rabbis see the women naked.

While R. Fox advocates for changing the common conversion procedure, he is not in fact proposing an innovation to Jewish law. As R. Fox cites, others such as R. Moshe Klein have addressed the *halakhic* status of the Beit Din not being in the *mikvah* room, with some concluding that the Beit Din need not be in the *mikvah* room at the time of the woman's immersion (12-13).⁶ These opinions are usually written from the perspective of *bediavad*, that is, if an immersion had already been done without the physical presence or direct viewing of the Beit Din, the conversion is nevertheless valid.⁷ Based on these opinions, R. Fox does not argue for a change in Jewish law as much as for what he takes to be a change in *halakhic* policy, promoting what had been stated as legitimate only after the fact to becoming the standard normative practice, or *lechatchillah*.

But this does not mean that R. Fox's position does not have *halakhic* implications. Foremost of which, R. Fox not only contests the current normative practice of having the Beit Din stand in the *mikvah* room,⁸ but in doing so he rejects as well as impugns the *halakhic* arguments and authorities on which current practice is based by claiming that it actually violates the Jewish laws of modesty. Challenging the status quo is not by itself sufficient to automatically dismiss R. Fox's *teshuvah*. However, if normative Jewish Law is

⁶I unfortunately do not have access to R. Moshe Klein's work "משנת הגר" which R. Fox cited, but to validate the claim that R. Fox is not acting as a *halakhic* innovator or reformer in stating that Jewish Law does not mandate the Beit Din physically observe the immersion, one simply needs to produce a precedent of someone who had previously made this case.

⁷CORRECTION 12/14/2014: I mistakenly referred to Mishpitei Uzziel Y.D. 1:13 as an example of a *bediavad*. His opinion is far more nuanced, in that he suggests having three women stand as agents of the Beit Din to oversee the conversion. וכדי למצוא היתר יותר מרווח אומר אני לתקן שתעמוד הגיורת בלויית שלש נשים ישראליות לפני בית דין ובית דין וכהלכה יודיעו לה מצוות קלות וחמורות וענשן כדן וכהלכה Space does not permit me to address R. Uzziel's position in detail, but regardless, it was not an essential component to R. Fox's *teshuvah*. I thank R. Gil Student for calling this error to my attention.

⁸Rabbinic colleagues have reported to me privately that in certain instances they were in fact instructed to remain outside the *mikvah* room during the immersion of a female convert. There are no reliable statistics available on how pervasive either practice is in the Orthodox world. However, that R. Fox feels compelled to compose a formal *teshuva* contesting having a Beit Din in the *mikvah* room is itself indicative that he acknowledges his argument goes against the prevailing practice.

not to be determined by popular practice⁹ or even general rabbinic consensus,¹⁰ then neither can it be determined through the selective citation or interpretation of Great Rabbis.¹¹

Instead, R. Fox's position must be evaluated based on the merits of his arguments, not only in terms of the sources cited and his interpretations of them, but also in terms of their internal *halakhic* coherency.¹² Keep in mind that were R. Fox merely arguing that rabbis *may* stand outside the *mikvah* room, he would only need to validate that it is a plausible *option*. However, in advocating for a wholesale change of the status quo, R. Fox argues that Rabbis *ought* to stand outside the room, a position which requires evaluating and affirming the *superiority* of a specific opinion to the *exclusion* of all alternatives. Though this not an impossible standard to meet, it is nevertheless imperative to acknowledge the full implications of R. Fox's argument, and evaluate its merits accordingly.

2. Rabbinic Sources, Interpretations, and Applications

The first source to consider is a passage from B. Yevamot 47a-b, in which the Talmud provides the description for how prospective converts are evaluated and the

⁹ See my essay, "Popular Practice and the Process of *Pesak*" here: <http://www.joshyuter.com/2005/06/06/judaism/jewish-law-halakha/popular-practice-and-the-process-of-pesak/> and/or the corresponding podcast *shiur* with source sheets here: <http://www.joshyuter.com/2012/12/16/judaism/ep-90-halakhic-process-popular-practice-and-the-process-of-psak-the-role-of-custom-in-jewish-law/>

¹⁰ See my essay, "The Conceits of 'Consensus' in *Halakhic* Rhetoric" here: <http://www.joshyuter.com/2014/04/06/judaism/jewish-law-halakha/conceits-consensus-halakhic-rhetoric/>

¹¹ See my essay, "'Gadolatry' in Orthodox Jewish Discourse" here: <http://www.joshyuter.com/2011/08/17/random-acts-of-scholarship/gadolatry-in-orthodox-jewish-discourse/> and/or the corresponding podcast *shiur* with source sheets on "'Gadolatry' and Daas Torah" here: <http://www.joshyuter.com/2013/10/13/podcasts/the-halakhic-process/ep-115-halakhic-process-23-gadolatry-daas-torah/>

¹² The Talmud rejects selective appeals to authority when done to support one's predetermined biases or conclusions, describing those who follow the stringencies of both Hillel and Shammai as "fools" and those who follow the leniencies of both as "wicked" (B. Eiruvim 6b, B. Hullin 43b-44a). Two notable exceptions to this principle pertain to the laws of Eiruvim and mourning where the law follows the lenient opinions (B. Eiruvim 46a).

formal process of conversion. I cite from B. Yevamot 47b the portion most relevant to our discussion.

אשה, נשים מושיבות אותה במים עד צוארה, ושני ת"ח עומדים לה
מבחוץ, ומודיעין אותה מקצת מצות קלות ומקצת מצות חמורות.

For a female [convert], women seat her in the water up to her neck, two sages stand on her behalf outside, and they inform her of some of the easy commandments and some of the harder commandments.

The attentive reader will notice that this passage only requires the presence of two individuals, not the requisite three which composes a Beit Din. However, this phrase is subsequently emended by R. Yohanan to require three people, indicating that a Beit Din's participation is in fact required.¹³ The nature and requirement of this participation are matters of significant dispute, and the crux of the current discussion.

The first question to consider is the physical orientation of the Rabbis compared to the woman in the *mikvah*. The text cited says the Beit Din stands "מבחוץ" which simply means "outside." According to one approach, the Beit Din physically stands "outside" of the *mikvah* room, such that their presence is nominal, inessential, and the members of the Beit Din possibly do not even witness the actual immersion.¹⁴ I understand the sympathies leading to this reading, but I do not believe this reading is justified.

From the perspective of Rabbinic Hebrew syntax, when the orienting adjective of "מבחוץ" is employed, the point of origin refers to the first location mentioned

¹³ See R. Tucker's thorough review of the role of the Beit Din in the Rabbinic period (9-13). Regardless, R. Fox does not contest that this passage is referring to a Beit Din of three people, only their role and necessity in the *halakhic* ritual

¹⁴ For example, the newly published Koren Talmud translates and interprets this line as, "two Torah scholars stand outside the bath house so as not to compromise her modesty." *Koren Talmud Bavli, Vol 14: Yevamot Part 1, English Edition*. Jerusalem: Koren, 2014. p. 321. R. Tucker similarly interprets, "whereas women receive it as the scholars stand outside the room." p. 18.

previously.¹⁵ We find one example in B. Bava Metzia 113b which describes that an agent of the court is prohibited from entering someone's house.

שליח בית דין שבא למשכנו - לא יכנס לביתו למשכנו, אלא עומד
מבחוץ

An agent of the court who arrives to collect a pledge does not enter his house to collect his pledge, but rather stands outside.

In the context of the above passage, the clear location from which the agent of the court stands outside is the house of the individual from whom he is collecting. There are several other instances of this form throughout rabbinic literature.¹⁶

When we apply this pattern to our passage in B. Yevamot 47b, we find that the Beit Din observing the female convert's immersion does not stand outside a "room" but rather the "water." I repeat the above citation with relevant emphasis.

אשה, נשים מושיבות אותה במים עד צוארה, ושני ת"ח עומדים לה
מבחוץ, ומודיעין אותה מקצת מצות קלות ומקצת מצות חמורות.

For a female [convert], women seat her in the water up to her neck, two sages stand on her behalf outside, and they inform her of some of the easy commandments and some of the harder commandments.

In the vernacular of contemporary Judaism, the term "*mikvah*" almost exclusively refers to specific constructions for the purposes of ritual immersion, but in Jewish law, a *mikvah*

¹⁵ This is in contrast to the use of "מחוץ" where the location immediately follows the adjective. For just five examples, see M. Pesachim 6:1 "והבאתו מחוץ לתחום", M. Nega'im 12:7 "אל מחוץ לעיר", T. Berachot 4:17 "אל מחוץ למחנה", B. Shabbat 22b "מחוץ לפרוכת העדת יערך", and B. Pesachim 19b "ובאה מחוץ לירושלים".

¹⁶ For just six examples, see M. Eiruvim 8:9, M. Yoma 4:5, T. Hagigah 3:34, B. Shabbat 21b, B. Rosh Hashana 31b, and B. Yevamot 21a. On occasion the point of origin may not be stated explicitly, but is implied from context as in B. Hagigah 4a.

describes any body of water which meets certain criteria. In addition to specifically constructed rooms of buildings,¹⁷ this may also include natural bodies of water.¹⁸

Based on the syntax of the B. Yevamot 47b, it would seem to me that the woman would be immersed in such a body of water, not necessarily in a specific *mikvah* room, while the male Beit Din stood sufficiently away from the water so as not to see the woman naked. This is in notable contrast to the conversion of a man where the Talmud passage records, "ושני ת"ח עומדים על גביו" – the Rabbis stand over or at the side of the male convert, something which could be accomplished easily even in a small *mikvah* room. If a woman immerses deep enough in the water such that only her head is above water and the rest of her body is submerged, then Rabbis who are standing on the shore or bank of this body of water can witness the woman immersing completely without compromising her modesty.

I believe this reading not only fits the syntax of Rabbinic Hebrew, but that this was the understanding as reflected in later commentators. For example, Rambam¹⁹ and the Shulhan Aruch²⁰ both add to the Talmudic formula that after the woman has completed her immersion, the Rabbis in the Beit Din must "turn their faces so as not to see her emerge [naked] from the water." Were the Rabbis standing behind the opaque door of a *mikvah* room, this qualification would be superfluous if not meaningless. We would have to envision the normative scenario to be that Rabbis would remain standing outside the walls of the *mikvah* room, waiting not only after the woman's immersion was

¹⁷ Archeologists have uncovered ancient *mikvahs*, though there is little concrete evidence as to how they were used and by whom, let alone contrasting their use in ancient Judaism with natural *mikvahs*.

¹⁸ See M. Mikva'ot chapter 5, 5:4 in particular. Even today, Jewish communities – particularly those which lack the resources to construct their own private *mikvah* – may in fact utilize a "natural" *mikvah*. Several years ago I had the opportunity to personally visit one in Medellin / Bello, Colombia. See slide 26 in the PDF attached to my podcast, "The Jewish Communities of Medellin Colombia" here: <http://www.joshyuter.com/2010/06/09/podcasts/episode-4-the-jewish-communities-of-medellin-colombia/>

¹⁹ Hikkhot Issurei Bi'ah 14:6

²⁰ Y.D. 268:2

completed, but even after she leaves the room itself. However, if the Rabbis were observing a woman immerse in a natural *mikvah*, this addendum is an understandable and welcome protection.

At any rate, this read would lead to the conclusion that the officiating Beit Din must in fact visually witness the immersion of a female convert, albeit while taking necessary precautions so as not to see her naked body. While R. Fox does reference this reading in his *teshuva*, he writes, "I will return to this possibility at the end" (3), though I confess I do not see where in his *teshuva* he explicitly addresses these issues and their implications.

Were the source from B. Yevamot 47b the only source to consider, there would not be much dispute regarding the role or necessity of a Beit Din. However, another passage from B. Yevamot 45b complicates the discussion.

עבדיה דרבי חייא בר אמי אטבלה להיא עובדת כוכבים לשם
אנתתא, אמר רב יוסף: יכילנא לאכשורי בה ובברתה; בה, כדרב
אסי, דאמר רב אסי: מי לא טבלה לנדוטה? ... ההוא דהוּו קרו ליה
בר ארמייתא, אמר רב אסי: מי לא טבלה לנדוטה? ההוא דהוּו קרו
ליה בר ארמאה, אמר ריב"ל: מי לא טבל לקרוי?

The slave of R. Hiyya bar Ami immersed a gentile woman for the purpose of marriage. R. Yosef said, "I could legitimate her and her daughter." Her, following the opinion of R. Assi who said, "Did she not immerse for the purpose of menstrual purity?...There was once a person who people called, "the son of an Aramean woman." R. Assi replied, "did [his mother] not immerse for the sake menstrual purity?" R. Yehoshua Ben Levi said, "did he not immerse for the sake of purification after a seminal emission?"

Despite our previously cited passage requiring a Beit Din's presence for the convert's immersion for conversion, R. Assi's and R. Yehoshua Ben Levi seem to rely on men and women's immersion for other ritual purposes. There are several approaches towards

harmonizing these two seemingly contradictory sources,²¹ but given the focus of R. Fox's *teshuva* and subsequent *halakbic* literature I will focus on the views of the Rif, Rambam, and Tosafot.

The opinion of the Rif is itself subject to enough interpretation that it is worthwhile to first see his quote in the original.²²

הא דרב אסי ודרבי יהושע בן לוי דיעבד הוא דלא פסלינן לבריה הואיל
וטבל לשם קריו דאי לאו גיורא הוא לא הוה טבל לשם קריו והא דר'
יוחנן לכתחלה דלא נהגינן ביה מנהג גר ולא מנסבינן ליה בת ישראל
עד דטביל בפני ג'

Behold R. Assi and R. Yehoshua Ben Levi [hold] that it is only after the fact (*bediavad*) that we do not invalidate his son since he immersed followed a seminal emission, for were he not a [legitimate] convert, he would not have immersed for a seminal emission. And according to R. Yohanan, it is initially (*lechatchillah*) that we would not interact with him with the practices of a convert²³ or marry a Jewish woman until he immersed in front of three.

Based on the Rif's interpretation as written, the immersion of the man and woman for other ritualistic purposes was not the *determinant* of their Jewishness, but rather *evidence* of a prior conversion done in front of a proper court. The reliance on subsequent observance of ritual immersion is only in the absence of formal verification that a proper conversion was in fact performed, yet this is sufficient so as not to invalidate or disqualify the individual after the fact. A ritual immersion does not in itself effectuate the conversion, but it is sufficient enough evidence so as not to disqualify someone's prior claims. R. Yohanan's requirement for a Beit Din is one of certitude, that given the options, it would be preferable for the individual to re-immers in the presence of a Beit

²¹ R. Tucker conveniently summarizes nine of them (14-15).

²² Yevamot 15b in the pagination of the Rif.

²³ R. Tucker notes this category remains undefined beyond the specific example of marriage (14). I would conjecture that this would include the special biblical protections associate with converts, such as the special care to love the convert (Deut. 10:19) and to oppress him (Lev. 19:33).

Din such that we would know definitively that in fact the person converted according to Jewish law.

Rambam seems to follow the Rif's paradigm.²⁴

גירת שראינה נוהגת בדרכי ישראל תמיד כגון שתטבול לנדתה ותפריש תרומה מעיסתה וכיוצא בזה, וכן גר שנוהג בדרכי ישראל שטובל לקריו ועושה כל המצות הרי אלו בחזקת גרי צדק, ואף על פי שאין שם עדים שמעידין לפני מי שנתגיירו, ואף על פי כן אם באו להתערב בישראל אין משיאין אותם עד שיביאו עדים או עד שיטבולו בפנינו הואיל והחזקו עכו"ם.

[The following laws apply with regard to] a female convert who we see conduct herself according to the ways of Israel at all times, for example, she immerses herself after being a *niddah*, she separates *terumah* from dough, or the like, and to a male convert who follows the paths of Israel, for example, he immerses himself after a seminal emission, and performs all the mitzvot. These are considered as righteous converts even though there are no witnesses to testify before whom they converted. Nevertheless, if they come to marry among the Jewish people, we do not allow them unless they bring witnesses or they immerse themselves in our presence. The rationale is that their identity was originally established as gentiles.

R. Fox acknowledges that Rif and Rambam essentially reach the same conclusion.

However, his interpretations of both Rif and Rambam are not based on their actual statements, but how they are filtered through and understood by other commentaries.²⁵

The רי"ף assumes that the presence of the בית דין at the immersion is a לכתחילה requirement, but בדיעבד, the conversion is valid for personal matters. However, if the person were to marry a Jew, another immersion in the presence of a בית דין would be required...

The רמב"ם appears to follow in the footsteps of the רי"ף and

²⁴ Hilkhot Issurei Biah 13:9. Translation is from R. Eliyahu Touger, available online here: http://www.chabad.org/library/article_cdo/aid/960661/jewish/Issurei-Biah-Chapter-Thirteen.htm

²⁵ Specifically Ramban on B. Yevamot 45b and the Maggid Mishna on the Rambam cited.

distinguishes between an individual's conversion status in personal concerns and his/her status as it relates to marrying into the Jewish people...

They both agree, however, that if this woman were to marry a Jew, her offspring would be Jewish (6).

Contrary to R. Fox's explanation, the text of the Rif does not address the subject of the presence of the Beit Din at the time of the conversion at all. There is no indication that the Rif does not in fact require presence of the Beit Din at the time of conversion, but the only doubt is whether or not subsequent observance is sufficient in the absence of formal validation. Furthermore, the claim that both Rif and Rambam would both validate the offspring is essentially contradicted by the words of Rambam who affirms that the *halakhic* status quo, the *bazakah*, of the person's gentile status remains until definitive evidence is provided to change it. Such evidence may come in the form of either the producing of witnesses to the original conversion, or through convening a Beit Din to oversee a new procedure and remove all doubt, but until such evidence is provided, the previously established status quo remains. The *halakhic* status of any child would then depend on whether the "convert" was a male who married a Jewish woman or a female who married a Jewish man. Since the status of inherited Jewishness is dependent on the mother,²⁶ validating the status of a suspect male convert's offspring has relatively minimal *halakhic* consequence, even for the Rif and Rambam.²⁷

But independent of the proper interpretation of Rif and Rambam, R. Fox's position that the Beit Din should either be outside of the *mikvah* room *lechatchillah* is ultimately predicated on the position of Tosafot.²⁸

²⁶ B. Yevamot 45a

²⁷ Magid Mishnah's interpretation of Rambam, adopted uncritically by R. Fox, is seemingly supported by Shulhan Aruch Y.D. 268:3, cited in full below, where he concludes, "אבל אם נשא ישראלית והוליד ממנה בן, לא פסלין ליה." However, note that Shulhan Aruch frames this statement only from the perspective of a *male* convert, not a *female*. Any commentary as to the "validity" of such a child would not refer to the Jewishness but of his ability to marry into the priesthood. See Shach Y.D. 268:11, Pitchei Teshuva 268:5, and Taz 268:10.

²⁸ Tosafot Yevamot 45b s.v. *Mi*

האי דבעינן שלשה היינו לקבלת המצות אבל לא לטבילה אף על גב דאמרין לקמן (דף מז:): דשני ת"ח עומדים מבחוץ היינו לכתחלה דעדיף טפי ויש מפרשים דכיון דידוע לכל שטבלה כאילו עומדים שם דמי

We need [the presence] of three for the accepting of the commandments, but not for the immersion. Even though we say later on (referring to B. Yevamot 47b) that two scholars stand outside, this is only more preferable initially (*lechatchillah*). And some interpret that since it is known to all that she immersed, it is as if the Beit Din were standing present.

According to Tosafot, while immersion may be required for a convert, this specific component of the conversion ritual need not be overseen by a Beit Din at all.

Alternatively, Tosafot approvingly cite an anonymous opinion that the mere *knowledge* that an immersion took place is akin to having witnessed the immersion visually. For R. Fox, if the Beit Din need not be physically present as a matter of law, or if the Beit Din need not visually witness the immersion, then given the inherent immodesty and discomfort of three male rabbis supervising a naked woman, the Beit Din ought not to be present at all as a matter of normative *lechatchillah* policy.

Due to R. Fox's dependency on the Tosafot, the next question to consider is to what extent is the opinion of Tosafot normative *halakhab*. To answer this question, R. Fox's methodology is to find precedents in communally accepted *halakbic* literature. First, R. Fox refers to the Shulhan Aruch Y.D. 268:3, who cites the opinions of both Rambam and Rif and the Tosafot.

כל ענייני הגר, בין להודיעו המצות לקבלם בין המילה בין הטבילה, צריך שיהיו בג' הכשרים לדון, וביום (תוס' ורא"ש פ' החולץ). מיהו דוקא לכתחלה, אבל בדיעבד אם לא מל או טבל אלא בפני ב' (או קרובים) (הגהות מרדכי) ובלילה, אפילו לא טבל לשם גרות, אלא איש שטבל לקריו ואשה שטבלה לנדתה, הוי גר ומותר בישראלית, חוץ מקבלת המצות שמעכבת אם אינה ביום ובשלשה. ולהרי"ף ולהרמב"ם, אפילו בדיעבד שטבל או מל בפני שנים או בלילה, מעכב, ואסור בישראלית, אבל אם נשא ישראלית והוליד ממנה בן, לא פסלינן ליה.

All the topics associated with the convert, whether the informing the convert of the commandments to accept them,

or the circumcision, or the immersion, must be performed in the presence of three people who are valid to stand as judges. However, this is only initially (*lechatchillah*), but after the fact (*bediavad*) if he was circumcised or immersed only in the presence of two or at night, even if he immersed not for the purpose of converting but for seminal emissions for a man or menstrual purity for a woman, this is a proper conversion and he is permitted to marry a Jewish woman, the only exception being, the acceptance of the commandments must be performed during the day and in front of three. And according to Rif and Rambam, even after the fact (*bediavad*) if the convert immersed or was circumcised in front of only two people or at night, this deficiency inhibits the conversion and he is prohibited from marrying a Jewish woman. And if he has a child from her, the child is not considered not-Jewish.²⁹

Based on what R. Fox calls "the accepted rules of *psak*," that when the Shulhan Aruch cites an opinion without citation followed by cited one afterwards, it is indicative that Shulhan Aruch prefers the first opinion. Following this approach, R. Fox interprets the Shulhan Aruch's presentation to indicate that the Shulhan Aruch ultimately prefers the opinion of the Tosafot over that of the Rif and Rambam such that the presence of the Beit Din is only *lechatchillah* but *bediavad* their presence is not required (7).

This by itself is a plausible enough interpretation of the Shulhan Aruch, but it is insufficient to support R. Fox's conclusion to dispense with the Beit Din *lechatchillah*. In fact both the previous and subsequent *halakhot* in the Shulhan Aruch would seem to contradict R. Fox's proposition. As referenced earlier, in Y.D. 268:2 the Shulhan Aruch follows Rambam's description of the immersion process for female converts, and retains Rambam's addition that the Beit Din turns away before the woman emerges from the water.

ואם היתה אשה, נשים מושבות אותה במים עד צוארה, והדיינים
מבחוץ, ומודיעין אותה מקצת מצות קלות וחמורות, והיא יושבת

²⁹ See above, note 27.

במים, ואח"כ טובלת בפניהם והם מחזירים פניהם ויוצאין, כדי שלא יראו אותה כשתעלה מהמים

And if [the convert] is female, women seat her in the water up to her neck, and the judges are outside, and they inform her of some of the lenient and strict commandments while she is sitting in the water. And afterwards she immerses in front of them, and they turn their faces and she emerges so that they do not see her when she rises [naked] from the water.

This passage of the Shulhan Aruch is not only unattributed, which following R. Fox's approach ought to represent the true opinion of the Shulhan Aruch, but it is also uncontested by the Ramo. R. Fox, however, interprets this passage to mean the exact opposite of what it actually says.

This is consistent with the opinion of רמב"ם in this area that the מחבר quotes in סעיף ג which requires the presence of the בית דין. However, the מחבר means to pasken against the רמב"ם in this area. Therefore the מחבר must also presume that when we pasken like the סתם position of Tosafot in סעיף ג that the language of רמב"ם from סעיף ב is also implicitly rejected (8).

Of course, these two passages can be reconciled easily by differentiating between the *lechatchillah* and *bediavad* practices, but since this is the very normative procedure which R. Fox is intent on changing, the simple reading will simply not suffice. In order to reach his desired conclusion, R. Fox must violate those very same "accepted rules of *psak*" regarding the Shulhan Aruch's anonymous citations which he necessarily applies in the subsequent *halakhab*. Additionally, he must present as a plausible argument the logically counterintuitive and textually unattested conjecture that the Shulhan Aruch cites this passage only to reject it. That he does so with the emphatic language that this "must" be the case, to the exclusion of even the most obvious of alternatives, is even more unfortunate.³⁰

³⁰ This unfortunate phenomenon of overuse of definitive rhetoric is pervasive enough in academia that sociologist Rodney Stark once admonished, "Keep in mind that 'must have been' is one of the most suspect phrases in the scholarly

Furthermore, Shulhan Aruch introduces Y.D. 268:3 by stating that the presence of a Beit Din of three people is needed (צריך), which even accounting for Tosafot would minimally imply a *lechatchillah* requirement for the participation of a Beit Din. This is also evident in the subsequent *halakhab* of Y.D. 268:4.

הואיל וטבילת גר צריך בית דין של ג', אין מטבילין אותו בשבת ולא ביי"ט ולא בלילה. ואם טבל, הרי זה גר.

Since the immersion of a convert **needs a court of three**, we do not conduct the immersion on Shabbat or Yom Tov or at night [when a court does not meet].

Even if the Shulhan Aruch relies on the Tosafot in a *bediavad* circumstance, he reaffirms the *lechatchilah* requirement of the Beit Din's presence to the point it determines the times when the immersion for conversion is performed. R. Fox does not address the Shulhan Aruch's use of "צריך" in his *teshuvah* at all.

3. The Opinion of R. Moshe Feinstein

R. Fox cites multiple contemporary Rabbis who claim that the Beit Din is inessential for a *bediavad* possibility, but the final step in his argument to make this *lechatchillah* is based on R. Moshe Feinstein's specific application of the Tosafot. Recall that the Tosafot cite an opinion that knowledge is equivalent to witnessing. R. Moshe Feinstein cites and relies on this opinion in his classic *teshuvah* permitting milk,³¹ and he also does so in a *teshuvah* regarding conversion.³² R. Fox presents R. Moshe Feinstein's position as follows.

He claims that as long as the male בית דין is certain that the immersion took place, even if they did not witness it directly, the conversion is valid according to all opinions (including Rif and Rambam) (11).

vocabulary; usually it should be translated as 'we don't really know, but perhaps.'" Stark, Rodney (2011). *The Triumph of Christianity: How the Jesus Movement Became the World's Largest Religion*. HarperCollins, New York. (p. 50).

³¹ Igrot Moshe Y.D. 1:47.

³² Igrot Moshe Y.D. 3:112.

Based on this description, R. Fox ultimately reaches his conclusion.

When the male rabbis stand outside the door and hear the splash of the water with the supervision of woman, it is as though the **בית דין** witnessed the event and the immersion is fully acceptable according to ALL positions. This is the approach that rabbis involved in conversion should be adopting today (12).

Space does not permit me to cite R. Moshe Feinstein's *teshuvah* in its entirety, but when we examine the question to which R. Moshe Feinstein was actually responding, we find a very different scenario than that which R. Fox portrays. I cite the introduction from Iggrot Moshe Y.D. 3:112.

בדבר הגרות שהיתה בפני שלשה דיינים כשרים שנכנסו להמקוה כשהיתה עומדת עד צוארה במים ומחמת שהיה המקום צר ולא יכלו לעמוד בשורה אחת באופן שיראו כולם היטב הרכנת ראשה במים אלא עמדו זה אחורי זה ראה רק הראשון דעמד אצל המקוה ושנים האחרים לא יכלו לראות אבל שמעו קול הטבילה בהכנסת ראשה בהמים.

Regarding a conversion which was done before a court of three valid judges who entered the *mikvah* when she was immersed up to her neck, and because of the narrow space they were not able to stand in one line such that every could see that well when her lowering of her head in the water, but rather they stood one after the other such that only the first person stood by the *mikvah* and the two others were unable to see but could hear the immersion when her head entered the water.

Thus, the question to which R. Moshe actually responds is not one where the entire Beit Din does not witness the conversion such that they all rely on the sound of the immersion. Rather, all three members of the Beit Din are indeed physically present; the question is if two judges may rely on the visual observation of the third. At no point in this *teshuvah* does R. Moshe Feinstein address the scenario where none of the three judges witness the immersion such that its validity is dependent exclusively on "knowledge."

Actually, there is *teshuvah* in which R. Moshe Feinstein does directly address the question at hand, though he reaches a very different conclusion than as presented by R.

Fox. The following quotes are from Igrot Moshe Y.D. 2:127, and one again due to its length I cite only excerpts.

והנה אם נחשב עמידת הב"ד בחדר הסמוך להמקוה בשעת טבילת
הגיורת כטבילה לפני ב"ד אף שלא ראו את הטבילה...

עכ"פ באופן זה שהיו הב"ד בחדר אחר וגם לא ראו את הטבילה אין
כאן ב"ד במעשה הטבילה בכל אופן שנימא בצורך הב"ד, ונמצא
שהיתה טבילת גיורת זו בלא ב"ד ותלוי זה במחלוקת הראשונים אם
ב"ד בטבילה הוא לעיכובא שהוא ספקא דדינא...

עכ"פ לדינא הוא כלא היו ב"ד בשעת הטבילה שהוא ספקא דדינא
וצריכה לחזור ולטבול בפני שלשה שיראו ממש הטבילה לעשותה
גיורת ודאית.

And here if it is considered when a Beit Din stands in a room next to the *mikvah* at the time of a convert's immersion that she immerses in front of a Beit Din, even though they did not witness the immersion...

In any event, in this circumstance where the Beit Din was in another room and also did not witness the immersion, there is no Beit Din for the action of immersion, which in any event, is said to require a Beit Din. And we find the immersion of this convert was done without a Beit Din, and [the status of which] depends on a dispute among Rishonim if the Beit Din by the immersion is an essential component, and here the law is disputed...

In any event, as a matter of law, when the Beit Din was not present at the time of immersion, this is a disputed law, and she needs to return and immerse once again in front of three people so that they witness the actual immersion to make her a valid convert with complete certainty.

Not only does R. Moshe Feinstein require the physical presence of the Beit Din, but in requiring the convert to undergo a second immersion, R. Moshe Feinstein rejects relying on the opinion of Tosafot even *bediavad*!³³

³³ Based on R. Moshe Feinstein's statement, it would appear his approach is *safek lehumra* – that since there is a dispute regarding this law, we ought to be strict to remove all doubt. In a recent private communication with R. Moshe Feinstein's son-in-law (and one of my teachers), R. Moshe Dovid Tendler shared with me that R. Moshe did not think there was a "doubt" at all, but truly believed that the Beit Din is in fact required to be physically present to witness the

There are risks inherent in extrapolating general principles from *teshuva* literature. For one, it is possible that over years of continual learning that a Rabbi changes his mind on a matter of law or his perception on its application. It is also possible that each answer is tailored to a specific scenario and accounts for any number of factors not mentioned in the *teshuvah* itself. While there may be an inconsistency in R. Moshe Feinstein's reliance on Tosafot, the two scenarios are not identical to demonstrate a contradiction. I could conjecture that R. Moshe Feinstein 1. Requires the physical presence of the Beit Din to convey its authority 2. Ideally expects all three to witness the immersion 3. In extenuating circumstances, two may rely on the observations of the third. It is equally plausible to suggest that in the scenario where the Beit Din was outside the room they were unable to hear the immersion to "know" that it happened, otherwise perhaps R. Moshe Feinstein would have validated the conversion at least after the fact. I am sure there are any number of other ways to interpret the "true" position of R. Moshe Feinstein. However, to claim that an opinion is based on the *halakhic* approach and authority of an individual, one needs to demonstrate that the individual in question actually held the belief being attributed to him. In this case, R. Fox selectively relies on R. Moshe Feinstein's writings, taking certain statements at face value, conjecturing regarding others, while dismissing what is contradictory to the desired conclusion.

4. Of Modesty and Methodology

The definition and parameters of modesty in Judaism is a subject worthy of its own discussion, though one which is best served elsewhere.³⁴ However, R. Fox's approach to this essential question, one which serves as the impetus for his *teshuvah* in the first place, is indicative of a systematically problematic methodology pervasive in his argument. At the very beginning of his *teshuvah*, R. Fox writes that he will be proposing a

conversion. His linguistic equivocation was less the result of uncertainty than it was of diplomacy. I did not have enough time to ask R. Tendler how he understood this *teshuvah* in the context of Iggrot Moshe Y.D. 3:112.

³⁴ I discuss this subject at length in my Current Jewish Questions class on *Tzniut* / Modesty available here: <http://www.joshyuter.com/2012/01/22/judaism/ep-55-current-jewish-questions-2-tzniut-modesty/>

solution, "that I believe reflects the values of modesty that have become normative in our community" (2). This statement assumes a great deal as to the determination of these specific "values of modesty" and the authority of social convention in Jewish law. But more significant is the selective application of this definition of normativity. The "values" can and have become normative in the community, but apparently the most commonly accepted *halakhab* procedure of a male Beit Din overseeing a female convert's immersion is not.

This sort of selective application continues with one of R. Fox's core arguments. In *Iggrot Moshe Y.D. 2:127*, R. Moshe Feinstein writes that were it not necessary for the purposes of conversion, it would be prohibited for men to gaze at a woman in the *mikvah*.³⁵ It is this line where R. Fox finds the *halakhic* imperative to change the current practice. The difficulty with this reasoning is that even if the Tosafot disagree with Rambam regarding the *requirement* of the Beit Din, at no point do they – or anyone else for that matter – suggest that it is *prohibited* for the Beit Din to witness the immersion (assuming again that appropriate precautions are taken). This would mean that for R. Fox, the opinions of the Rif and Rambam are not only *halakhically* incorrect, but in fact are in violation of Jewish law. Even according to the Tosafot, the presence of the Beit Din is still only a *lechatchillah* practice,³⁶ with no mention at all of the issues of modesty – let alone an outright prohibition for the Beit Din to witness the conversion. Thus we find that the authority on which R. Fox relies for his conclusion also happens to contradict that conclusion. For R. Fox's argument to cohere, he would also have to also demonstrate that the opinions on which he relies for the laws of conversion were either oblivious or unconcerned with the laws or "values" of modesty.

³⁵ "שבלא צורך גרות ודאי אסור להסתכל באשה הרוחצת"

³⁶ Tosafot Yevamot 45b s.v. *Mi*: "דשני ת"ח עומדים מבחוץ היינו לכתחלה דעדיף טפיל"

One final example where R. Fox's conviction obscures his reasoning may be found in his dismissal of R. Moshe Sternbuch.

In a parallel but opposite direction Rav Sternbuch in תשובות והנהגות כרך א סימן תרכא only refers to the earlier teshuva of Rav Moshe and does not consider the later teshuva at all...Rav Sternbuch does not offer a conceptual analysis but seems to just take for granted that we hold like רמב"ם over תוס' such that there is no room for a debate (13).

This is a strikingly ironic critique for R. Fox to make for several reasons. First, as noted above, while R. Fox does reference both *teshuvot* of R. Moshe Feinstein, he glosses over and essentially disregards R. Moshe Feinstein's incompatible conclusion that derives from Igrot Moshe Y.D. 2:127. Second, R. Fox objects that R. Sternbuch simply assumes that "we hold like Rambam over Tosafot such that there is no room for a debate," yet R. Fox's own *teshuva* is necessarily based on adopting the Tosafot's view to the complete rejection of Rambam's, and at no point in his *teshuvah* does R. Fox evaluate the relative merits of Rambam or Tosafot's respective positions,³⁷ let alone demonstrate or qualify the superiority of the Tosafot.³⁸ Finally, in saying "we hold like" as a determinant of Jewish law, R. Fox is implicitly arguing from an assumed consensus. This is a difficult argument to make in any context,³⁹ but it is evident from the popular normative practice that "we hold like" the opinions which require the physical presence of the male Beit Din at the time of a female convert's immersion.

5. Conclusions

³⁷ However, R. Fox does demote Rambam's position from being a legitimate legal opinion to being a "*humra*" (13).

³⁸ It may be tempting to point to the Shulhan Aruch's endorsement as "proof" of the correctness of Tosafot's position, but this too would be disingenuous. Aside from the inevitable discussion as to the definitive authority of the Shulhan Aruch and the general logical implications of appeals to authority, if the Shulhan Aruch is indeed the final arbiter of Jewish law, then R. Fox's position of removing the Beit Din for the conversion of a female *lechatchillah* would also have to be rejected on these grounds.

³⁹ See my essay "The Concepts of "Consensus" in Halakhic Rhetoric" here: <http://www.joshyuter.com/2014/04/06/judaism/jewish-law-halakha/concepts-consensus-halakhic-rhetoric/>

As stated earlier, a *teshuvah's* validity must only be measured by the merits of its argument. R. Fox advocates for changing the accepted and to date normative practice of having a Beit Din observe the immersion of a female convert, even the with precautions that by convention are prescribed. Of the three options presented by R. Fox, two rely on the assumption that no member of the Beit Din need to visually witness the immersion, which I believe is a contrived interpretation and application of R. Moshe Feinstein. One assumes the presence of the Beit Din is inessential to the conversion (the opinion of Tosafot), even *lechatchillah* and the opinion of Rif and Rambam is invalid to the point it should no longer be a factor in *halakhic* deliberation.

R. Fox's first suggestion of having the Rabbis stand outside the *mikvah* room while retaining visibility of the woman's immersion seems consistent with what is currently practiced, though not always feasible depending on the construction of the *mikvah*. In the practice R. Fox describes, there is distance but no physical obstruction between the Beit Din and the *mikvah*. I am uncertain as to what types of obstructions would negate the *halakhic* presence and effectiveness of the Beit Din, for example, a windowed wall through which the Beit Din could observe while technically being in a separate room. I understand how this could ameliorate discomfort felt by some women, which is itself an admirable goal. But if the premise is that the preventative measures currently and historically practiced to safeguard a woman's modesty are indeed insufficient as a matter of *halakhab* such that current normative practice ought to be changed, then I fail to see how this provides a substantive advantage as a matter of law.

Aside from the *halakhic* merits of R. Fox's *teshuvah*, there are other questions to consider as a matter of policy, especially when the impact of R. Fox's *teshuvah* is felt not by the Rabbis, but by the converts. Several years ago I found myself debating the issue of whether the *halakhic* prenuptial agreement⁴⁰ ought to be mandated by all Rabbis who

⁴⁰ See the resources provided by The Prenup here: <http://theprenup.org/>, the Organization for the Resolution of Agunot (ORA) here: <http://www.getora.org/> or my Current Jewish Questions class on Solutions to the Agunah

officiate a wedding. One of the more convincing arguments I heard came from a colleague who made an argument from personal responsibility. If I chose to marry a couple without the prenup, would I also commit to personally intervening should a problem arise with a get not being given in the future, or would I leave this responsibility with whichever Rabbi happens to be around. I suggest the same logic ought to apply here. We have already seen the ugliness of the politics of conversion and power play out over the past several years, and potentially drastic *halakhic* changes will certainly not help matters. For those who do wish to change the status quo, I would ask the same question, if they would personally assume the responsibility to interrupt their busy lives to defend the converts who converted on their authority.

I have not spoken here about the discomfort felt by female converts; since I am neither a woman nor a convert, I cannot comment on the experience from that perspective. I have heard women express to me their discomfort and others who were not bothered by their conversion experience, and I will not dismiss the feelings of anyone. This means I cannot contest or dismiss women who were bothered by the Beit Din's presence, and at the same time I cannot universalize the experience for all women either.

For those who do feel discomfort at the prospect of immersing in front of a Beit Din – again, even with the established precautions – I would highly encourage a pastoral discussion not only to address those feelings, but to use the opportunity to discuss with the convert how one reconciles one's personal feelings when they may conflict with what the Torah expects of us. This is a tension most thoughtful Jews will feel at some point in their lives, and how one answers this question may help illuminate one's approach to Judaism in general.

Problem here: <http://www.joshyuter.com/2012/03/25/podcasts/current-jewish-questions/ep-63-current-jewish-questions-10-solutions-to-the-agunah-problem/>

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