

## THE SIGNIFICANT ROLE OF HABITUATION IN HALAKHA

*Yehuda Herzl Henkin*

Rabbi Henkin is the author of *She'elot u-Teshuvot Bnei Banim* and the recent *Equality Lost: Essays in Torah Commentray, Halacha and Jewish Thought*. He is the grandson of Rabbi Yosef Eliyahu Henkin, z"l.

One of the offshoots of contemporary preoccupation with sex is the tendency to read sexual considerations into *halakhot* where they don't belong. Two examples come readily to mind. Rabbi Moshe Meiselman, in his book *Jewish Woman in Jewish Law*,<sup>1</sup> explains the *beraita* in *Megilla* 23a, "... the Sages said, a woman may not read the Torah because of *kavod hatsibbur*," as referring to the probability that a woman reader would arouse impure thoughts in the listening males. He offers no source for such a contention, and he is almost certainly in error, as none of the other Talmudic references to *kavod hatsibbur* has the slightest sexual context.<sup>2</sup> Rather, as *Petah haDevir* explains, *kavod hatsibbur* as regards women's Torah readings refers to the damage to a community's good name caused by relying on the services of woman readers, for this gives the impression that there are not enough men competent to read themselves.<sup>3</sup>

*Sefer haMeorot* is explicit that *kavod hatsibbur* as regards women's *aliyot* does not mean sexual distraction: "That which we say, 'a woman may not read the Torah because of *kavod hatsibbur*'—the reason is *kavod hatsibbur*, but there is no *peritsuta* (licentiousness)."<sup>4</sup> Furthermore, Maharam Rottenberg rules that in a town where all the males are *kohanim*, they read the first two *aliyot*, and all the other *aliyot* are read by women. His reason is that "where there is no alternative, [the consideration of] *kavod hatsibbur* is pushed aside"; i. e., if the *kohanim* would read the portions normally reserved for non-*kohanim*, people might think that they were disqualified (*pegam*) from the priesthood.

Therefore, women should read in their place.<sup>5</sup> Such a ruling is inconceivable if the meaning of *kavod hatsibbur* is impure thoughts—better not to have the Torah read at all.

Proof that *kavod hatsibbur* as regards women's readings is a matter of an invidious contrast between literate women and seemingly illiterate men, on the other hand, comes from the *rishonim*'s linking of women's reading the Torah in the synagogue and *me'era*. *Me'era* (evil) is the imprecation inveighed in the *beraita* in *Berakhot* 20b and *Sukka* 38a against someone who neglects to learn the text of *birkat hammazon* himself, and remains dependent on others:

They clearly stated, a son blesses [*birkat hammazon*] on behalf of his father, and a slave on behalf of his master, and a woman on behalf of her husband. But the Sages said, let *me'era* come upon a man whose wife and children bless on his behalf.

R. Avraham Min Hahar, in his commentary to *Megilla* 19b, writes concerning a woman reading the Purim *megilla* for men:

Certainly, *lekhatila* she should not fulfill men's responsibility [by reading the *megilla* for them], as is stated in [*Berakhot*], "let there come *me'era* upon a man whose wife and children bless on his behalf." And it is stated in [*Megilla*] "Everyone is counted towards the quota of people who read the Torah, even a woman or a minor, but the Sages said, 'a woman may not read the Torah because of *kavod hatsibbur*.'" "

Similarly, Ritva writes in *Megilla* 4a that, although from a technical halakhic standpoint women can read the Purim *megilla* for men, "it is not *kevod hatsibbur*, and they are in the category of *me'era*." R. Avraham Min Hahar and Ritva equate women's reading the *megilla* for men with their reading the Torah for men (*kavod hatsibbur*), which in turn they compare to husbands relying on their wives or children to recite *birkat hammazon* (*me'era*). The common denominator is that it is not *kavod* for men to be incompetent to read the texts themselves or to be perceived as incompetent; impure thoughts (*hirhur*) are not mentioned at all.

A second unwarranted claim of sexual distraction as the grounds for a halakha can be found in an article by R. Aharon Feldman in a recent issue of *Tradition*. He writes:

Even though there are opinions which permit women to recite *kaddish* in private prayer groups, these do not permit *kaddish* in the synagogue. The obvious reason for this, as explicitly stated by one rabbinic authori-

ty, is once again that men are easily distracted sexually by women, a fact which might affect their concentration on the prayers.<sup>6</sup>

Now, it should be obvious that from the standpoint of *hirhur* during prayers, there is no difference between private and public prayer, and in fact *Mateh Efraim*, who presumably is the authority referred to by R. Feldman, in his *Elef LaMateh*, prohibits a woman from raising her voice in *kaddish* or any other prayer, whenever and wherever men are present:

It is probable that she will try to prettify her voice (*levisumi kala*), and we say 'if women sing (*zamrei nashei*) and men respond—it is licentiousness'" (*Sota* 48a). . . . It is worthy and proper that every respectable woman who fears God, whether married or single, not make her voice heard where there is [any] man. Only her lips should move [in prayer] but her voice should not be heard at all, lest the man who hears [her] be brought to *hirhur* . . . for she has to guard lest she be a stumbling-block for people.<sup>7</sup>

This would, perforce, equally apply to women's *aliyot*, to women's *zimmun*, and to women's reading the *megila*—according to this *humra* all would be forbidden in the presence of men, lest the woman's voice cause sexual distraction. But such an approach is contradicted by the *rishonim*:

1) Maharam Rottenberg and the other *rishonim* who cite him, as well as *Sefer haMeorot*, R. Avraham Min Hahar and Ritva, ignore *hirhur* in the case of women reading the Torah.

2) Ritva explicitly permits women to say *zimmun* and men to answer<sup>8</sup> and, according to *Bah*,<sup>9</sup> so does Raavad.

3) Rashi, Rambam, and many other *rishonim* permit women to read the Purim *megilla* for men unconditionally,<sup>10</sup> ignoring *hirhur*, and even *Halakhot Gedolot* and most others who forbid it do so for reasons unconnected with *hirhur*.<sup>11</sup>

In the case of *kaddish*, *Havot Yair*, the first authority to address the question of a woman saying *kaddish*, objected to it as undermining established customs,<sup>12</sup> but neither he nor any of the other 17<sup>th</sup> and 18<sup>th</sup> century *aharonim* who refer to it mentions sexual distraction. In our day, *Iggerot Moshe* permits women to occasionally say *kaddish* in a men's *bet hamidrash* and writes that such has always been the custom;<sup>13</sup> he takes no account of *hirhur*.

The custom of saying *kaddish* in unison with other mourners is an additional factor. Elsewhere<sup>14</sup> I have expanded on the ruling of my grandfather, R. Yosef Eliyahu Henkin *zt"l*, permitting women to recite *kaddish* from the *ezrat nashim* together with male mourners, and but-

tressed his cogent historical argument that in the time of the *Havot Yair*, *et al*, Ashkenazi custom was that only one mourner said *kaddish* at a time; in such circumstances, it was objectionable for a woman to be the one person reciting *kaddish*. That was still the custom when *Match Efraim* was published in 1835, and that is what *Match Efraim* is describing when he writes “certainly it is forbidden, *halila*, for her to make her voice heard to the many (*lehashmi'a kolah lerabbim*) in *kaddish*, whether in the synagogue or in a [private] *minyan*.” Ashkenazi custom began to change to its current form of saying *kaddish* in unison only in the mid-to late-nineteenth century.

It should be obvious that my grandfather, *Iggerot Moshe*, and others are not saying that the *hirhur* caused by a woman reciting *kaddish* is irrelevant. They are saying that a woman reciting *kaddish*, depending on the circumstances, does not cause *hirhur* at all, and that therefore other issues can be addressed.<sup>15</sup> This is a *metsiut* question, and it will not do for R. Feldman and others to simply quote *Match Efraim*. The question which has to be asked is, does a woman saying the *kaddish* today really cause impure thoughts and sexual distraction among men? Where the answer is “yes” or “probably,” one cannot rely on any *heter* in practice. In most communities, however, the answer is “no” or “very unlikely.”

One reason women's *kaddish* is not a source of sexual distraction in many of our communities—aside from the fact that *kol be'isha erra* does not apply when *kaddish* is only spoken,<sup>16</sup> and doubtfully applies even when chanted<sup>17</sup>—is that we are inured to much worse. Inurement, or habituation, plays a definite although often overlooked role in the development of Halakha. Its most trenchant expression is found in the *Yam Shel Shelomo* of R. Shlomo Luria, also known as Maharshal, to *Kiddushin* (4:25):

Everything depends on what a person sees, and [if he] controls his impulses and can overcome them he is permitted to speak to and look at an *erra* (a woman forbidden to him) and inquire about her welfare. The whole world relies on this in using the services of and speaking to and looking at women.

Maharshal refers first to the individual, who may not go beyond what the Talmud permits in matters of *hirhur* unless he has extraordinary strengths and qualities,<sup>18</sup> but concludes with the *community*: when the community (the “whole world”) is accustomed to mingling with and speaking to women, their familiarity may be relied on to forestall sinful thoughts. The source for this distinction is the *Tosafot* in *Kiddushin* (82a). In the Gemara, “*hakol leshem shamayim*” (“all in the name

of heaven”) is used by R. Aha bar Ada to explain the special liberty he alone took in taking his betrothed granddaughter on his lap, but *Tosafot* write, “On [*hakol leshelem shamayim*] we rely nowadays [in] that we make use of the services of [married] women.” *Tosafot* employ this principle to justify widespread practices. This is precisely the equation employed by Maharshal.

To prevent any mistake, it is important to be absolutely clear about which activities are subject to the mitigating effects of inurement and which are not. Habituation is an argument for permitting activities which are innocent in and by themselves, such as those mentioned by Maharshal: speaking with women and looking<sup>19</sup> at women’s faces, and many everyday social and commercial activities which involve intermingling of the sexes. It is *not* an argument for permitting activities that have explicit or implicit sexual content, in which case *hirhur* is inevitable. Mixed swimming, especially by the scantily clad, is one example. Another is mixed dancing, particularly the discotheque variety. Two youngsters doing the twist are not an acceptable couple even if they never touch.<sup>20</sup>

Besides *Tosafot*’s application of habituation, another use by a *rishon* of the principle is apparently found in the 15<sup>th</sup> century *Leket Yosher*, in the name of his teacher, *Terumat HaDeshen*:

He said that it is permitted to walk behind the wife of a *haver* or behind his mother, because nowadays we are not all that prohibited (*en annu muzharin kol kakh*) from walking behind a woman.<sup>21</sup>

Walking behind a woman is proscribed by the Talmud in *Berakhot* 61a, and what is the meaning of “nowadays we are not all that prohibited”? It means that although the Talmud forbade men from walking behind a woman lest it cause *hirhur*,<sup>22</sup> nowadays women go everywhere and we are used to walking in back of them and so no *hirhur* results.<sup>23</sup>

Among other *aharonim* besides Maharshal, the clearest use of the principle that habituation forestalls *hirhur* is found in *Levush*, written by Maharshal’s student, R. Mordechai Yafe. It is customary to add the phrase *shehasimha bim’ono*, “in Whose abode is happiness,” in *zimmun* at the festive meals following a wedding; however, the 13<sup>th</sup> century *Sefer Hasidim* specifically excludes feasts “where women sit among the men, *hirhur* being present.”<sup>24</sup> *Levush* writes on this issue at the end of his *Minhagim* that “We do not take care about [avoiding] mixed seating because nowadays women are very common among men, and there are relatively few sinful thoughts [about them] because they seem to us like ‘white geese’ due to the frequency of their being among us. . . .”<sup>25</sup>

This is identical to the approach found in the *Yam Shel Shelomo*, and indeed, *shehasimha bim'ono* is today universally recited even in communities where there is mixed seating at *sheva berahot*.<sup>26</sup>

In recent times, the principle of habituation has been employed by *Arukh HaShulhan*, R. Yehiel Michel Epstein. One of the things that prevent a man from reciting the *Shema* is viewing the uncovered hair of a married woman. Nevertheless, *Arukh haShulhan* (*Orah Hayyim* 75:7) writes:

For many years Jewish women have been flagrant in this sin and go bareheaded . . . married women go about with [uncovered] hair like girls—woe to us that this has occurred in our day. Nonetheless, by law it would appear that we are allowed to pray and say blessings facing their uncovered heads, since the majority go about this way and it has become like [normally] uncovered parts of her body, as Mordehai wrote in the name of Raavya, “all the things we have mentioned as being *erva* [are] only in what is normally covered”. . . .

That is to say, although it remains forbidden for married women to go bareheaded in public,<sup>27</sup> because they do so regardless their hair is no longer an impediment to a man's reading the *Shema*. Since men are used to seeing it, women's hair no longer causes *hirhur*.

All this complicates the task of a *posek*: in a number of areas of *tzeniut* and interaction between men and women there are not always fixed rules, and he may have to employ knowledge of the community, psychology, and sociology (which *poskim* have always employed, long before the social sciences were given names) to determine what is permissible and what is not for a particular *tsibbur*. A recent writer for the *Jewish Observer*<sup>28</sup> found it impossible to accept that in the strictly Orthodox Germanic-Dutch (*Yekkische*) communities before the Holocaust and in their remnants around the world afterwards, mixed seating at weddings and other social events,<sup>29</sup> mixed Torah *shiurim*, and even mixed handshakes<sup>30</sup> were the norm.

Certainly, what was acceptable there is not necessarily acceptable elsewhere, and certainly, the principle of habituation has the potential of being abused and misused by the irresponsible. Applying it to *halakhot* that exist independently of *hirhur*, such as head-covering by married women or the requirement of a *mehitsa* in the synagogue,<sup>31</sup> would be abuse and misuse, not to mention titillating literature or entertainment. But in that there is nothing new.

NOTES

1. P. 142.
2. See *Yoma* 70a, *Megilla* 23b, *Gittin* 60a, and *Sota* 39b.
3. *Petah HaDevir* 282:9. For this reason R. Yaakov Emden, in his *Hagahot to Megilla* 23a, writes that women may be called to read if in fact there are not enough males who can read. In such a situation, the community's repute suffers whether women read or not; better, then, to have women read than to forgo the Torah reading altogether.  
This explanation nicely parallels the usage of *kavod hatsibbur* found in *Gittin* 60a, "One does not read the Torah in the synagogue from *humashim*, because of *kavod hatsibbur*," i.e., use of a scroll of a single book of the Torah such as *Bereshit*, *Shemot*, etc. is prohibited because here, too, a blot on the reputation of the community would result from the impression that the synagogue was unable to afford, or uninterested in obtaining, a complete scroll containing all Five Books of Moses. On this and other aspects of *kavod hatsibbur*, *mehila* of *kavod hatsibbur*, etc., see my Resp. *Bnei Banim*, II, nos. 10-11.
4. *Sefer haMeorot to Berakhot* 45a.
5. Resp. *Maharam Rottenberg*, Prague edition, no. 108; Mordechai to *Gittin*, remez 404; Rabbeinu Yeruham 2:3. Maharam's ruling is not codified for extraneous reasons but his reasoning is not challenged; see *Bet Yosef, Orah Hayyim* 135.
6. *Tradition*, vol. 33, no 2 (Winter 1999), p. 71. The article, "Halakhic Feminism or Feminist Halakha?" is an unremittingly negative review of the book *Jewish Legal Writings by Women*. Remarkably, however, R. Feldman passes over what is the book's most objectionable feature: the strident and occasionally insulting tone of a few of the articles. Particularly egregious is the article "Artificial Insemination of an Unmarried Woman", one of three written in Hebrew. It describes rabbis who object to use of non-Jewish sperm to father Jewish babies as being racists, and dismisses those who are concerned lest the availability of such insemination serve as a cover-up for promiscuity, by curtly (and irrelevantly) quoting the Talmudic dictum "*kol haposel, bemumo posel*." (!)
7. *Match Efraim* and *Elef LaMatch*, *Dinei Kaddish Yatam* 4:8, and see below, notes 16-17. "It is worthy and proper . . ." is from *Eliya Rabba* in the name of *Be'er Sheva*.
8. Ritva, *Hilkhot Berakhot* 7:2.
9. *Bayit Hadash to Orah Hayyim* 689. Both Raavad and Ritva view men and women as equally commanded in *birkat hammazon*, which is not the accepted Halakha, but this is irrelevant to their views on *hirhur*. On men answering to women's *zimmun*, see *Bnei Banim*, III, no. 1.
10. Rashi to *Arakhin* 3a; *Sefer haMeorot*, Riaz in *Shiltei haGiborim*, Ritva, Meiri, and *Nemukei Yosef*, all on *Megilla* 4a; *Or Zarua*, pt. 2, no. 368. These *rishonim* state explicitly that women may read for men. Others indicate this by quoting *Megilla* 4a or mentioning women's obligation to read the *megilla* without qualification: see Rambam, *Hilkhot Megilla* 1:1; Rif and Raban to *Megilla* 4a; *Shibbolei haLeket* 198; *Ohel Moed, Dinei Megilla*, p. 108.

11. *Halakhhot Gedolot*, Venice edition, p. 80; *Tosafot* in *Arakhin* 3a; Raavya chap. 569; Mordehai to *Megilla*, remez 778; *Sefer haNiyar*; Rosh, *Sefer haAguda* and Ran (on the Rif), all to *Megilla* 4a; Rabbenu Yeruham 10:2. Their reason is that women are not as fully obligated in the *megilla* reading as are men.  
 Only *Sefer haKolbo*, chap. 45, and *Orhot Hayyim* (both by the same *rishon*), in the name of *Sefer haItur*, prohibit women from reading the Purim *megila* for men because of *kol be'isha erva*. This view could be applied to *zimmin* because of the prevalence of drinking at meals, see *Sefer haMeorot* to 19b, but not to *kaddish*; and see *Bnei Banim*, II, no.10 and, in English, my book *Equality Lost: Essays in Torah Commentary, Halacha, and Jewish Thought* (Urim, 1999), chap. 7, and there in note 14.
12. Resp. *Havot Yair*, no. 222.
13. Resp. *Iggerot Moshe*, *Orah Hayyim*, V, no. 12 (2).
14. *Bnei Banim*, II, no. 7, and III, no. 27, note, and *Equality Lost*, chaps. 5-6.
15. When a woman says *kaddish* from behind the *mehitsa*, the only question of *tzeniut* is that of her voice. If she is among the men a new set of questions arises, although even here, *Iggerot Moshe* seems unconcerned with *hirhur*. My grandfather writes that although she should stand behind the *mehitsa*, if (on occasion) during *kaddish* she pushes her way into the men's section, as long as there are male mourners also saying *kaddish* "we ignore it" (*lo ikhpat lan*); see *Teshuvot Ivra* (*Kitvei haGri'a Henkin*, vol. 2), no. 4 (2). It should be noted that the language used there in no. 4 (1) "*befnei ha-nashim*" does not indicate anything as to whether or not her voice is audible in the men's section. On the question of a lone woman in the *ezrat gevarim*, see *Bnei Banim*, I, no.4.
16. See *Orah Hayyim* 75:3 and *Magen Avraham* sub-par. 6. This is *Elef LaMateh*'s meaning when he writes, ". . . even though *kol be'isha erva* doesn't apply. . . ."
17. *Elef LaMateh* continues, "Nevertheless, it is probable that she will try to prettify her voice (*levisumei kala*), and we say 'if women sing (*zamrei nashei*) and men respond—it is licentiousness'" (*Sota* 48a). The assumption to be proved is that 1) chanting even if not actually singing; 2) the *kaddish*, even though it is a text of prayer; and 3) even a short interchange, with men responding only "*amen*" and "*yehei shemeh rabba*," still fall in the category of forbidden song and response. Cf. *Bnei Banim* II, pp. 37-38 and III, no. 25 (2). It should be noted that even *Mateh Efraim* might agree that none of this applies to women saying *kaddish* in unison with male mourners, because of the principle *trei kalei lo mishtama'ei*.
18. This is the subject of the well-known disagreement among *rishonim* whether or not especially pious individuals in every generation may take special liberties. See *Equality Lost*, chap. 9.
19. On the difference between looking and gazing (*histaklut*), see *Shita Mekubetset* to *Ketuvot* 17a, and *Yam Shel Shelomo*, *Ketuvot* 2:3 and *Kiddushin* 4:25, intro. Maharshal's position appears to be that a brief look at a woman's face was always permitted, and habituation would permit even lengthier gazing.
20. Modern, suggestive dancing and even ballroom dancing should not be con-



- fused with the minuets and other stylized forms of previous generations. On the dances mentioned in a few sources, see *Bnei Banim*, I, no.37 (4-10).
21. *Leket Yosher*, sect. *Yoreh De'a*, p. 37.
  22. R. Yehuda b. R. Binyamin (Rivevan) in *Berakhot*, and Resp. Radbaz, II, no. 970. Rashi gives a different reason, but it does not easily fit the words of *Leket Yosher*.
  23. Resp. *Tsits Eliezer*, IX, no. 50 (3). In section (2) he suggests an explanation for the difference implied in the *Leket Yosher* between walking behind the wife or mother of a *haver* and walking behind other women. I have suggested that the difference is that the former can be relied upon not to intentionally walk in a provocative manner; contrast the daughter of R. Hanania b. Teradion in *Avoda Zara* 18a.
  24. Par. 393.
  25. The reference is to *Berakhot* 20a, where R. Gidal used to sit near the entrance to the mikveh building as the women left. He justified himself by saying that to him they were like "white geese," i.e., he had no untoward thoughts.
  26. Maharshal himself, however, in *Yam Shel Shelomo* to *Ketuvot* (1:20), agrees with *Sefer Hasidim* on not saying *shehasimha bim'ono* where there is mixed seating. The apparent contradiction between his words in *Kiddushin* and *Ketuvot* can be explained by the merry nature of a wedding feast that makes it more problematic regarding *hirhur* than everyday occasions. An alternative explanation is that in *Ketuvot* Maharshal writes that the custom "in my country . . . in most places" was that men and women feasted in separate rooms at *sheva berakhot*—and therefore he had no cause to justify mixed seating there—as opposed to the *minhag* recorded by *Levush*. See below, n. 29.
  27. *Arukh haShulhan* waives the impediment of a married woman's uncovered hair as regards a man's reading *Shema* but forbids the act of going bare-headed itself; the two are separate *halakhot* stemming from two completely separate Talmudic discussions, in *Berakhot* 24a and *Ketuvot* 72a. The prohibition of a married woman going bare-headed in public derived in *Ketuvot* is independent of whether her hair causes *hirhur* or not. On the halakhic parameters of women's hair covering today, see *Bnei Banim*, III, nos. 21-24. On *Arukh haShulhan*'s disagreement with *Mishna Berura* on the issue of *Shema* and uncovered hair, see *Bnei Banim*, III, no. 26 (6-7). On the relative authority of *Arukh haShulhan* vs. *Mishna Berura*, see *Bnei Banim*, II, no. 8.
  28. Levi Reisman, in the *Jewish Observer*, October 1998, p. 42. Reisman insists that the Germanic communities' practices resulted from a "lapse in observance" without halakhic sanction, and that their rabbis disagreed but were powerless to object. Reading the *Bet Meir* in *Even haEzer* 62 disproves the first assertion, and the second is countered by the fact that rabbis of known piety organized mixed-seating weddings for their children, as in the case of the wedding of R. Eli Munk, the son of R. Azriel Munk of Berlin, to the daughter of the Hamburg *Rav*, a leading *posek* and champion of the strictest Orthodoxy. While it is true that these practices are dying out as the result of the destruction of the home *kehilot* during the Holocaust, as recently as