

SOCIAL ATTITUDES DISGUISED AS HALAKHAH:

ZILA MILTA, EIN HAVRUTAN NA'AH,

KEVOD HATZIBBUR

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The status of women in *halakha* is determined by a central rule – their exemption from positive, time-bound *mitzvot*¹ – and by the great number of exceptions to this rule.² Confounding this enactment and its many apparent inconsistencies is the seemingly tangential pronouncement, “Greater is one who is commanded and performs the command than one who is not commanded and performs the command.”³ Thus, woman, by virtue of her exemption, can never be as “great” as man. Even if she were voluntarily to obligate herself in all the *mitzvot* that a man generally performs, her reward for performing these *mitzvot* could never match his. Since he instinctively rebels against the requirement to do x, actually doing x is seen as manifesting a stronger conquest of the human predisposition to disobey and be contrary.⁴

In addition to this maxim, which almost by definition regards the woman as, in some sense, of lesser value, one finds in the halakic sources disparaging comments about women and women’s company which serve to exclude her in cases where the *halakha* itself does not. These statements manifest social attitudes that emanate from a clearly defined social hierarchy and lead to strictures on female behavior. For example, on strictly halakic grounds a woman should be able to make *kiddush* (the benediction made over wine on the Sabbath) for a roomful of guests⁵ or read the Scroll of Esther for her female friends.⁶ However, *rishonim* and *aharonim*, former (mid-eleventh century to mid-fifteenth century) and latter-day (mid-fifteenth century on) legal experts, rule that she should do neither. *Zila milta*, they claim; doing so is not “dignified.” One must refer to the use of these words in another context entirely to begin to

understand how this pronouncement of social convention is used to enjoin halakic prohibition:

R. Kahana said, “Even if one needs to strip carcasses in the marketplace [to support oneself and one’s family], one doesn’t say ‘I’m an important person and this work is disgraceful/contemptible [*zila milta*] for me.” (BT *Baba Batra* 110a)

A similar use of social convention to enjoin halakic prohibition occurs in the lengthy discussions of women and *zimun*, the “invitation” to the Grace after Meals said in the presence of a fellowship of three or more persons. The phrase *ein chavrutan na’ah* occurs several times in these discussions. Meaning “the company of women is not fitting” or “is inappropriate,” it is invoked even to prohibit a woman from forming such a fellowship, or *mezuman*, with another woman and her husband. But if men form a *mezuman*, women are required to participate; in that case the inclusion of women is not deemed inappropriate.

A lag between cultural change and religious legal texts is to be expected; indeed, it is characteristic of the development of religious legal texts in all traditions and is a safeguard against radical and untoward change. But when the changes in the culture are long in existence and the lag appears to be due to a refusal to share power and an unwillingness to recognize individual autonomy outside of oneself and one’s group, trust in the religious authorities diminishes. Many of the instances that demonstrate this theoretical legal analysis relate to the status of women within Jewish society. One thus becomes cognizant of the enormous political and social power wielded by the male community as it struggles with permutations of the notion of “the equality of woman”⁷ and manifests a decided reluctance to acknowledge women as equals in positions of professional and communal authority and of leadership. This extends to their participation in some religious acts that are largely unproblematic from this point of view in the rabbinic sources.

This paper will examine the concepts of *zila milta* and *ein havrutan na’ah* as they appear in halakic sources, serving there as a means of prohibition where permissibility seems otherwise indicated. A third concept, *kevod hatzibbur*, in some ways is different from the first two notions, but in other ways it is completely analogous. The examination of these three concepts

as used in halakhic sources contributes to our understanding of social/cultural categories as aspects of halakhic decision-making. It also demonstrates clearly the use of hierarchical categories in both descriptions of and value judgements about a society based on halakhic principles.

Zila milta

Like the example from *Baba batra* given above, two further uses of the phrase *zila milta* in the Babylonian Talmud indicate that it is a term of denigration and disparagement. In the first case, in *Baba kama* 64a, a donkey causes the hand of a baby to be cut off. When the parent, presumably the father, comes before R. Papa bar Shmuel, he is told that the *nezek*, the damages to the child, should be appraised according to the method established by Jewish courts. The value of the child should be calculated as if he were a slave to be sold in the marketplace, and the difference between his value before and after the injury will comprise the *nezek* for which the donkey owner is liable. The father's response is, "No, I don't want the child evaluated; it is an insult – *zila milta* – to compare him to a servant or slave sold in the market place." Better not to receive anything, the father reasons; when the child gets older, "I [the father] will appease him/her and give him/her money so s/he will not be embarrassed." He sees the possible embarrassment of not receiving damages as preferable to the insult to both the child and the parent of comparing his/her value to that of a slave.

The second case, in *Avodah zara* 43b, concerns the use of a damaged pedestal upon which an idol may once have been placed. The text reads:

Both Rab and Samuel declared that a damaged pedestal is prohibited; and even according to him who said that [heathens] do not worship fragments [of idols], that applies only to an idol because it is an act of contempt [*dezila milta*] to worship fragments, but with this [pedestal] one does not care. (Soncino translation)

Here the Talmud informs us that even for idol worshippers, devotion directed to a broken idol is considered contemptible. Thus, the term *zila milta* connotes that which is not up to one's usual or intrinsic standard of

value, indeed, that which in some way disgraces the usual standard. That customary standard is at the apex of a hierarchy of values.

Similar uses of the term are found in the midrashic literature and in talmudic commentaries. The *Yalkut shimoni*, a rather late collection of *mid-rashim*, uses the term to indicate that what might be embarrassing for a rich person to have to request would not necessarily be so for a poor one.⁸ Rashi, commenting on BT *Yevamot* 100a, remarks that a woman who has come to collect *ma'aser ani*, the tithe reserved for the indigent, should be given it before a man, because it is undignified – *zila milta* – for her to have to maintain herself. The accepted role for a woman is to be provided for by a man and to confine herself, for the most part, to the private realm of the home. In BT *Shavuot*, Rashi comments on the text that explains the procedure for dividing the remnants of the daily incense offering in the Temple among the artisans and workers. Neither carelessness nor disrespect should characterize the transition of the incense from *kadosh*, holy, to *hullin*, temporal; otherwise it would be *zila milta*, undignified or insulting to the incense.

The term *zila milta* thus indicates the acceptance within a group – a small unit, a larger one, or even society writ large – of a hierarchy of value, significance, or importance of function and role. The determination of the hierarchy has a strong subjective component, formed to a large degree by the social conventions of the time. Within the halakhic system, however, social conventions adduced, using this term, by a seventeenth-century halakhic authority to support a particular religious behavior – often one that contravenes the plain sense of the halakhic texts – may still be adduced today by rabbinic authorities, though social conditions have changed dramatically.

For example, it is only in recent years that Jewish women have begun to recite the *kiddush* in their homes – with their families and/or guests – and also outside of their homes, such as in the synagogue after services. The reluctance of women actively to take on this *mitzvah* – and of men to share what has hitherto been regarded as a male-only privilege – seems strange when we examine the *Shulhan arukh*, which specifically designates the recitation of *kiddush* by women as appropriate, acceptable, permissible, and in some cases advisable. Although several *aharonim* concur with the *Shulhan arukh*, others disagree on the grounds of *zila milta* – it is disgraceful for a woman to recite *kiddush* for men and /or in the company of men.

According to the *Shulhan arukh*, “women may ... recite *kiddush* for men, thereby fulfilling the men’s obligation, since they have the same Torah obligation⁹ to recite *kiddush* as men” (*Orah hayim*, Laws of *Kiddush*, 271). R. David Halevi (the Taz, Poland, seventeenth century), an early commentator on the *Shulhan arukh*, R. Abraham Gumbiner (author of *Magen Avraham*, Poland, seventeenth century) and R. Elijah b. Solomon, the Gaon of Vilna (1720–1797) are among the *aharonim* who agree with the *Shulhan arukh* that women may recite *kiddush* for men. But R. Yisrael Meir Hacothen Kagan (the Hafetz Hayim, 1938–1933), author of the halakhic compendium *Mishnah berurah*, comments on this passage:

Nevertheless, it is initially preferable that one be stringent in not having a woman make *kiddush* for men who are not members of her family, for this is disgraceful [*zila mitla*].

The Hafetz Hayim is concurring here with the view expressed in several earlier halakhic works, including *Eliyahu rabbah*, a supercommentary on *Shulhan arukh: Orah hayim*, by R. Eliyahu Shapira (Prague, seventeenth century) and *Derekh hayyim*, by R. Yaakov Lorbeerbaum of Lissa (Poland, 1760–1832). However, it was the Hafetz Hayim who revolutionized Jewish education by supporting the establishment of the Beis Ya'akov schools, the first institutions of Jewish learning for girls. He was a man with foresight and understanding of the changing world he lived in, and he recognized the increasing opportunities it held out to women, including political rights and access to university training. Nevertheless, he could not have imagined that the gender hierarchy predominant in all the societies of the time would eventually give way to varying degrees of egalitarianism, even in the most conservative of European countries and the most cautious of religious traditions. He retained the hierarchy characteristic of the religious observances of the tradition he had set out, in his own way, to modernize, in which female is subordinate to male. His use of the term *zila mitla* shows that this gender division, as he saw it, is one not only of difference but also of value.

We might say that the *Shulhan arukh* and the *aharonim* who commented on it were setting out the theoretical parameters of the rabbinic tradition, within which, of course, women could say *kiddush* for men. But would women know that such an option existed? Would the learned men in their

communities teach them so as to encourage their participation? Would husbands decide to share this perceived male *mitzva*? The answer to all these questions is negative. Rabbinic sources, true to their structure and style of argumentation, leave intact legal precedents that are not adopted. In the face of these alternatives, it seems strange that conclusions based not on law but on cultural assumptions are still widely defended.

Before concluding this section, an important question must be asked. When the Hafetz Hayim chooses to support the opinion of the *Eliyahu rabbah* and *Derekh hayyim* by quoting their language of *zila mitla*, emphasizing the impropriety and “disgraceful” quality of a woman reciting *kiddush* before men, the nature of the impropriety must be clarified. For whom is the woman’s recitation undignified – for the men or for the woman? It is surely so for the men, since it is inappropriate for them to have their obligation discharged by one lower in status than themselves. But public recitation is also deemed inappropriate for the woman, on account of the halakhic system’s presumption – though it is often undermined, contradicted, or simply ignored – that woman’s nature is intrinsically private. The biblical phrase *kol kevudah bat melekh penimah* (Ps. 45:14),¹⁰ read in the sense of “The king’s daughter is all glorious within,” is invoked widely in texts on marriage, sexuality and appropriately modest female behavior.¹¹ One may understand this usage as an *ex post facto* justification for the less public – and therefore often less valued – role of women in society.¹²

Ein havrutan na'ah

Ein havrutan na'ah, used by halakhic sources in the discussion of *zimun*, may be rendered as “their [fem.] companionship is not suitable [or: becoming].” While some of the halakhic texts regarding women’s participation in *zimun* have been examined in recent literature,¹³ I wish to focus specifically upon the use of this phrase in promulgating a prohibition where the grounds for doing so are very weak. I would also like to discuss its intrinsic meaning. What does it mean to say that someone’s company or fellowship is “unbecoming” or “uncomely”?

The *Shulhan arukh* (*Orah hayim*, 199) codifies Mishnah *Berakhot* 7:1, which states: “Women, children, and slaves may not be counted in the

[fellowship of] three” (Soncino translation). Members of the first or the last group may, however, form a fellowship on their own; that is, women together or slaves together, but not women and slaves in a composite group (minors never form a table fellowship, as they are not yet obligated in *mitzvot*). One of the determining factors in the hierarchy of this list is each group’s level of obligation to perform the *mitzvah*, and the question thus arises as to whether *zimun* is optional or obligatory for women. Although the Vilna Gaon obligates women to form a *mezuman* if three or more have eaten together, the prevailing opinion – going against the halakhic evidence in this regard – is that it is optional for them to do so.

It is interesting to note the puzzlement of the Tosafists, commenting on BT *Berakhot* 45b, at this promulgation. They reason that the rabbis could only have reached such a conclusion because they considered women as a class too ignorant to know how to recite the *zimun* and perhaps even the Grace after Meals. In other words, this astounding conclusion was based on an assessment of social circumstances: Only widespread ignorance among women could lead to such a distortion of the original intent of the text, which was to obligate women. But neither the Tosafists nor any of the *aharonim* of the next generations suggested the obvious solution: teach girls and women so that they will know what to do and then invoke the obligation. Shall we conjecture that issues of social custom – the notion of women’s “proper” place in a patriarchal society – combined with the reluctance of those who hold the power of knowledge to share it, all mitigated against this seemingly common-sense solution?¹⁴

The reasons given in the *Mishnah berurah* (199:6–7) for women not counting as part of the table fellowship with men are several. First, women’s participation is optional, putting it on a lower legal level than men’s, which is obligatory. Second, even if women desire to form a *mezuman* on their own when in male company, they should be discouraged, since doing so constitutes the exercise of a “mere” option. Third, a table fellowship of men and women is not acceptable because it is not fitting that women be the one or ones to complete the group of three – *ein havrutan na’ah*. Once again, the nuance of the phrase must be clarified. For whom is it not fitting? It is inappropriate for the men to accept as part of their group someone whose obligation is lesser,¹⁵ or who is considered subordinate or lesser in the social hierarchy, as women clearly were.

The reason given by the *Mishnah berurah* for why *zimun* is optional for

women is that “the sages did not wish to impose an obligation upon women to form a *zimun* on their own, since it is not so usual that women will be sufficiently learned to say the Grace after Meals properly.” However, when women eat together with a group of at least three men, *zimun* becomes obligatory for them. This conclusion represents an attempt to resolve the apparent contradiction in this regard between BT *Berakhot* 45b and BT *Arakchin* 3a, but the reasoning is strangely convoluted. If women are generally insufficiently learned to form a *mezuman* on their own – and therefore doing so is optional – then why would they all of a sudden be sufficiently erudite to be *required* to join in the *zimun* with three men? Either women are learned – or teachable – or they are not; one cannot have it both ways.

It seems that one aspect of what is going on here is a rationalization of the prevention of women from regularly forming a *mezuman*, which is a kind of micro-community. Communities are political units; better to keep women separated from each other, even in the area of religious observance, than risk them forming a women’s group, a sisterhood, so to speak. Going over these sources always leaves me with a sense of amazement over how many legal contortions are created in order to withhold religious autonomy from women, so that women may participate only in a manner that leaves them dependent upon men. Surely the deeply ingrained social convention – and reality – of women’s subordination and legal and political powerlessness in the societal hierarchy feeds into this discussion as a stream of water feeds into a fountain. The perception of women as inferior – as not being autonomous persons, and certainly not public persons – in both general and Jewish societies governed how the halakhic system wrote about and treated them.

To be sure, following the line of an argument advanced by Judith Hauptman,¹⁶ one thread in the halakhic tapestry woven by the sources in this regard is a genuine concern about obligating women in a *mitzvah* the fulfillment of which, by virtue of social circumstance, might prove a hardship. Against this we might argue, again, that one could lessen the perceived difficulty by teaching women how to perform the *mitzvah*, much as women were taught how to kosher meat. Perhaps in weighing this course of action against that of exempting women and thus obviating the problem altogether, the latter proved the easier option. It surely fit in with the prevailing views of women in both Jewish and general culture.

The *Mishnah berurah* continues its discussion by stating that if one woman could complete the fellowship of three with two men, she should not, for this would be a *genai* – a shame, a disgrace, a gesture characterized by a lack of dignity – “which is not the case when three men themselves form the group.” It seems clear that the “disgrace,” for a man, would be that of having to depend upon a woman, who is both legally and socially his inferior. The legal language thus also works to guarantee a homogeneous group; pluralism was not part of the thinking of the times.

The *Shaar hatsiu*, also written by the Hafetz Hayim, gives the sources for some of the rulings discussed in the *Mishnah berurah*. Citing the *Magen Avraham*, it offers another possible reason for why *zimun* remained optional for a group of women by themselves. The most appropriate way (*mitzvah min hamuvhar*) for the leader to recite the *zimun* is over a glass of wine, and for a woman to do that “is a disgraceful matter [*genai hadavar*].” However, women are obligated to drink wine for *kiddush*! It seems that the wine is a cover for the real issue, that of leading the group of three as an autonomous, self-sufficient individual. This is further reinforced by the *Mishnah berurah*'s comment that when a man recites the Grace over wine, it is propitious (*siman berakhah*) for him to give some to his wife.¹⁷

In defense of the *Magen Avraham*, one might argue that only a small amount of wine need be imbibed when someone else has made the *kiddush*, while leading the *zimun*, if (and only if) one wishes to follow the Grace with a blessing after drinking wine, entails drinking a *rivi'it*, a considerably larger amount. If Gumbiner held that one ought to drink the larger amount, he may have deemed this – and with it, leading the *zimun* – inappropriate behavior for a woman. But his use of such an argument would only support the contention that social and cultural factors constitute subjective elements in the halakhic decision-making process. Would anyone now consider a woman drinking a few ounces of wine after a meal to be an example of “disgraceful” behavior?

Further supporting evidence that the expression *ein havrutan na'ah* expresses social convention is to be found in *Sha'arei teshuvah*, R. Chayim Margoliot's nineteenth-century commentary on the *Shulhan arukh*, and in the opinions of other *aharonim*. Commenting on *Shulhan arukh: Orah hayim*, 199:3, according to which women may form a table fellowship of their own, Margoliot writes:

See the *Levush*,¹⁸ who states that even with her own husband it is not fitting [*na'ah*] for a woman to form a *mezuman* ... [R. Abraham b. Mordechai Halevi (1650–1712), author of] *Gan hamelekh* cites a sage who reported that he formed a *mezuman* with his daughter and son-in-law, but he [Halevi] rejected his view.

That it is unsuitable for a *mezuman* to be formed by a woman, her husband and her father seems exceedingly strange. Though the word *na'eh* can also mean “beautiful” or “comely,” the issue here does not seem to be the reduction of women to sexual objects, as occurs in some legal texts. Indeed, sexuality comes up in this context only in a remark in the *Mishnah* about the general loose morals of slaves. As in the *Mishnah berurah*, the word *na'ah* as used here seems to connote suitability, in the sense of “being the same” – that is, similarly obligated. In the view of the *Levush*, too, putting oneself on the same level as a woman was unsuitable because it meant identifying with a subordinate.

In his *Bi'ur halakhah* (199:7), the Hafetz Hayim quotes the opinions of the Vilna Gaon, of R. Asher b. Jehiel (the Rosh, 1250–1327), and of the disciples of Rabbeno Yonah to the effect that *zimun* is obligatory for women. However, he concludes, “the [Jewish] world did not conduct itself this way.” The Jewish world could not accommodate its own legal ruling, since it contravened a deeply held, often unconscious and unarticulated notion about the proper places of men and women in society. Despite the claims of some scholars that the halakhic system is meta-historical,¹⁹ a legal system necessarily operates within the context of history and culture, and it is never immune to their influences. The issues examined here are excellent examples of that principle. Even when the halakhic sources moved cautiously outside of their own hierarchical framework on the basis of consistent legal reasoning, the fundamental assumptions underlying both general and Jewish society did not allow them to “conduct themselves” in the way indicated by the legal theory.

Historical change, especially of deeply held notions, can move at a glacial pace. This is readily seen in the case of *zimun*. Notwithstanding the legal conclusion that women may form a *mezuman*, it is only in recent years,²⁰ in the wake of the introduction of various permutations of feminism into “the [Jewish] world,” that women have begun to feel sufficiently self-possessed to form and lead a *mezuman* rather than merely to answer to a

male group of three. Even as we examine and debate, we must begin to move out of the constricting parameters of social conventions that encode a view of women no longer acceptable, tenable, or usable. Those parameters are non-halakhic; they are social convention disguised as halakhah. We must alter our behavior even as we reason through the theories.²¹

Kevod hatzibbur

A final example of the principle that social convention influences halakhic reasoning is evidenced in the use of the phrase *kevod hatzibbur*, “the honor of the congregation,” which occurs in six different discussions in the Babylonian Talmud, each conveying an aspect or nuance of the notion of social convention. In *Gittin* 60a, the following question is raised: Can a *humash* – that is, a single book of the Pentateuch handwritten on parchment, as opposed to a complete Torah scroll – be used for the congregational reading? Rabbah and Rav Yosef respond that this is not permissible on account of *kevod hatzibbur*: it is improper for a congregation to hold services without a proper and complete Torah scroll. A further issue relating to the congregational Torah reading is raised in *Yoma* 70a: When two different sections are read from the Torah, may the same scroll be re-rolled after the first reading to the appropriate place for the second reading? No, responds the text, because of *kevod hatzibbur*. Delaying the continuation of the service infringes upon the congregation’s honor, and it is therefore preferable to use two scrolls, each one pre-rolled to the proper place.

In an apparently a similar vein, a well-known passage in BT *Megillah* 23a reads:

Our rabbis taught: All are qualified to be among the seven [who are called to the Torah], even a minor and a woman, but the Sages said that a woman should not read because of the congregation’s esteem [*kevod hatzibbur*].²²

It is clear that from a halakhic perspective, women, as men, are obligated to hear the reading of the Torah, and they are therefore are qualified in

theory to be among the seven readers of the weekly portion. Only the tangential issue of *kevod hatzibbur* precludes women from actually reading.²³

It is unlikely that the phrase *kevod hatzibbur* refers to sexual distraction, for which rabbinic sources have more specific terms, such as *perituz* (licentiousness), *ervah* (sexual transgression), or *yetzer hara* (the evil impulse); the expression *mahshavot zarot* (strange/foreign thoughts) may also be used in this sense. The reason why “the honor of the congregation” would be blackened by a woman reading the Torah is, rather, that her doing so would imply a dearth of competent men in the congregation.²⁴ Two traditional social presumptions – that of a hierarchy with women in second place, and that of illiteracy in the holy tongue among women, while near-universal literacy was enjoined for men – allow this concept, which clearly describes social patterns and convention, to enter into halakhic discussion. When descriptions become prescriptive, the original social circumstances that informed them lock the legal discussion into a frozen moment of history. When women were for the most part unlearned, the concept of *kevod hatzibbur* made sense, at least for men. Since this is no longer the case, however, reconsideration of the specific rulings based on *kevod hatzibbur* is imperative.²⁵

Indeed, sociologist Peter Berger has argued that within the structures of modern society, honor, in certain contexts, may be considered an anachronistic notion. His analysis is directly applicable to the study of *kevod hatzibbur*. Berger demonstrates how the concept of honor no longer has legal status and has been replaced by “a historically unprecedented concern for the dignity and rights of the individual.”²⁶ A notion deeply embedded in hierarchical societies, honor, he asserts, “is a direct expression of status, a source of solidarity among social equals and a demarcation line against social inferiors.”²⁷ However, it functions as a link not only between the self and the community, but also between the self and the theories/ideals/visions upon which the community bases its self-conception. Honor is present in a social structure in which the identity of the individual is firmly entrenched within a larger group or class. This fixedness is further defined by the socially imposed roles or norms of the larger group. In contrast, “dignity always relates to intrinsic humanity,”²⁸ stripped of social context. Honor implies that identity is linked to institutional roles, while dignity asserts the independence of individual identity from institutional embeddedness.

This is not to say that dignity is uniquely an aspect of modern consciousness; the concept has roots in the Torah as well as in some Greek sources. But, Berger writes, “What is peculiarly modern is the manner in which the reality of this intrinsic humanity is related to the realities of society.”²⁹ Berger sees the “obsolescence of the concept of honor” as being part of a complex and comprehensive transformation that is essential to modern consciousness. The very disintegration of the world in which honor functioned has allowed dignity to become more central. Socially defined roles no longer necessarily lead to self-actualization; rather, the individual searches for him/herself. Identity is no longer a given, but much more a journey, a quest. To be sure, Berger speculates, it is possible that honor might reestablish itself as society continues to develop, and this may even be “morally desirable.”³⁰ But honor in the matrix of modern consciousness, embedded within reconfigured institutions, would necessarily entail an elevated concept of dignity.

Berger’s insights enhance our understanding of *kevod hatzibbur* as deriving from a socially constructed hierarchy. They also reaffirm and affirm women as human beings with intrinsic worth rather than as persons whose value is fixed within a social hierarchy. Dignity, or *kevod haberiyot*, blurs the boundaries of socially constructed honor, emphasizing an egalitarian concept of individual worth. In religious terms, one might say that our being created in the image of God (*betzelem Elohim*) must always supercede our embeddedness within the constructs of social organization, be they family, community, or society in general. While it is impossible to obliterate social distinctions completely, the intrinsic worth of the individual must be the ultimate measuring rod. As Berger indicates, honor in the modern world – and in Judaism as articulated within that world – must be allied with dignity. And dignity, when added to honor as a constitutive concept, will in some cases surpass honor.

In an essay entitled “Creativity and Innovation in *Halakha*,”³¹ Jonathan Sacks, Chief Rabbi of Great Britain, comments on this same chapter by Peter Berger in the context of his rebuttal of Conservative legal scholar Joel Roth’s defense of the ordination of women as rabbis.³² Sacks rightly construes Berger’s analysis as posing a challenge to the rabbinic concept of *kavod*, as expressed in the phrase *kevod hatzibbur*.³³ Sacks’s analysis of Berger makes several points. First, he states that Berger “has convincingly demonstrated” that dignity has replaced honor in modern societies.³⁴ But

190

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then, elaborating upon Berger’s thesis, he quotes Alasdair MacIntyre, who states:

This democratized self which has no necessary social content and no necessary social identity can then be anything, can assume any role or take any point of view, because it *is in and for itself nothing*.³⁵

This second point is problematic for two reasons. First, the structure of the paragraph makes it seem as if MacIntyre’s words are Berger’s. Since MacIntyre presents a much more radical stance, the use of this quotation distorts Berger’s analysis, which, I believe, astutely explains the social dynamics that are spurring halakhaic change – indeed, religious change in general. Sacks goes on to claim that “*it is this modern consciousness that is radically subversive of tradition of all kinds*”³⁶ (italics in the original). But this is to misconstrue the subtlety of Berger’s analysis. It is to blacken “modern consciousness” as the enemy of all traditions, surely a gross oversimplification.

Sacks’s third point is based on the metahistorical view enounced by Rabbi J.B. Soloveitchik, according to which “permanent ontological principles” may be ascribed to halakhaic behavioral presuppositions. But this point is weakened when Sacks, in the context of defending Moses Isserles’s expansion of the concept of an “important woman” (*ishah hashavah*), declares:

There are some laws which explicitly allow for differential behavior depending on social circumstance. ... There are others that depend on convention.³⁷

The Talmud, in BT *Pesahim* 98a, states that a woman sitting in the presence of her husband at the Pesach seder is not required, as are the men, to perform various *mitzvoth* connected with the seder while leaning – expressing the leisure of a free person – unless she is an “*ishah hashavah*.” In his gloss on *Shulhan arukh: Orah Hayim*, 472:4, Isserles comments, “All our women are ‘important,’ but our custom (i.e., that of Ashkenazi Jews) is not to lean, based on the opinion of R. Eliezer b. Joel Halevi of Bonn.” If Ashkenazi women nevertheless took on leaning as their dominant custom, this, Sacks acknowledges, must be a consequence of both “social

191

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circumstance" and "convention." Even so, he labels Berger's analysis, as well as Roth's resposnum, as "uncritical acceptance of a late-twentieth-century American view of what is 'sexist' or undemocratic." He continues: "This fails to pass a minimal threshold of sociological insight, let alone halakhic integrity."³⁸ I would disagree. Distorting Berger's conceptual bases for political ends, Sacks refuses to see that the integrity of *halakhah* has always been enmeshed in a social and historical context.

Concluding his discussion of *halakhah* and sociology, Sacks makes the contradictory statement that "concepts like *ervah* and *kavod* are [italics original] culturally determined, and ... a general disposition to find them meaningless testifies to a failure of cultural transmission."³⁹ Sacks implies that certain interpretations of culturally determined concepts manifest the failure of Judaism to transmit its legacy properly. But if such concepts are indeed culturally determined – and in this Sacks affirms Berger's analysis – their meaningfulness in the present day is not necessarily a function of "failure of cultural transmission"; it is, rather, a product of cultural change. In arguing that *halakhah* should use history to *defeat* change, Sacks makes clear his agreement with Edmund Burke, whom he paraphrases: "most change is for the worse."⁴⁰ Sacks is thus both convinced by Berger's analysis and resistant to dealing with its full impact. His ambivalence is palpable, weakening the supporting structure of his argument.

In examining the concepts of *zila milta*, *ein havrutan na'ah*, and *kevod hatzibbur*, I have endeavored to show that the forces of culture and social convention play a prominent role in the determination of religious legal rulings. Acknowledging this variable in the development of *halakhah* should allow change to occur with less anguish, accusation and assumption of betrayal of the tradition. The fluidity of the tradition, its inherent capacity to adapt to a wide variety of historical circumstances while maintaining the centrality of its ethical and theological principles,⁴¹ has been perhaps its greatest strength. The notion of woman as secondary in the halakhic hierarchy of value and obligation is no longer an acceptable component of halakhic argumentation.⁴²

Notes:

1. BT *Kiddushin* 34a.
2. One list is given in David b. Joseph Abudarham, *Sefer Abudarham* (Seville,

1340), *Birkat hamitzot*, chap. 3. For full discussions see Saul Berkan, "The Status of Women in Halakhic Judaism," *Tradition* XIV/2 (Fall, 1973), and Elyakim Ellinson, *Ha'ishah vehamitzot*, I (Jerusalem: WZO, 1978; in Hebrew).

3. Stated by R. Hanina in BT *Kiddushin* 31a. See also *Shulhan arukh: Yoreh de'ah*, 245:6 and *Tosafot* to *Kiddushin* 31a.

4. See commentaries on Gen. 8:21: "for the inclination of a person's heart is evil from his youth."

5. *Shulhan arukh: Orah hayim, Hilot shabbat*, 271:1-4; see also the *Mishnah berurah*, *ad loc.*

6. BT *Megillah*, 4a. See the commentary of Rabbenu Nissim on *Megillah* 23a.

7. A vast literature explores this notion. Two important works in the present context are Bernadette J. Brooken, *Women Leaders in the Ancient Synagogue*, *Brown Judaic Studies* 36 (Atlanta, Ga.: Scholars Press, 1982) and Judith A. Baer, *Women in American Law: The Struggle Toward Equality From the New Deal to the Present* (New York: Holmes and Meier, 1996). See also Catherine Wessinger (ed.), *Religious Institutions and Women's Leadership: New Roles Inside the Mainstream* (Columbia, S.C.: University of South Carolina Press, 1996).

8. *Yalkut shimoni, Kedoshim*, 147. The *Yalkut shimoni* was edited between 1200 and 1300 and is considered of unknown authorship.

9. That is, *de'oraita* in contradistinction to *derabbanan*. See BT *Berakhot* 20b.

10. Some contemporary Bible translations take *kevudah* as referring not to the bride's "glory" but to her "burdens" or "luggage," thus neutralizing the use of this verse as a basis for ontological declarations about female nature. See the discussion in note 2 of David Ellenson and Elissa Ben-Naim, "Women and the Study of Torah: A Responsum by Rabbi Zalman Sorotzkin of Jerusalem," in this issue, and the sources quoted there.

11. The literature ranges from the simplistic to the more sophisticated. In no particular order, some examples are Pinchas Stolper, *Jewish Alternatives in Love, Dating, and Marriage* (New York: NCSY/University Press of America, 1984); Tamar Frankel, *The Voice of Sarah: Feminine Spirituality and Traditional Judaism*, especially chaps. 3 and 5; Lisa Aiken, *To Be a Jewish Woman* (Northvale, N.J.: Jason Aronson, 1992), pp. 100-101, 137-138; Aharon Feldman, *The River, the Kettle, and the Bird: A Torah Guide to Successful Marriage* (Jerusalem: CFB Publications, 1987).

12. See Michelle Rosaldo and Louise Lamphere (eds.), *Woman, Culture, and Society* (Stanford, Ca.: Stanford University Press, 1974), especially the essays by Rosaldo, Ortner, and Sanday. See also, Jean Baker Miller, *Toward a New Psychology of Women* (second edition, Boston: Beacon Press, 1986).

13. See Ari Z. Zivotofsky and Naomi T.S. Zivotofsky, "What's Right with Women and Zimmun," *Judaism*, 42/4 (Fall, 1993), pp. 453-464, and Joel B. Wolowelsky,

in *Women, Jewish Law, and Modernity* (Hoboken, N.J.: Ktav, 1997), pp. 34–42.

14. When Rabbi J. B. Soloveitchik established the Maimonides School in Boston nearly sixty years ago, the girls in the junior and senior high school always recited the *zimun* after lunch. They learned all the rabbinic texts, knew the terms of the dispute and followed Rabbi Soloveitchik's legal ruling, which was based on the opinion of the Vilna Gaon. This was also the case at the Yeshiva High School of Greater Washington for many years. Undoubtedly bowing to pressure from the religious right, girls in both institutions usually no longer form a *mezuman*. Information about the Yeshiva High School of Greater Washington was related to me by Ari Zivotofsky and about Maimonides by Hillel Katchen and Medinah Korn.

15. A person's obligation may only be discharged by another person on the same level of obligation. The obligation of women to participate in the *zimun* is a subject of dispute. According to some, their lesser obligation is derived from their lack of *brit milah*. See note 13 above.

16. Judith Hauptman, *Rereading the Rabbis: A Woman's Voice* (Boulder, Colo.: Westview Press, 1998), pp. 1–14, 244–249.

17. *Mishnah Berurah* 183:19, on *Shulchan Arukh; Orah Hayim*, 183:4. I am grateful to Ari Zivotofsky for pointing out this reference.

18. The *Levush* was written by R. Mordecai ben Abraham Jaffe (1535–1612), who lived in Prague, Italy, and Poland.

19. This viewpoint is variously expressed in several important contemporary sources. See J. David Bleich, "Introduction: The Methodology of Halakhah," in idem, *Contemporary Halakhic Problems* (New York: Ktav, 1977); J.B. Soloveitchik, *Halakhic Man* (English transl. by Lawrence Kaplan, Philadelphia: JPS, 1983), and *The Halakhic Mind: An Essay on Jewish Tradition and Modern Thought* (New York: The Free Press/Macmillan, 1986). While Soloveitchik's view of halakhah as meta-historical is subtle and complex, it becomes distorted in several recent applications. See Mayer Twersky, "Orthodox Women Today: The Good News," in *Jewish Action*, 57/4 (Summer, 1997), pp. 24–29; and idem, "Halakhic Values and Halakhic Decisions: Rav Soloveitchik's Pesak Regarding Women's Prayer Groups," *Tradition*, 32/3 (Spring, 1998), pp. 5–18.

20. But see note 14 above.

21. For a variety of thoughtful and sometimes problematic suggestions as to how this might be done, see Tikva Frymer-Kensky, "Toward a Liberal Theory of Halakha," *Tikkun*, 10/4 (1995), pp. 42–48, 77; David Golinkin, "A Halakhic Agenda for the Conservative Movement," *Conservative Judaism*, 46 (1994), pp. 29–39; Tamar Ross, "Can the Call for Change in the Status of Women be Halakhically Legitimated?" in *Judaism*, 42/4 (Fall, 1993), pp. 478–492 and idem, "Modern Orthodoxy and the Challenge of Feminism," in Jonathan Frankel (ed.),

Jews and Gender: The Challenge to Hierarchy (New York: Oxford University Press, 2000), pp. 3–38; and Elliot N. Dorff, "Custom Drives Jewish Law on Women," in *Conservative Judaism*, 49/3 (Spring, 1997), pp. 3–21.

22. See also *Maseket Safrim*, 118:4; *Magen Avraham, Orah Hayim*, 182:6; *Orah hashulhan*, 182:6.

23. The *Orah hashulhan*, among other sources, disputes the seeming clarity of this ruling, based on the social reality that women needed to take care of children so that men could discharge their obligation. See the patronizing footnote in Ellinson, *Ha'ishah vehamitsvot* (above, note 2) p. 119, n. 21: "Women should not derive from these words permission to remain in the synagogue during the reading of the Torah in order to talk."

24. For a similar use of this term, denoting the sense of shame that would ensue if the established order of Torah reading should be altered due to the presence of an unqualified *kohen*. See R. Meir of Rothenburg, *Responsa*, 47 (quoted in Rachel Biale, *Women and Jewish Law: An Exploration of Women's Issues in Halakhic Sources* [New York: Schocken, 1984], p. 27); and Joseph Karo, *Beit Yosef: Orah Hayim*, 135.

25. For a contemporary, similar reading of *kevod hatzibbur*, see R. Yehudah Herzl Henkin, *She'elot ureshuvot benei banim*, I, 4 (p. 17). I am grateful to Ari Zivotofsky for bringing this issue to my attention.

26. Peter L. Berger, "On the Obsolescence of the Concept of Honor," in idem, Brigitte Berger and Hansfried Kellner, *The Homeless Mind: Modernization and Consciousness* (New York: Random House, 1973), p. 85

27. *Ibid.*, p. 86

28. *Ibid.*, p. 89

29. *Ibid.*

30. *Ibid.*, p. 96

31. Jonathan Sacks, "Creativity and Innovation in Halakhah," in Moshe Z. Sokol (ed.), *Rabbinic Authority and Personal Autonomy* (Northvale, New Jersey: Jason Aronson, 1992), pp. 123–169. The volume is based on the first conference, held in 1989, of the Orthodox Forum, whose expressed aim is "to create and disseminate a new and vibrant Torah literature addressing the critical issues facing Jewry today." Of the conference's 34 participants, only one was a woman.

32. In Simon Greenberg (ed.), *The Ordination of Women as Rabbis* (New York: Jewish Theological Seminary, 1988), pp. 127–185.

33. As distinct, for example, from *kiduv av ve'em*, the honoring of parents, which is based on a natural and necessary hierarchy.

34. Sacks, "Creativity" (above, note 31), p. 165.

35. Alasdair MacIntyre, *After Virtue* (London: Sackworth, 1981), pp. 84–102, quoted in Sacks's essay on p. 165.

36. Sacks, "Creativity" (above, note 31), p. 166.

37. *Ibid.*, p. 164.

38. *Ibid.*, p. 166.

39. *Ibid.*

40. *Ibid.*, p. 167.

41. See the following works by Jacob Katz, *Tradition and Crisis: Jewish Society at the End of the Middle Ages* (New York: New York University Press, 1993); *Exclusiveness and Tolerance: Studies in Jewish-Gentile Relations in Medieval and Modern Times* (Oxford University Press, 1961); *The "Shabbos Goy": A Study in Halakhic Flexibility* (Philadelphia: Jewish Publication Society, 1989); and *Jewish Emancipation and Self-Emancipation* (Philadelphia: Jewish Publication Society, 1986); and *Divine Law in Human Hands: Case Studies in Halakhic Flexibility* (Jerusalem: Magnes Press, 1998); See also Gershom Scholem "Revelation and Tradition as Religious Categories in Judaism," in *The Messianic Idea in Judaism and Other Essays on Jewish Spirituality* (New York: Schocken Books, 1971), pp. 282-303.

42. See David Kraemer, *Reading the Rabbis: The Talmud as Literature* (New York: Oxford University Press, 1996), chap. 7, especially p. 108. Judith Plaskow presents an important analysis of hierarchy in *Standing Again at Sinai: Judaism From a Feminist Perspective*; and see Hava Tirosh-Rothchild, "'Dare to Know:' Feminism and the Discipline of Jewish Philosophy," in Davidman and Tenenbaum (eds.), *Feminist Perspectives on Jewish Studies* (New Haven: Yale University Press, 1994), pp. 85-119. See also Blu Geenberg, "The Theoretical Basis of Women's Equality in Judaism," in Dorff and Newman (eds.), *Contemporary Jewish Ethics and Morality: A Reader* (New York: Oxford University Press, 1995), pp. 315-329.