

Further on Women's Hair Covering: An Exchange

Tradition, Modesty and America: Married Women Covering Their Hair

MICHAEL J. BROYDE

MARC SHAPIRO'S ARTICLE, "ANOTHER EXAMPLE OF 'Minhag America'," JUDAISM, 39:154 (1990), begins with an interesting premise — an attempt to explicate the "tradition" that married women do not cover their hair despite the apparent *halakhic* obligation to do so. Mr. Shapiro's article is flawed, however, in a number of ways, each of which undermines the purpose of the article, and whose sum total leave the reader with misunderstandings of *halakhah* and how it works. The first significant error is the mixing of two unrelated topics — mixed seating in the synagogue and married women not covering their hair. While he claims that both are examples of custom triumphing over law, in fact, the two cases are readily distinguishable. Mixed seating in the synagogue cannot be justified *halakhically*, and can be validated only *extra-halakhically*. Married women not covering their hair has a basis, albeit a minority one, within *halakhah*, and, thus, need not be justified externally to *halakhah*. The second pivotal error is related to the first: Shapiro fails to mention any significant opinions within *halakhah* which sanction the practice of married women not covering their hair.

The essential theme of Shapiro's article is that the phenomenon of married women not covering their hair in violation of *halakhah* represents another example of Professor Gordis' thesis that tradition or custom (*minhag*) can, and does, override *halakhah* on occasion.¹ Further more, Shapiro maintains that the tradition of married women not covering their hair is an example of "*minhag America*" as Gordis uses the term. Shapiro attempts to defend this "non-*halakhic*" tradition by quoting

1. Professor Gordis maintains that, in many circumstances, custom can triumph over law, and mixed pews in the synagogue is one example of that: Robert Gordis, "Seating in the Synagogue: Minhag America," JUDAISM, 47, Winter 1987.

MICHAEL J. BROYDE is a rabbi and a lawyer and is currently a member of the *Kollel l'Hora'ah* (yadin-yadin) at Yeshiva University.

from the *Yad Halevi*, a work written in America during the 1920s² and, in Shapiro's opinion, the sole *halakhic* defender of the "new" tradition. Finally, Shapiro concludes that Gordis is correct, and that *minhag* can, in fact, triumph over Jewish law.

I

As an initial matter, Shapiro and Gordis fail to distinguish between changes in the principles used by *halakhah* and differences in results provided by *halakhah* to questions based on novel social or technological situations. Few would deny that *halakhah's* response to any given question depends on the factual reality of the times. To say that 500 years ago it was improper for a man to pray in front of a woman whose hair was uncovered, but that it is not now prohibited,³ does not demonstrate a change in the *halakhah*. Rather, it demonstrates the consistent application of a principle — in this case, not to pray in the presence of potential sexual stimulation — to diverse factual settings. In one society, hair was considered erotic, while, in another, it was not. Different decisions frequently result from the consistent application of fixed principles to dissimilar settings.

For example, applying the prohibition for men to dress in women's clothes and vice-versa (a fixed legal principle) to dissimilar sociological settings produces diverse results; yet that does not demonstrate that the underlying legal principle has changed. In one society *halakhah* may prohibit women from wearing pants and men skirts, and in another society the opposite results may be produced. Such dissimilar conclusions occur in all legal systems, and are not matters for controversy. The critical issue is whether principles, and not results, change.

Thus, the first error made has its origins in Professor Gordis' original thesis of "*minhag America*." Shapiro continues an improper methodology, one undoubtedly related to the underlying concept that Gordis wished to prove — that the principles used by *halakhah* change.

Second, Shapiro's and Gordis' insistence that the tradition of the people not to observe can change an undisputed legal principle is, itself, wrong. Gordis is undoubtedly correct when he asserts that, factually, most Jews pray in synagogues in which men and women sit together. Non-observance does not demonstrate a change in the *halakhah*. All that it establishes is that Jewish law is not obeyed by all Jews — certainly

2. Shapiro's statement that the *Yad Halevi* is the sole *halakhic* source defending the practice of women not covering their hair is similar to a parallel assertion in Professor L. Epstein's work, *Sex Laws and Customs in Judaism* (KTAV, 1948), p. 55 n. 146, where Epstein states that the *Yad Halevi* is a "daring" defender of the practice of many women not to cover their hair.

3. As most modern authorities maintain; see Rabbi Y. Epstein, *Arukh HaShulhan* 75:8; Rabbi M. Feinstein, *Iggrot Moshe, Oraḥ Hayyim* 1:39, 42; Rabbi O. Yosef, *Yalkut Yosef* 1:125 n. 4 (in the name of most decisors).

not a novel phenomenon. So, too, Shapiro's assertion that, standing alone, women's practice of not covering their hair justifies the practice as "*minhag America*" is incorrect.

Minhag as a legal tool is limited to deciding which of various *halakhically* tenable positions is the one that should be followed; it cannot be used to justify what is undeniably impermissible. As numerous authorities have stated in many different circumstances, "custom [*minhag*] can decide disputes between the various authorities." No one maintains that custom determines the proper practice where no dispute among decisors exists.⁴

However, decisors of Jewish law *do* look to the traditions of observance of the people as a tool to evaluate the acceptability of various *halakhically* tenable positions.⁵ Gordis' article is still flawed, however, because he insists on looking towards the wrong audience to determine the tradition. Gordis uses the concept of "*minhag America*" to justify mixed pews, although Jews who are generally observant of *halakhah* do not pray in such synagogues, and would not do so, as they believe that mixed-pew synagogues are in violation of Jewish law. Gordis is forced to maintain that, in looking to determine "*minhag America*," one must look toward the Jewish population at large, be it generally observant or not, to establish the proper tradition.

This approach has little merit. Only the traditions of people who are generally observant of *halakhah* ought to be considered when

4. For a short essay on this topic, see Rabbi Y. Engel, *Gilyonei HaShas*, Rosh Hashanah 15b, and the numerous sources cited therein. It is important to realize that not every published work, particularly in our era when many rabbis publish their own works, represents an "authority" upon whom the custom can rely. As Rabbi David Cohen of *Gevul Yavez*, Brooklyn, stated (in a letter to this author) in the context of discussing Rabbi Hurewitz and the *Yad Halevi*, "Being published does not make one into a decisor."

5. Many decisors look to the traditions of the community to determine the validity of a practice. For example, Rabbi Karo states in the *Shulhan Arukh (Yoreh Deah 115:2)* "It is prohibited to eat cheese produced by a Gentile." The glosses of Rabbi Isserles (RaMA) add "That is the tradition and it should not be broken, *unless one has an ancient tradition permitting it.*" Since a number of early authorities permitted this type of cheese to be eaten, a permissive tradition based on their rulings need not be abrogated — even though such a tradition accepts as correct a position that has been generally rejected. The scope of deference to *minhag* is undoubtedly one of the key differences between the various decisors. See, e.g., H. Soloveitchik, "Religious Law and Change: The Medieval Ashkenazic Example," *AJS Review* 12:2 (Fall 1987): 205-223 (arguing that the members of one of the schools of Tosaphists were sufficiently confident in the general traditions of their community that they would re-examine talmudic sources in an attempt to justify the practices of the community); M. Tendler, "Halachic Response to Societal Change," *Halachic Process and Contemporary Issues* (Yeshiva University, 1991) (forthcoming) (the tradition of part of society to make new customs; furthermore, typically, the legal custom of the Jews is the end result of *minhag* that has encompassed *halakhic* concerns and expressed it in the form of *minhag*.); Justice M. Elon, *Hamishpat Ha'Ivri*, p. 596-607 (3d ed., Magnus Press, 1987) (tradition is a tool for deciding between various *halakhically* tenable positions) (forthcoming in English).

evaluating the correctness of a custom. “*Minhag America*,” as used by Gordis and Shapiro, can prove the triumph of non-observance over observance in many areas and can supplant any value that *halakhah* has. “*Minhag America*,” in the sense of the tradition of most Jews in America, is not to keep kosher or observe *taharat hamishpahah* (family purity laws), and to work on the Sabbath. Close to a majority of American Jews intermarry, and a majority inter-date. Premarital relations are as common in the non-observant Jewish community as in the general community. The *halakhah*, however, gains nothing through such statistics, since the population surveyed does not value Jewish law as a source of guidance. *Minhag* as a *halakhic* concept must be limited to those who care about observance generally and whose conduct deserves the presumption of validity that makes *minhag* worth deferring to.

The essential value of *minhag* within *halakhah* is that it represents a tradition of observance. When a large percentage of observant individuals maintain that their tradition is to do something that is apparently at variance with the law, *halakhic* decisors should pause to determine if the tradition has a basis in law that has not yet been explored. The concepts of “the tradition of our parents” (“*minhag avotenu*”) and “the tradition of our community” (“*minhag hamakom*”) justify not only strictures, but, also, liberalities. Surely neither Gordis nor Shapiro is satisfied with a version of Jewish law which accepts as proper the conduct of 51% of the Jewish born population: such is not the path of a system of divine laws.

II

But, yet, Shapiro’s analysis of hair covering is more troubling than Gordis’ analysis of mixed pews, because Shapiro alleges that most religious married women do not cover their hair, a practice, he maintains, that does not conform to the requirements of normative *halakhah*. To prove his point that the *halakhah* mandates hair covering, Shapiro briefly surveys the *halakhah* and cites what he believes is the lone defender of the “American tradition” of non-observance — Rabbi Hurewitz, and his work, the *Yad Halevi*.

Upon further analysis, however, one sees that the issue of whether *halakhah* mandates that married women must cover their hair is not nearly as clear as Shapiro claims. He is simply wrong as a matter of fact when he states that

Epstein [the *Arukh HaShulhan*] viewed the basic law that a married woman had to cover her hair as eternal and not admitting of any change, no matter what the circumstances. *This was also the opinion of all of the rabbinic authorities in the world with one notable exception, Rabbi Isaac S. Hurewitz.*

* * * *

[S]ince no contemporary rabbinic authority has accepted Hurewitz’ position, perhaps

there is no *halakhic* alternative [but for married women to cover their hair].

He understates the scope of rabbinic decisors who have concluded that married women's obligation to cover their hair is based upon societally delineated modesty grounds and, thus, no obligation to cover exists in a society in which chaste women generally do not. If there is a "*minhag*" at work here, it perhaps is to accept a minority opinion within *halakhah* as the one followed by certain Orthodox communities. It is not analogous to mixed seating in the synagogue — something which even Gordis acknowledges has no *halakhic* validity — because uncovering hair by married women has some basis within *halakhah*. It is methodologically well accepted within the *halakhah* to rely, in appropriate circumstances, on well established minority opinions — and this is even more true when these opinions are in harmony with the *minhag*.⁶

III

The number of latter-day authorities (*Ahronim*) who have addressed the issue of married women covering their hair and ruled that such conduct is permissible is — as I shall indicate below — certainly more numerous than merely Rabbi Hurewitz, a twentieth-century authority whose renown comes from both this position and his opinion that it was now permissible to drink some types of *stam yayin* (wine made by non-Jews).⁷

The theoretical underpinnings for not requiring married women to cover their hair, according to *halakhah*, must derive from the conclusion that the Talmud's statement (*Ketubot* 72a), which apparently labels such uncovering as a Biblical prohibition, is either disputed elsewhere in the Talmud, was not meant literally (*asmakhta*), or applies only in a society where women generally cover their hair. If any of these is true, the principle involved could thus be one of prohibiting that which is immodest rather than an objective and immutable Biblical prohibition. On the other hand, if it is established that the prohibition is Biblical and immutable, then the tradition of Jewish women not to observe would have no impact on the *halakhah*.

6. Literally dozens of examples of reliance on a minority position because it is the tradition of the Jewish community can be found in the *Shulhan Arukh* or the glosses of the RaMA. For a few examples, see *Shulhan Arukh, Yoreh Deah* 112:6, 115:2, 151:2, 192:4; *Even Ha'ezer* 3:1, 21:5; *Orah Hayyim* 8:6, 28:11, 37:3; *Hoshen Mishpat* 2:1, 3:1, 5:1, 28:17; see also note 5.

7. The *Yad Halevi* was a work of considerable controversy when it was first published, and was reviewed quite unfavorably by a number of rabbis and scholars; see Rabbi R.M. Barishansky, "Response to Rabbi Hurewitz' *Yad Halevi*," *Degel Israel*, June/July, pp. 16-18 (1928). Other reviews of the *Yad Halevi*, as well as a reply from Rabbi Hurewitz, appeared in the April, May, August, and September 1928 issues of this paper. Within the various reviews are references to other unfavorable reviews.

Perhaps the most eminent later decisor (*ahron*) to have ruled that the underlying legal principle at work here is that women must dress modestly, rather than that married women must cover their hair, was Rabbi Yehoshua Babad (the father of Rabbi Joseph Babad, the author of the *Minhat Hinukh*), in Responsa *Sefer Yehoshua*, #89. He states:

If the tradition had been that married women went with their hair uncovered and single women with their hair covered, then it would be prohibited for single women to go uncovered, and married women could walk around uncovered. . . . All is dependent on the tradition (*minhag*) of the women.⁸

A number of other modern authorities have accepted this rationale as well. For example, Rabbi Yosef Chaim, the author of the famous Sephardic *Ben Ish Hai* code, in his *Sefer Hukei Hanashim*, ch. 17 (which was written in nineteenth century Arabia) states:

It is prohibited for a woman to reveal any part of her body; only her face, neck and hands may be revealed. . . . However, the women of Europe have commenced . . . to uncover their faces, neck, hands and heads [hair]. It is true, they uncover their hair — according to our law it is prohibited — but yet they have a justification, because they say that the tradition has become accepted, both among the Jews and other nations where they live, to accept uncovering of hair, like the uncovering of the face and hands, as not causing provocative thoughts . . .

This rationale appears to have been accepted, at least in theory, by the *Mahazit Hashkel* (commenting on *Even Ha'Ezer* 21:5), when he states that the reason why single women do not cover their hair is that the standards of observant women in society determine the permissibility of uncovering. He states that this is so even according to those authorities who consider it a Biblical obligation for single women to uncover their hair.

Similar sentiments can be found in *Sefer Sanhedrai*, pp. 201-202; *Responsa Masat Moshe*, *Even Ha'Ezer* 8; *Yeshuot Yakov*, *Even Ha'Ezer* 21:3 (responsa of R. Zvi Hirsch Aurinstein printed in text), 115:3. In fact, numerous other authorities can be found who support this approach.⁹

Among contemporary decisors, Rabbi Yosef Masas, an eminent Sephardi decisor, in his Responsa *Mayim Haim* 2:110 and his *Ozar Mikhtavim*

8. See also Responsa *Maharaz Hayes*, #53; Responsa *Mayim Rabim* 3:28.

9. See Dov Frimer, *Grounds of Divorce due to Immoral Behavior (other than Adultery) in Jewish Law* (Hebrew with English synopsis), Doctoral Dissertation, Hebrew University (1980), pp. 102-104 and, particularly, n. 161. His list includes many authorities not quoted in this article. He specifically quotes Rabbi Gershuni's opinion discussed later. Rabbi Frimer covers much of this field extensively, and collects many, although not all, of the decisors who link hair covering to societal norms. This work is the best starting point for any research into the scope of the prohibition for married women uncovering their hair. It addresses numerous details of the prohibition, including how much hair needs to be covered (pp. 106-107) and whether any covering is needed within one's own house or in the house of another (pp. 109-110, and, particularly, n. 172). These important issues are not addressed in this article.

#1884, after establishing that no Biblical prohibition is violated by uncovering, states:

[T]he obligation for women to cover their hair is based only on custom. In the past such conduct was thought to be a sign of modesty and one who acted contrary to the custom was indiscreet. However, now that all women agree that such conduct is neither lewd nor immodest, covering of hair is not a sign of modesty . . . and the prohibition disappears.

So, too, Rabbi Yehuda Gershuni, in conversation with this author as well as others, has expressed the opinion that the obligation to cover does not apply when, in society at large, women do not cover their hair. He reaches this conclusion by first positing that no Biblical prohibition is involved, and then by demonstrating that, as a general rule, rabbinic regulations concerning modesty are time bound. He recounts that a number of his teachers agreed with this approach. His mode of analysis is similar to the reasoning of Rabbis Masas, Babad and Chaim (and Hurewitz). The opinions of Rabbis Gershuni and Masas stand in sharp contrast with Shapiro's assertion that "no contemporary rabbinic authority has accepted Hurewitz' [the *Yad Halevi*'s] position."

Yet other authorities advance rationales for the prohibition of married women not covering their hair which indicate that married women need not cover their hair if religious women generally do not. By categorizing the prohibition to uncover in the manner they do, these decisors indicate that the prohibition is time (or place) bound. Some of these authorities are, for example, *Sefer Eleh HaMizvot* (Rabbi Chagiz), Mizvah 262; Rabbi Perlow, *Sefer Hamizvot Shel Rav Saadia Gaon*, 1:650; Responsa *Shevuot Yakov*, *Even Ha'Ezer* 103; Responsa *Dai Hashiv*, *Even Ha'Ezer* 4; Rabbi M.Z. Cohen, *Tipheret Moshe* 2:10 (p. 292).

Additional authorities focus on the linguistic ambiguity in the Hebrew word "*per'iah*," which is the word used in Numbers 5:18, the verse that is the basis for the prohibition. These authorities argue that, while a Biblical prohibition is involved, it is only for women not to go with their hair disheveled, which they claim is what the word *per'iah* means, rather than uncovered; see *Magen Avraham*, commenting on *Shulhan Arukh*, *Orakh Hayyim* 75:1 (#1-3); *Yad Efraim* commenting on *id.*; *Peni Moshe*, commenting on *Even Ha'Ezer* 21:2 (in *Mareh Hapanim* #2); Rabbi A. Hoffer, "Which Disheveling [Uncovering] of Hair for Women is Biblically Prohibited?," *Hazofeh Lehakhmat Yisrael* 12:330 (1928); see generally Rabbi M. Kasher, *Divre Menahem*, *Orakh Hayyim* 5:2:3.

In short, there are quite a number of authorities, although without a doubt a small minority of the latter decisors,¹⁰ who think that married

10. Almost all contemporary decisors maintain that a Biblical and immutable rule requires married women to cover their hair; see Rabbi O. Yosef, *Yekhaveh Da'at* 5:62; Rabbi E. Waldenburg, *Ziv Eliezer*, 7:48:3; Rabbi M. Feinstein, *Iggrot Moshe*, *Even Ha'ezer* 1:53; Rabbi Y. Weinberg, *Seride Aish*, 3:30. It is quite possible that Rabbi Weinberg was unsure if the requirement was actually Biblical in nature or only tradition-based; see Rabbi Y. Weinberg, "Married Women Covering Their Hair," *Ha'Ma'ayan* 5:1, 8 (1965).

women do not have to cover their hair in our society since that conduct is not a sign of modesty. Thus, uncovering hair perhaps can be *halakhically* justified by reliance upon these, and other, rabbinic authorities. The *minhag* here, as in many other cases within *halakhah*, might be merely to rely on minority, although by no means singular, opinions of respected decisors. Such an approach is neither extra-*halakhic* nor surprising. There is no need to resort to extra-*halakhic* sources, and adherents of *halakhah* do not accept the validity of such as a source of authority.

IV

Even had all of these sources been analyzed, however, the picture would still be barely painted. Any discussion of this topic, like all topics in Jewish law, must start with the Talmudic sources to determine what positions are tenable within the law. In this case, the explicit Talmudic statement (*Ketubot* 72a) that the prohibition involved in uncovering hair is objective and Biblical must be addressed, as must any other relevant portions of the Talmud and talmudic literature.

Furthermore, even if uncovering were tenable within the talmudic texts, in order to determine if there is any actual basis in Jewish law to permit uncovering, an analysis of the relevant earlier authorities (*ri-shonim*) would have to be undertaken, as would a study of the *Shulhan Arukh*,¹¹ its commentaries and other codes. None of this was done in Shapiro's article — perhaps because its purpose was not to demonstrate the viability of *halakhah*, but, rather, to support the proposition that tradition is more significant than law.

Conclusion

In sum, Shapiro's article suffers from three distinct flaws:

1) The article misconstrues issues by equating the use of mixed pews in the synagogue, a practice for which no *halakhic* justification can be found, and married women not covering their hair, a convention which has some basis within *halakhah*.

2) It confuses the consistent application of legal principles to diverse factual settings with a change in underlying legal principles. It tries to prove the existence of the latter from the former.

11. Although this is not the forum to address this issue in detail, it is worth noting that both the *Tur* and the *Shulhan Arukh* do not state that the prohibition for married women uncovering their hair is a *dat Moshe*, the "code words" for Biblical and immutable prohibitions. Rather, they explicitly edit their quotations of Maimonides on this topic so as to transfer all references to uncovering hair in *Even Ha'ezer* 115 to *dat Yehudit*, the "code words" for rabbinic (and, perhaps, societally subjective) prohibitions. So, too, the discussion of this topic found in *Even Ha'Ezer* 21 is in a context of purely rabbinic prohibitions. The reason for this reformulation needs further elaboration. See also note 14.

3) In order to demonstrate the lack of rabbinic support for the proposition that married women need not cover their hair, and, thus, the triumph of *minhag* over *halakhah*, it incompletely quotes from the rabbinic sources.¹²

The last flaw is particularly serious since Shapiro's failure to refer to virtually any of the significant rabbinic authorities sanctioning the practice of women not covering their hair (rather than the actual absences of such authority) gives unjustified credibility to his assertion that the practice of many religious women can be justified only extra-*halakhically*, or through the triumph of "*minhag America*" over *halakhah*.

Thus, by overlooking opinions justifying a common practice, the value of Jewish law as guidance to its adherents is diminished, and the value of *minhag* is overstated. The certain consequence, even if not the intended goal, is to undermine the viability of Jewish law.

The question that still needs to be fully addressed is: does the law that married women must cover their hair fall into the category of society-dependent or is it immutable? An overwhelming majority of modern authorities believe it to be immutable;¹³ some think that it changes with time. The basis in the Talmud and early commentators for the position that the obligation to cover is modesty-based and, therefore, can change with society, have yet to be fully elucidated.¹⁴

Regrettably, Shapiro's article has done little to clarify this particular issue or the larger matter of the relationship between *minhag* and *halakhah*.¹⁵

12. This error is compounded by footnote six of Shapiro's article, where he acknowledges the existence of only one other work on this topic, and then argues that it is a non-rabbinic text. No other authorities are mentioned to justify the practice.

13. See note 10.

14. I have a manuscript circulating on the topic of married women covering their hair which attempts to provide a basis within the Talmud, *Rishonim*, and *Shulhan Arukh*, for the position that the obligation for married women to cover their hair is based on societally defined concepts of modesty (*dat Yehudit*). The proper forum for such an article is a more specialized rabbinic journal where articles dedicated to discussions of classical Jewish law are presented, rather than a popular Jewish periodical, even one as respected as JUDAISM, where full discussion is both impossible and inappropriate.

15. In the final paragraph of his article, Shapiro gives two other examples of what he thinks are changes in the *halakhah*: the prohibition for men to greet women, and for women to be teachers. Neither example strengthens his thesis that the principles used by the *halakhah* change.

More than 600 years ago, Rabbi Yom Tov Ashveili [RiTV] ruled that the prohibition of greeting a woman applied only if that conduct is considered immodest in society at large. Thus, the prohibition is society-based and changeable. This position is quoted in many standard rabbinic works such as the *Pit'hei Teshuvah*, *Even Ha'Ezer* 21:6 and the *Ozar Haposkim*, *Even Ha'Ezer* 21:6. Each of them quotes both modern and early authorities who agree with this understanding.

Even without further analysis, a careful reading of the *Shulhan Arukh* (*Even Ha'Ezer* 22:20) limits the prohibition of women teaching to those who are not married, or who are married and separated [*ba'alah lo ba'ir*] from their husbands. Furthermore, most au-