

Another Example of "Minhag America"

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IN ROBERT GORDIS INSIGHTFUL ARTICLE, "Seating in the Synagogue: Minhag America," (JUDAISM, Winter, 1987), he has given us a perfect illustration of how a custom, in this case mixed seating in the synagogue, is able to triumph over a law. This is so despite the fact that "No halakhist has thus far been able to validate the family pew from traditional sources" (p.53). A similar phenomenon, with an interesting twist, can be seen with regard to another area of Jewish law. I refer to the prohibition for a married woman to uncover her hair.

This law is first stated in the Talmud (*Ketubot* 72a), where it is even considered a Pentateuchal prohibition. The reason for the prohibition is because a woman's hair is considered to be *ervah*, (nakedness) (*Berakhot* 24a). The law is duly recorded in the various codes of Jewish law without any dissenting voices¹. The only point at issue is whether an unmarried woman also has to cover her hair. Although this view has not generally been accepted, there are some authorities who believe that in this matter there is no difference between a married woman and an unmarried one.² A direct outcome of the Talmudic law is that one may not pray with a married woman's natural hair in view (*Shulhan Arukh, Oraḥ Hayyim* 75:2).³

From post-Talmudic sources it appears that the majority of women accepted this law, and there is much discussion in the sources about its exact parameters, with some authorities even forbidding a husband from seeing his wife's hair. With the breakdown of the ghetto walls

1. For discussions of the halakhic and historical literature on this topic see *Ozar ha-Poskim* (Jerusalem, 1965), Vol. 9, *Orah Hayyim* 21:2; Jehiel Jacob Weinberg, *Seiveri Esh* (Jerusalem, 1977), Vol. 2, no. 30; S. Carlebach, "Mar'eh Mekomot le-Issur Periat Rosh be-Ishah ve-Dinei Peah Nakhrit," in Simon Eppenstein et al., eds., *Festschrift zum Siebzigen Geburtstage David Hoffmann's* (Berlin, 1914), pp. 218-249 (Hebrew section); Samuel Krauss, "The Jewish Rite of Covering the Head," *Hebrew Union College Annual* 19 (1945-1946), pp. 121-168; and the extremely comprehensive treatment in Moshe Wiener, *Glory of the King's Daughter* (New York, 1980).

2. Indeed, this appears to be very logical, for why should hair be considered as *ervah* only in married women?

3. A number of authorities also discuss whether this law applies to the hair of a Gentile woman. See, e.g., Rabbi Abraham Danzig in his standard work, *Hayyet Adam* 4.5, who can arrive at no definite decision either way. Incidentally, from *Sanhedrin* 58b it is obvious that in Talmudic times married Gentile women were also accustomed to cover their hair.

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and the increasing freedom given to women, this law quickly became a thing of the past, and even the wives of many Orthodox rabbis began to ignore what for previous generations had been standard practice. A number of special publications were issued to combat this laxity, but to no avail.⁴ Things have reached the point where today, although the Orthodox insist on a *mehizah*, the majority of Orthodox women do not cover their hair. Such behavior has raised an important *halakhic* problem for, as has been noted, the *Shulhan Arukh* states: "It is forbidden to read [the *Shema*, and by extension all prayer] opposite the hair of a woman which she is accustomed to cover."

The obvious question is what to do in a situation where women do not generally choose to cover their hair? The *Shulhan Arukh* seems to imply that it is permissible to pray in such circumstances. Indeed, a number of medieval authorities state that the reason why prayer is permitted in front of the uncovered hair of an unmarried woman is that there is a dulling effect with regard to hair which is generally uncovered. Such hair will not bring about lustful thoughts. The principle behind this view is stated clearly in these sources: only that which is customarily shielded from public view has the potential to bring about sexual arousal. Based on this idea, there is reason to believe that prayer in front of a married woman's hair should also be allowed if this hair is not normally covered. Yet, such an inference is fiercely resisted by Rabbi Israel Meir Ha-Cohen (1838-1933) in his classic work, *Mishneh Berurah* (*Orah Hayyim* 75, note 10). In his opinion, just because women choose to act licentiously and go about with their hair uncovered does not suffice to change the law.

According to him, the *Shulhan Arukh* could have been speaking only of a case where, according to law, the hair did not have to be covered (with unmarried women). If, however, these unmarried women had accustomed themselves to covering their hair *then* it assumes the status of *ervah*. With regard to the hair of a married woman, however, there can be no discussion of "custom," for the law is clear and will offer no exceptions. No matter how many women choose to uncover their hair, one may not pray with it in sight.

Despite the seemingly unequivocal nature of this law, it did admit of some change. Another leading rabbi, Jehiel Michel Epstein (1828-1909), came to an opposite conclusion from what we have just seen. Although he laments the fact that so many women choose to disregard the law, this lack of concern is, nevertheless, enough to necessitate a change in *halakhic* practice. Since so many married women choose not to cover their hair there is no longer the status of *ervah*

4. See the list of such East European publications in Wiener, *op. cit.*, p. 54 (Hebrew section).

attached to it. It is, therefore, not forbidden to pray with such hair in view. (*Arukh ha-Shulhan, Oraḥ Hayyim* 75:8).⁵

Faced with a *fait accompli* in that people paid no regard to women's hair and did not view it as an impediment to prayer, Epstein updates the law. Here we see the triumph of *minhag* over *halakhah* that Gordis has already pointed out with regard to the issue of *mehizah*. The important difference between the two is that, in this case, the change of practice has been sanctioned by an Orthodox rabbinic authority. It must be noted, however, that Epstein was not declaring it permissible for a woman to uncover her hair. In his mind, this was a law independent of how women behaved. His decision relates to only one aspect of this issue: the permission to pray with a married woman's uncovered hair in view. Epstein 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.⁶ It is Hurewitz who uses the same logic as Epstein but goes further than the latter ever dreamed. In doing so he gives rabbinic approval to a practice which is even more in the nature of *minhag America* than mixed seating. It is very significant that Hurewitz also has impeccable Orthodox credentials.⁷ Needless to say, he was very opposed to all non-Orthodox varieties of Judaism, and would have objected strenuously had anyone told him that he had any similarities with them.⁸

Hurewitz was born in the city of Navaradok in 1868, studied in the leading European yeshivot, and was ordained by Rabbi Isaac Elhanan Spector, one of the leading rabbis of his day. In 1895 he became Rabbi of the Jewish community in Hartford, where he remained until his death in 1935.⁹ His *magnum opus* is his *Yad Halevi*, an excellent commentary on Maimonides' *Sefer ha-Mizvot*, where he shows himself to be a great scholar and a *talmid hakham* of the old school. Despite this, he also showed himself to have an independent mind, as can be seen in his discussions of the applicability of copyright with regard to Jewish

5. In our own day, Rabbi Moses Feinstein reaffirmed Epstein's position. See his *Iggerot Moshe, Oraḥ Hayyim*, nos. 39 and 42 (New York, 1959).

6. A certain Jacob W. Brecher wrote a book entitled *Katuv Yashar Divrei Emet* (Czernowitz, 1925), in which he claims that the prohibition against married women uncovering their hair is no longer applicable. Not much is known of Brecher, but he was definitely not a rabbinic authority. Rabbi Hayyim Mordechai Roller, *Be'er Chaim Mordechai*, Vol 3, no. 52 (reprinted in Jerusalem, 1976), harshly attacks this "heretical" book.

7. See Jacob I. Dienstag, *Eyn ha-Mizvot* (New York, 1969), pp 36-38, and Hurewitz' obituary in *Ha-Pardes* (Tevet, 5696), p. 19.

8. See, e.g., his *Yad Halevi* (Jerusalem, 1926), pp. 136-137, where he attacks Louis Ginzberg, whom he considers "the Gaon of the Karaites," and a man "far from the re-

9. Morris Silverman, *Hartford Jews: 1659-1970* (Hartford, 1970). pp. 190-191.

books (second side of title page), the practice of giving *kohanim* the first *aliyah* (pp. 92-93), the renewal of the Sanhedrin (pp. 144-145), the binding nature of the *Shulhan Arukh* (p.266b), and many other interesting sections. Yet, without a doubt, it is his discussion regarding the covering of a married woman's hair that is the most significant in the book (pp. 143a-b).

In this discussion, Hurewitz was faced with an obvious difficulty. The Talmud has very harsh things to say about women who do not cover their hair. On the other hand, he was able to see from his experience in the United States that women who did not cover their hair were not the immoral beings who were often portrayed in the rabbinic writings which discuss women who go out with an uncovered head.

It was this difficulty that compelled him to give his own opinion of women who did not cover their hair. He begins his discussion of the topic by reviewing the rabbinic literature. According to him, the reason why Maimonides did not count the prohibition against a married woman uncovering her hair in his *Sefer ha-Mizvoth*, even though the Talmud seems to consider it to be a Pentateuchal prohibition, is that this commandment "is dependent only on the place and the time." In a place where the practice is for women, including those who are unmarried, to cover their hair, Hurewitz claims that no woman may do otherwise. Even further, in such a place it is not even permitted for a woman to wear a wig.

Indeed, Hurewitz notes that, according to the early rabbinic sources, it would appear that all women, married or not, must cover their hair. This is surely the implication of Maimonides (*Hilkhot Issurei Biah* 21:17), the *Tur* and the *Shulhan Arukh* (*Even ha-Ezer* 21), who state simply: "Jewish women should not walk in the market place bareheaded, regardless of whether they are unmarried or married." This law has always created problems, and Rabbi Raphael Meldola (1685-1748), in one of his responsa, quotes a great sage who was shocked when he saw that in Italy and Constantinople the unmarried women did not cover their hair.¹⁰

The leading commentators all struggle to rationalize the accepted custom for unmarried women to leave their hair uncovered with the explicit prohibition found in the codes. According to Hurewitz the answer is obvious. The fact that in Italy and in Constantinople the unmarried women did not cover their hair was, itself, the determining factor in how the law should be understood. Of course, even in these two places married women would not dare venture outside of the house with an uncovered head. With regard to such places, Hurewitz again repeats his contention that a married woman must cover her hair and is not even permitted to wear a wig, for if she does it is licentiousness

10. *Mayyim Rabim* (Amsterdam, 1737), *Even ha-Ezer* no. 28.

and she violates the law of Moses, for what difference does it make if it is her own hair or a wig? In fact, as Hurewitz points out, when married women first began to wear wigs, the leading rabbis of the eighteenth and nineteenth centuries loudly protested the practice. Although a sixteenth century rabbi had given his approval to the wig,¹¹ such luminaries as Jacob Emden and Moses Sofer strongly protested against this view, which they saw as a total distortion of both the spirit and the letter of Jewish law. According to Hurewitz, those rabbis were totally justified in their protest for the simple reason that people were not yet accustomed to seeing married women in wigs.¹²

The fact is that, despite the attitude of the rabbis and despite all the curses and *herems* which were placed on women who wore a wig, the custom spread rapidly throughout Europe. Hurewitz claims that the reason why the rabbis in his generation did not protest this any longer was that, although it was a violation when women first began to change the method of covering their hair, it was no longer forbidden since the people had become accustomed to this phenomenon. Hurewitz continues:

Yet the women did not stop at this and little by little they began to neglect the despised and miserable wig and to go out showing their natural hair. They did not listen to the calls of the leaders of Israel and this practice has spread so much that today it is the *minhag* in almost all cities where Jews are found, and even more so in our home in the new land [America] where all women go out with an uncovered head.

Hurewitz goes on to explain that not only is there nothing wrong with the new *minhag* (as he calls it!), but he actually says that it is better not to cover one's hair than to put on a wig, which is simply a disgrace for a woman to wear. According to Hurewitz, the status of married women in America in his generation was the same as that of unmarried women in previous generations. Just as those unmarried women did not have to cover their hair because people had become accustomed to it, so, too, married women in his day were no longer obligated to do so. The effect of social reality in determining *halakhic* practice could not have been more clearly stated.

To prove his point, Hurewitz cites the words of the *Tur* (*Orah Hayyim* 75): "It is forbidden to read the *Shema* opposite an uncovered area of a woman's body, the size of a handsbreadth, which is normally covered, and opposite the hair of a woman which is normally covered." The implication of the *Tur*, according to Hurewitz, is that in places where it is the general custom for women to uncover their hair, or

¹¹ Joshua Boaz, *Shiltei Gibborim to Shabbat* 64b.

¹² It is interesting to note that Rabbi Ovadiah Yosef, probably the leading contemporary Sephardic Orthodox rabbinic authority, is also vigorously opposed to married women wearing a wig: see his *Yabia Omer* (Jerusalem, 1976), Vol. 5, *Even ha-Ezer* no. 5. Among current authorities he stands almost alone in this position.

even other parts of the body, there is nothing objectionable in this. In such localities, these parts of the body are considered equivalent to a woman's face or hands, which she is never required to cover. Some might assert that Hurewitz would not have held this view if he had seen some of today's fashions, for, if so, his assertion could be carried to extreme conclusions. That these extreme conclusions cannot be dismissed out of hand can be illustrated by the opinion of a recent rabbi, admittedly a minority opinion, who, in a sense, reaffirms Hurewitz' view that nakedness is determined only by social mores. If women have no shame in baring their breasts, he declares, this behavior ceases to be an impediment to prayer.¹³ Similar to what we noted before, this rabbi is not declaring it permissible for women to dress immodestly, only that such behavior is not considered nakedness with regard to prayer. It is Hurewitz who extends this idea and turns it into a generally applicable principle.

In order to uphold this radical view, Hurewitz has to consider the famous Talmudic statement (*Berakhot* 24a): "A woman's hair is a sexual enticement, as it says, *Thy hair is as a flock of goats* (Song of Songs 4:1). According to his previously established principle, he claims that this verse certainly does not teach that a woman is forbidden to uncover her hair. Rather, it is simply brought to support the idea that only in localities where women are accustomed to cover their hair is uncovered hair considered an enticement.

Hurewitz also notes that if this Biblical exegesis is taken to be an actual tradition, reflecting a law which applies to all times and places, why did they not also derive that even a woman's nose is nakedness, for it is written, *Thy nose is like the tower of Lebanon* (Ibid. 7:4), or say that the eyes are nakedness, for it is written, *Thine eyes are as doves* (Ibid.4:1). The fact that the Talmud asserts that a woman's voice is a sexual enticement (*Berakhot* 24a) and, yet, the accepted law is that this applies only to a woman's singing voice but not to her spoken voice which one is accustomed to hear, adds further support to his contention.

Hurewitz concludes his discussion by once again referring to the wig:

Our sages were very concerned with the betterment of Jewish women so that they should not be repulsive to their husbands. How can we then come and force the Jewish women to wear a wig on their heads and to transform their glory into a vile disfigurement? . . . If all Jewish women, young and old, are forced to cover their head with a wig, it will be a blemish and a mark of scorn in their [i.e. the gentiles'] eyes and [the Jewish women will appear] as uncivilized savages who aren't fit to enter the land: similar to the Chinese who go about with braided hair. The name of God and of Israel will be disgraced in an awful way as is known . . . In truth, this entire matter, what is forbidden and permitted, is not rooted in the Talmud and codes but in the custom of women in the

13. Ovadiah Hadaya, *Yaskil Avdi* (Jerusalem, 1948), Vol. 4, *Orah Hayyim* no. 9.

particular place and time. All this I have written not for practical application (*halakhah lema'aseh*), but rather to defend the Jewish women [who do not wish to cover their hair].

Although Hurewitz notes that his opinion is not to be taken for practical application, what is important is not whether he felt confident enough to render a revolutionary decision — he clearly did not — but, rather, how he felt about this issue. Even though he did not think that one should, in practice, rely on his opinion, he was still convinced of its correctness. The issue of covering the hair is similar to that of family pews discussed by Gordis. Both have become accepted practice despite the *halakhah*, making both *minhag America*. The difference between the two is that, unlike the family pew, there was at least one leading Orthodox rabbi who was ready to lend his support to this particular *minhag*.

There will probably be some in the Orthodox community who will object to the basic premise of this article. The fact that trends in human behavior can quickly change direction whereas *halakhah* is eternal will, in their mind, render flawed any attempts to show that anti-*halakhic* behavior can decisively influence Jewish law. They can rightly point out that accompanying the religious move to the right in much of contemporary Judaism is a growing trend among young Orthodox women once again to cover their hair, thus showing that a *minhag* cannot develop from violations of the *halakhah*. However, whether this growing tendency of Orthodox women to cover their hair will continue remains to be seen; since no contemporary rabbinic authority has accepted Hurewitz' position, perhaps there is no authentic *halakhic* alternative. Still, the basic idea that *minhag* can both triumph over *halakhah* and also receive rabbinic sanction is indisputable, and one can point to a number of examples to support this contention.

The fact is that many of the very women who would never dream of uncovering their hair are violating a number of explicit *halakhot* which most of them have probably never heard of. For example, Maimonides (*Hilkhot Issurei Biah* 22:13) and the *Shulhan Arukh* (*Even ha-Ezer* 22:20) explicitly state that a woman, *any* woman, is not allowed to be a teacher! In previous generations, when it became customary for women to teach, it was seen as an unfortunate state of affairs that this *minhag* had triumphed over the *halakhah*¹⁴ but, today, who would dare to criticize the Beit Ya'akov schools for violating the law? Most leading rabbinic authorities have by now lent their support to this violation of *halakhah*. A similar example is the law that a man may not say hello to a woman (*Shulhan Arukh, Even ha-Ezer* 21:6). Yet, this law is completely disregarded even among those who are generally careful to follow *halakhah* in all its particulars. Such is the great power of *minhag*.

14. See the comments of *Apei Zutrei*, *Even ha-Ezer*, section 22.