

# Journal of Halacha and Contemporary Society

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# **Journal of Halacha and Contemporary Society**

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Rabbi Alfred S. Cohen**

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It is the purpose of this Journal to study the major questions facing us as Jews in the twentieth century, through the prism of Torah values. We will explore the relevant Biblical and Talmudic passages and survey the halachic literature including the most recent Responsa. The Journal of Halacha and Contemporary Society does not in any way seek to present itself as the halachic authority on any question, but hopes rather to inform the Jewish public of the positions taken by rabbinic leaders over the generations.

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## Kiddushei Ketana – Betrothal Of A Minor: A Halachic Discussion

*Rabbi Chaim Malinowitz*

The Jewish world recently received a jolt, in the form of a new weapon unleashed in "divorce wars" – a man and wife battling over everything and anything in the face of their impending divorce. Apparently, a Mr. G., who had been battling with his wife, claimed in front of a Beit Din (Jewish court) that he had accepted *kiddushin* (betrothal) for his minor daughter (under the age of twelve), thus rendering her a married woman in Jewish law. However, he would not divulge the identity of the man to whom he had "married" her off, unless his wife acquiesced to various demands of his. This drastic action was taken, he claimed, as a "bargaining chip" against his wife, who would have to give in in order to extricate her daughter from the predicament into which her father had catapulted her.

To explain this episode, which burst upon the scene like a bombshell: in Jewish law, marriage takes place in two stages A) "*Kiddushin*" (called, for lack of a better word, betrothal), which effects a legal state of marriage; the woman is forbidden, under pain of adultery, to anyone other than the betrothed; however, the couple do not yet actually live together until (B) "*Nisu'in*", (effected by our "*chupah*") when the married state actually begins – the couple live together and are bound by all their various marital obligations. By Torah law, a woman can only be betrothed and/or married, with her full knowledge and consent. A minor has no power of legal consent; therefore, the Torah empowered a father to accept

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*Dayan, Beit Din of Kollel HaRabbonim, Monsey.*

*kiddushin* on behalf of his not-yet-adult daughter, and to "give her over" in the *chupah* ceremony.<sup>1</sup>

It is important to bear in mind that child marriage (for girls) was in former times a common practice, and the Torah thereby gave the father an opportunity to provide for her care and safety. This proviso of the Torah was seen as a benefit for the young girl. Although some of the Sages later frowned upon this practice,<sup>2</sup> certain generations found it advisable.<sup>3</sup> In any case, in our society it is simply not done; it is, in fact, unheard of, and in many instances, illegal.

The purpose of this paper is to explain (a) what happened, (b) what the halachic status is, and (c) possible halachic resolutions.

The first point we have to consider is how "betrothal" – or *kiddushin* – is performed for a young girl by her father. She does not have to be present nor even aware of the procedure. The father simply accepts the *kiddushin* for his daughter from the groom in the presence of two witnesses. This authority is granted to him by the Torah.

Another aspect of the Torah's empowerment of a father is found in the Gemara, *Ketubot* 22a:

"How do we know that a father is believed to say that his daughter is forbidden to all [i.e., that he has accepted a betrothal for her]"? The Torah states,<sup>4</sup> "I have given my daughter to this man...."

This teaches that although testimony that a woman is

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1. *Kiddushin* 3B, 4A and *Ketubot* 46B, 47A.

2. See *Kiddushin* 41A.

3. See *Tosafot*, *ibid.*

4. Deuteronomy 22:16.

married would normally require two kosher witnesses testifying to that effect in a Beit Din,<sup>5</sup> we have here what is in effect a Torah decree – a "*G'zeirat Hakatuv*", that a father, who is just one person, and a close relative at that, making such a statement is to be believed.<sup>6</sup>

There is a dispute between Rav and Rav Assi<sup>7</sup> as to the extent to which we believe a father who announces that he has accepted *kiddushin* for his daughter. Rav Assi's opinion is that we accept his word completely; if she cohabited with someone else, the court would put her to death for committing adultery, based on the father's testimony that he married her off. Rav, however, holds that the Torah's acceptance of the father's word does not extend to that degree; his trustworthiness is valid to the extent of rendering her forbidden to others, as a married woman should be, but not to punish her for adultery. The halacha is according to this latter opinion of Rav.<sup>8</sup> This puts the father's trustworthiness in the same category as other cases where we have otherwise invalid testimony accepted by Scriptural decree, but where believability is somewhat limited.<sup>9</sup> To what degree the father

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5. See *Kiddushin* 65B,66A and *Gittin* 2B.

6. The degree to which the rationale behind this law is based on the father's ability to go and perform this very act now, is a matter of some debate. See *Tosafot Yeshonim*, *ibid*, ד"ה מנין; *Ritva* *ibid*; *T'shuvot Rabbi Akiva Eiger* II:53; *Chidushei Rabbi Akivah Eiger to Ketubot* 22A.

7. *Kiddushin* 63B.

8. Rambam, *Issurei Bi'ah* 1:23. For the basic halacha, see Rambam, *Ishut* 9:10, and *Shulchan Aruch Even Haezer* 37:20.

9. These include a) שויה אנפשי חתיכא דאיסורא – The law that a person is believed to say that a particular item is forbidden to him – e.g., this meat is *treif*, I am a *mamzer* (and am forbidden to marry a regular *Bat Yisrael*) (*Ketubot* 9A; *Kiddushin* 65A and countless places in *Shas*); b) "Yakir" – a father's credibility to

has credibility is the crux of our problem and the major subject of this article.

This is the halachic underpinning of the now-notorious Mr. G. case. Mr. G, who felt himself an aggrieved party, unleashed a bombshell: he stated – in front of a Beit Din – that his daughter (who is in the custody of her mother) is a married woman by virtue of the fact that he, the father, had accepted *kiddushin* on her behalf! He refused to name either the "husband", or the witnesses, maintaining that he had done this in order to give himself the "upper hand" in his battles with his wife,<sup>10</sup> inasmuch as it would now be up to him to decide whether or not to tell who the husband is. Naming the husband, of course, would not undo the act; however, it would allow the possibility of a *get* (Jewish divorce) being given to his daughter – but she would henceforth be a "divorcee".

Unfortunately, the story was recently picked up and run in a number of newspapers – with the dreadful result that the Torah and its laws were put up to ridicule and mockery. "How could the Torah give such power to a vindictive father,

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tell us who his first-born is, how old his children are, and even that his child is not really his or is otherwise illegitimate. (*BB* 127B, *Kiddushin* 78B). See also footnote 53. This issue is discussed further in this article, section IV.

10. Mr. G. claims that he is one of a too-large number of husbands whose wives are in the process of litigating against them in the secular courts in order to receive a civil divorce, support, maintenance, custody, visitation decision, and, hopefully, a *Get*. Rather than being self-proclaimed *agunot*, Mr. G. says, these women are guilty of a serious transgression, and are under an obligation to have all such matters settled by a Beit Din – instead of receiving our sympathy, these women should be ostracized from our community, with pressure being brought to bear on them to drop their court cases, and come to Beit Din.

allowing such harm?" And once such matters became public, the temptation among certain elements to rail against Torah, Rabbis, *Poskim*, *Shulchan Aruch*, and "chauvinistic" right-wing Orthodoxy became irresistible. The story was quickly blown up into a claim that at least twenty such girls had this problem (a baseless claim). Further damage ensued: the offering of "solutions" were bandied about in the popular press, not exactly the appropriate place for serious, implication-laden deliberations. Thrown about were terms such as "nullification" of the purported *kiddushin*, a concept which is, as any knowledgeable *Posek* will affirm, outside the scope of our generation's purviews, for both halachic and practical reasons.<sup>11</sup>

What the issue actually is, of course, is only the question of the *credibility* of the father – and the degree of belief that the Torah ascribes towards such a statement. It is along these lines that a solution may be sought, for the present case rests entirely on the father's claim that he contracted a secret marriage for his daughter. If the court decides to give no credence to the claim, the entire issue becomes moot.

However, an insidious attitude is emerging in the minds of many who are ignorant of the true intricacies of the case. What might heretofore have been discussed in a reasoned, rational way by recognized *Poskim*, has now become a public relations issue. A dangerous misperception is perilously close to being accepted, that if only enough pressure were applied to "the Rabbis" about a particular "problem" that "Torah" was causing (!), a "rabbinic way" would be found to alleviate that problem.

Indeed, "solutions" continue to be offered in the press –

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11. See *T'shuvot Rashba* I:1,185 and 1,206; *Rivash* 399. See *Even Haezer* 28:21 and *Chatam Sofer E.H.* I:108.

some nonsensical, others having some validity but presented in a simplistic, superficial, indeed demeaning fashion.<sup>12</sup> The dangers of this should be obvious to all. For example, "Why do the Rabbis care about one girl and slice through all that "Torah-red-tape", and not care about all those thousands [sic] of *Agunot*?"<sup>13</sup> Why can't "they" just solve that "problem" as well?" Thus, reports of the bizarre actions of one perverse father have opened up a Pandora's box of diatribes against the process of Jewish law, maligning it as the instrument of imposing the autocratic will of a few imperious, old-fashioned, out-of-touch scholars in their ivory towers upon multitudes of hapless victims. This is patently not so, as any serious investigation of the halachic process will easily demonstrate.

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A few weeks after the original expose' of the "betrothal of a minor", *The New York Times* reported that a Beit Din in New York had nullified the father's action, and that the child had been declared free to marry anyone. It is, of course, ludicrous to ponder such a serious issue of Jewish law based on partial reports in secular newspapers. At the date of this writing, the Beit Din has not yet published its ruling; thus,

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12. For example, a "Torah" newspaper kept headlining how a deceased *Posek* had "nullified" the *kiddushin*; it also printed a "T'shuva" from a "Rabbi" in a southern state in which he "solved" the problem by "ingenious" solutions – he decided that a father's right to betroth a child is limited to where the betrothal is clearly beneficial – a baseless opinion, contradicted by the Talmud itself in various places ( *Ketubot* 40B, *Kiddushin* 41A and 64A). He also wrote that the father must state whom the betrothal involved – a nice try, but disagreed with by the Talmud in *Kiddushin* 63B and 64B.

13. Women who cannot remarry due to lack of a Jewish divorce or lack of proof that the husband is deceased.



it is impossible to analyze the specific halachic reasoning which motivated the decision of the court. However, there are a number of avenues of approach to resolve the problem, which, either singly or in combination, might be adopted to lead to such a conclusion. We will now present some of these halachic possibilities, note the various complexities and subtleties involved, and cite any precedents which may bear upon this case.

### **I – Is a Person Believed When He Declares Himself Wicked?**

One point that has been made is that given modern-day conditions, a person stating that he has contracted betrothal for his minor daughter is casting himself as a wicked person. Certainly, then, Mr. G qualifies as "wicked" – he has stated quite openly to the Beit Din that he did it for the purposes of blackmailing his wife. It is an outrageous act, illegal by civil law, and thus we should be able to apply the halachic principle "*Ein Adam Maysim Atzmo Rasha*" – "A person cannot make himself wicked." This means that we do not believe a person when he testifies about himself in such a way that he is now considered a "*rasha*", a wicked person. This principle is stated in *Sanhedrin* 9B and *Ketubot* 18B.

As codified in *Shulchan Aruch*,<sup>14</sup> this rule means only that a person cannot testify against himself that he is unfit to be a kosher witness or that he is unfit to be allowed to take a judicial oath.<sup>15</sup> Nevertheless, there are many sources

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14. *Choshen Mishpat* 34:25 and 92:5.

15. And would thus be limited to such sins of "wickedness" which disqualify a person from same (see *Choshen Mishpat* 34 and 92); it would also have as at least part of its rationale that a person can never, legally, testify about himself – whether for benefit or for detriment.

which indicate a more expansive meaning; to wit, a person is simply not believed to say he did any "act of wickedness".<sup>16</sup> The matter is discussed at some length, with various opinions cited and proofs offered, in *Birkei Yosef*.<sup>17</sup> The *Noda Biyehuda* takes the more limited position.<sup>18</sup> The matter is also taken up by the *Minchat Chinuch*.<sup>19</sup>

What happens when the rule of "*Ein Adam Maysim Atzmo Rasha*" comes into play in a case where there is a specific Scriptural law that we *should* believe the person's statement (such as in our case)? A common case is where a person admits owing money due to his having stolen it, or a similar type of admission. Most sources indicate that since there is a Scriptural law that we do believe a person's admission of liability in monetary matters,<sup>20</sup> that extends to a case of "wickedness" as well. Though some dispute this, the consensus is clearly that he *is* believed.<sup>21</sup>

Another case would be the believability the Torah extends to a father who says his child is illegitimate.<sup>22</sup> What if the father declares that this occurred when he — the father — cohabited with a woman forbidden to him under penalty of

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16. See comments of Rabbi Akiva Eiger to *Ketubot* 18B and *Ketzot Hachoshen* 35:4. It is interesting to note that in the *sefer* "*Shev Sh'mat'so*" 7:5 (authored by the *Ketzot* at a younger age) the author refers to and retracts his position taken in the *Ketzot*! He takes the position that the rule only relates to witness disqualification.

17. *Choshen Mishpat* 34:33.

18. *Mahadura Kama*, *Even Haezer* 72 and 74.

19. End of *Mitzvah* 296.

20. See *Bava Metziah* 3B and *Ketzot Hachoshen* 34:4.

21. See *Ran* to *Ketubot* 32B (in *Rif*).

22. *BB* 127B; *Even Haezer* 4:29.

*karet*; certainly he is rendering himself "wicked". Nevertheless, Rambam<sup>23</sup> apparently says that he *is* believed – since the Torah extended to him that credibility, it extends to this case as well. The *P'nei Yehoshua*<sup>24</sup> questions why the *Shulchan Aruch* left out this case and suggests that perhaps the *Shulchan Aruch* holds that indeed the father would *not* be believed. The *Nimukei Yosef*<sup>25</sup> and *Shiltei Giborim*<sup>26</sup> both state clearly that the father would be believed in such a case *only* if he stated that he cohabited inadvertently, thus negating any "wickedness". The *Me'iri*<sup>27</sup> and others,<sup>28</sup> however, seem to concur with the aforementioned position of Rambam. One could assume that these opinions would hold the same in our case as well (i.e., that the father *is* believed).

In fact, the *Rishonim* discuss the **exact** case of our scenario of a father stating that he betrothed his minor daughter (the case they debate is one where he says he betrothed her through cohabitation to a person with whom relations are forbidden). Rashba and Ran<sup>29</sup> seem to say the father is *not* believed – and the Maharit<sup>30</sup> gives their reason as "*Ein Adam Maysim Atzmo Rasha!*" Thus, if we follow their position, it would be possible to declare Mr. G.'s claim to have betrothed his daughter as "null and void." However, Ritva<sup>31</sup> says the man

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23. *Issurei Bi'ah* 15:15,16.

24. *Kiddushin* 78B.

25. *BB* Chapter 8 (56A in Rif).

26. *Kiddushin* (32A in Rif).

27. *Kiddushin* 78B.

28. See *Teshuvot Beit Yitzchak* 54:14, interpreting a Rosh.

29. *Kiddushin* 64A; Ran (27B in Rif).

30. *Ibid.*

31. *Ibid.*

is believed. The Chazon Ish<sup>32</sup> explains the opinions of Ran and Rashba in such a way that they concur with the Ritva holding that he is believed! If this is so, obviously Mr. G. will have to be believed as well.<sup>33</sup>

It is not all clear, in the opinion of this writer, that the rule even applies here. All the cases cited are cases of *objective* wickedness i.e., one who performed a forbidden action. To say, however, that when a person performs a *totally legitimate* act with a *motive* of blackmail, or the like, it is transformed into an act whose performance would not be believed because it would be an admission of wickedness, is quite a leap. The act itself can hardly be termed "wicked", inasmuch as it is one sanctioned by the Torah. And after all, even the stated *purpose* in the case of Mr. G. is, on the surface, laudatory (getting his wife out of the civil courts so that they can resolve their divorce in the Jewish one). And so the act in and of itself is not "wicked", and the motive is not "wicked". But, admittedly, the connection between the two and their respective relevance was "wicked".

Are these not extremely subjective criteria? And, once we've moved away from objective wickedness, just how wicked would one have to be? What would be said if our society condoned, or encouraged, child marriages – but Mr. G. had done this particular one for his nefarious purpose – is that "wicked enough"? It is not within the scope of this article to weigh the evidence and issue an authoritative

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32. Even Haezer 49:13.

33. There are also cases where the "wickedness" of the action is being justified by the perpetrator – the *Hagohat Ashri* (BK chapter 9) states that in such a case we do not apply the rule of "*Ein Adam Maysim Atzmo Rasha*". (One assumes that even according to this opinion, there must be limits and/or guidelines.) See also *Birkei Yosef*, *Choshen Mishpat* 34:38.

ruling, but certainly one hopes that these issues were considered by the Beit Din convened to consider the problem and to offer an avenue of resolution.

## II. The Invalidation of Trustworthiness of a "Nogea" (A witness who is an interested party)

It is well-known that being "*nogea*" invalidates a witness's testimony.<sup>34</sup> It has been suggested that Mr. G., by his own admission, is an interested party to his own "testimony", since he is using it to acquire what he desires.

Before examining the logic of the above, let us examine a basic question: when we are not dealing with technical "testimony" (i.e., of two kosher witnesses), but rather a Torah-decreed belief in a party's statement, does the disqualification of having a vested interest (*negiut*) apply? A most logical comparison, again, seems to be the halacha where a father is believed when he states that a child presumed to be his son is not his son at all.<sup>35</sup> What if the father makes this statement as a response to a claim for child support? Certainly he is *nogea*, having a vested interest in being released from the obligation to support his child! The Chatam Sofer<sup>36</sup> writes that the father is not to be believed, as does *T'shuvot Binyan Olam*.<sup>37</sup> However, the *Tashbatz*<sup>38</sup> and *Rivash*<sup>39</sup> state explicitly that he is believed.<sup>40</sup>

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34. *Choshen Mishpat* 37.

35. See *Even Haezer* 4:29.

36. *Ibid.* 1:76.

37. 6:11.

38. 2:90.

39. 41.

40. One could relate this question to the famous argument regarding the rationale of the disqualification of a *noge'a* – whether

The logic of this approach seems questionable to this writer. The disqualification of *nogea* has to involve a specific **monetary** interest.<sup>41</sup> It is not clear that it applies in our situation. In fact, the *Shulchan Aruch* specifically states that interests such as revenge do *not* constitute *negi'a*<sup>42</sup> – moreover, this interest has to be present and immediate, and not speculative<sup>43</sup> (e.g. a pressure tactic).

Furthermore, the disqualification of *nogea* always means that there is a vested interest in the matter being testified about. In our case, Mr. G. has no more or less *ne'gia* in the matter of his daughter's marriage than any father has. (Every father, in fact, would seem to have a vested interest in his daughter's being married – and even so, is believed). What we have in our case is Mr. G. *utilizing* his very believability for what is a totally unconnected matter; although it is a lamentable utilization of the credibility that the Torah accorded to him, it makes him neither more nor less *nogea* in the issue of his daughter's marriage.

### III "Din Merumah" – "A Deceitful Case"

Another approach suggested by some is based on the halacha of the procedures to be followed by a Beit Din when they suspect deceit by the litigants or the witnesses (*Din Merumah*). An examination of the relevant laws in *Shulchan Aruch* shows that the primary result of the law of *Din*

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it stems from the possibility of lying, or from the concept that someone with a vested interest is considered a party to the case, and hence cannot testify. (The latter presents a problem only for technical testimony; a father is presumably always a party to his daughter's betrothal.) See *Ketzot, Netivot*, 37:1 at length.

41. *Ketzot* 37:2.

42. 33:16; see *Shach* there.

43. *Choshen Mishpat* 37:10.



*Merumah* is the obligation on the part of Beit Din to make a thorough examination of the witnesses<sup>44</sup> and to unearth the apparent falsehood, wherever its source.<sup>45</sup> After all is said and done, if the Beit Din feels that the case is deceitful it has the right, and in fact the responsibility, to withdraw from the case and, when necessary, declare that it not be dealt with by another judge or Beit Din in the future.<sup>46</sup> This would certainly obligate a Beit Din to whom Mr. G. appears not to let him say his piece and leave, but to subject him to a thorough grilling and, if he refuses, to dismiss the case.

In the case of Mr. G., however, he has already appeared at a Beit Din and made his statement without being grilled, and his statement was accepted. The Ramo rules that in such a circumstance, if the required questioning was not done properly, or if the witnesses did not answer the questions, the testimony is still valid *ex post facto* (*b'dieved*).<sup>47</sup> Thus, in the opinion of this writer, there would

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44. See *Choshen Mishpat* 15:3 and 30:1. See *Even Haezer* 17:21 and 42:7.

45. See *Chidushei Haran* to *Sanhedrin* 32B in explanation of Rashi there.

46. See *Choshen Mishpat* 15:3 and G'ra *ibid* 7.

47. *Ramo, Choshen Mishpat* 15:3.

Though there are those who rule otherwise, (see *Shach* 30:5 and *Ketzot* 30:1) closer examination proves that this approach is faulty even according to these opinions. The rationale of the insistence – even *b'dieved* – of thorough questioning is the basic Torah Law that *all* witnesses require thorough questioning. *Chazal* removed this requirement in monetary cases (see *Choshen Mishpat* 30:1) and perhaps marital ones as well; (see *Even Haezer* 42:4 with commentaries). In a "Deceitful Case" *Chazal* reinstated the requirement (See *Teshuvot R. Betzael Ashkenazi* 4). This would not seem to be applicable regarding a father's trustworthiness, where the requirement never existed! In addition, the "stringent" opinion (that the testimony is *not* acceptable even *b'dieved*) states

be a problem in utilizing this rationale for invalidating the credibility of the father.

#### IV Basic Unbelievability

It seems to this writer that we can combine the underlying themes of all the above approaches and come to a definitive conclusion.

The Torah mandates that evidence is affirmed by the testimony of two witnesses, regarding which the Torah writes "By the testimony of two witnesses shall the matter be established."<sup>48</sup> Rambam writes "When two witnesses appear before a judge, the judge shall rule, based on their testimony, even if he does not know whether or not they are telling the truth."<sup>49</sup> Two witnesses are the epitome of believability – Beit Din is enjoined to accept their words and to rule accordingly. Furthermore, the law is that they cannot retract once they have spoken.<sup>50</sup>

In contrast to witnesses, we have areas in the Torah where specific people are granted belief – and even in those areas their believability is limited. Let us take three of them: A) a person's ability to say that something is truly forbidden to him. B) "*Yakir*" – the father's ability to declare who his firstborn is, and even to declare any of his children illegitimate, C) the halacha with which we are dealing – a father being able to state "I have betrothed my minor

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that when dealing with a marital case, it defers to the "lenient" opinion ( that the testimony *is* acceptable) and would necessitate a *Get*. However, this might not apply to our case, where a *Get* is impossible to obtain.

48. Deuteronomy 19:15.

49. Rambam, *Sanhedrin* 24:1.

50. See *Choshen Mishpat* 28 and 29.

daughter."<sup>51</sup>

These cases should not be classified as technical "testimony": rather we shall label them – "*credibility*", or believability.<sup>52</sup> Indeed, in each of these cases, the person's (Torah-recognized) credibility is somewhat subjective and limited.<sup>53</sup>

Obviously, this does not mean that we can arbitrarily or capriciously decide not to believe one to whom the Torah has granted believability. We cannot categorically tell Mr. G., for example, that we don't believe him. Nevertheless, there are cases where, due to the more subjective nature of this "*credibility*" (as opposed to the absolute nature of "witness-testimony"), we have *halachic* guidelines as to when we can negate such statements. Let us therefore examine these precedents, and try to see into which category Mr. G.'s statement might fall.

a) A major rule in "*credibility*" (as distinct from "testimony") is the principle of "*Amatla*" – "a rationale." This means that if a person (in one of the categories above, whose statement is accepted on his say-so) makes a statement before the court (about which he is believed), and then subsequently retracts it *and gives a rationale why he made the earlier statement*, which he now declares was false—his

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51. See Note 9.

52. See beginning of Chapter 4 of *Masechet Shevuot* where, regarding the "oath of testimony", we learn that "believability" is not sufficient – we require testimony. See *Chut Hameshulash* (3) where this basic idea is expounded and elaborated upon.

53. For example: In each of these cases, no punishment may be rendered purely on the basis of their Torah-granted believability. See *Kiddushin* 63B; Rambam *Issurei Bi'ah* 1:23; *Divrei Yechezkel* 21; *Shiltei Gibborim*, *Kiddushin* 32A in Rif. This is also the plain meaning of the Talmud in *Kiddushin* 63B – 64A.

retraction and explanation, rather than his original statement, are believed, provided his rationale is convincing, even compelling.<sup>54 55</sup> In contrast, witnesses are never believed to retract, even with a valid *Amatla*.<sup>56</sup>

How can jurisprudence justify the principle of "*Amatla*"? The first statement was believed by Torah law – why is the second one believed at all?<sup>57</sup> An explanation can be derived from an analysis of *Tosafot*<sup>58</sup> who state that the rule of

54. Rambam *Ishut* 9:31; *Magid Mishnah* *ibid*; *Tashbatz*, *Tur* 2:15. See also *Be'er Heitev Even Haezer* 47:8.

55. See *Even Haezer* 4:29 and 47:4, and *Yoreh Deah* 185:3, for examples of *Amatla*. These sources refer to "*Shavya A'nafshay*" and a father's credibility regarding the legitimacy of a child. Regarding *Amatla* in the case of a father's statement that he betrothed his daughter, see *Shev Shmat'so* 6:8 and 6:12 who concludes that the *Amatla* rule does apply. That is also the conclusion of the "Wise Men of Provence" who originally questioned this. See also *Chut Ha'Meshulash* 3 at length.

In *Even Haezer* 37:27 it seems that the *Ramo* requires that the *Amatla* be said *בדבר דבור* ; upon further examination, however, this is not so. The *Ramo* is not discussing an *Amatla* where a reason for the first statement is given – he is discussing an additional claim made by the father – see *Taz* there #22; see also *Aruch HaShulchan* 37:71.

There is also an issue of *Amatla* being effective after a statement made in *Beit Din*: A consensus of *Poskim* rule that it would be – *Mahari Ben Lev* 1:39; *Nodah BiYehuda* I:60 *ד"ה ועיר*; Rabbi Akiva Eiger 110; *Chut Ha'Meshulash* 3; *Avnei Neizer* 134. *Chazon Ish*, however, maintains that *Amatla* in such a case would not be effective – see *Chazon Ish Even Haezer* 59:24.

56. *Choshen Mishpat* 29:1

57. See *Kovetz Shiurim Ketubot* 51 and *Kovetz He'arot* 78. R. Elchanon's explanation, however, would not extend to other cases besides the one of which he speaks.

58. *Yevamot* 118A *ד"ה סד"א* with *Maharsha*; see *Beit Meir Even Haezer* 17:46 and *Noda BiYehuda Even Haezer* II:26 where

"*Amatla* does not give believability to the second statement – all it does is allow the person to "explain away the first one" i.e., to explain that he did not actually mean to forbid his daughter, or render his son illegitimate, etc. – (but just meant to protect himself, scare someone, etc.). Having "explained away" the original statement, it is now considered as if he has said nothing! By the rule of *Amatla*, the person can "explain away" his statement – i.e., that his purpose in saying it was only for some other purpose, but he "really didn't mean it."<sup>59</sup>

Apparently, then, the credibility of his first statement is not all that absolute – it is subject to being shunted aside by a compelling and believable explanation as to why it was said. The salient point is not that we accept the retraction – what we accept is his explanation that the first statement was made in jest, or to frighten someone, etc.

Since this is so, it seems to this writer that Mr. G.'s case has two factors subjecting his statement to this rule of *Amatla*:

1) In his original statement to the Beit Din, Mr. G. said that he did what he did as a ploy in his battle with his wife who had wronged him. Thus, Mr. G. himself has given the *Amatla* – that he is making this statement as a punishment, or inducement, to his wife. True, he did not *retract* but, as explained, the focus of the halacha of *Amatla* is not the retraction, but the explanation of the context of the first statement which nullifies its credibility. Here, he has provided it for us as well!

2) There is also a "built-in" *Amatla* – i.e., when the reason and rationale of the first statements are self-evident to all –

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this is elaborated upon.

59. See sources of note 54 where the very etymology of *Amatla* is explained as meaning this.

as in the present case – then we have the "*Amatla*" even without his statement! This is not the same as just saying that we have an understanding that he's lying: without the rule of *Amatla* governing such statements, just saying "we don't believe you" is directly in conflict with his Torah-granted credibility. We are not able to do that. However, given the rule of "*Amatla*" which bids the Court to accept a rationale of why a person would make a false statement, it seems logical that we can accept a built-in, obvious, "*Amatla*".

b) As stated earlier, a person's unsupported statement that something is truly forbidden to him is believed. There are sources that state that where there are clear indications that his statement is false, we do not grant him credibility.<sup>60</sup> Our case – where marriage with a minor is completely unacceptable and unheard of, and the father will not supply the name of the "husband" nor the witnesses – is obviously

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60. *Be'er Heteiv Even Haezer* 4:37.

True, there is some dispute about this, (see *Pitchei Teshuva* there 4:34) but the dispute stems from a unique aspect of this law (i.e., according to some, he is believed even in the face of witnesses to the contrary). If we accept the basic comparison from "*Shavya A'Nafshay*" to other forms of "credibility" (which probably do not share this uniqueness) we are left with the basic rule that we can ignore credibility when there are clear-cut indications to the contrary. See also *Even Haezer* 178:9 where there is a cited dispute about believing a husband that his wife is forbidden to him (i.e., she has willingly committed adultery) *after* the Rabbinic decree that one cannot divorce a wife against her will – that is, since it is entirely plausible that he is only saying so in order to divorce her, we should not believe him. Although the dispute there has no clear resolution, it is clear that the issue there is one of the degree to which we would suspect him of lying – not the basic principle. (We obviously never consider this in a case of "testimony".)



such a case.

c) The Ramo in *Even Haezer* 178:9 rules clearly that where there is an acrimonious dispute between parties, we do not grant credibility to someone who says "*Shavya A'Nafshay*".<sup>61</sup> In fact, the *K'nesset Ha'Gedola* 115:27 writes that the same would apply when one is battling with a father-in-law, and he states that his wife is forbidden to him!

Actually, a strong case can be made that our comparison is even more definitive. Many sources<sup>62</sup> indicate that the father's credibility to state "I have betrothed my daughter" is the exact law that says "*Shavya A'Nafshay*" – i.e., a minor daughter is so much within the aegis of her father that his statement regarding her betrothal entails the very same concept as it would regarding himself – that is, we say that a man can render his daughter forbidden as he can himself. According to these opinions obviously whatever rules govern "*Shavya A'Nafshay*" will govern our case as well. Although there are those who strongly dispute this explanation of a father's credibility (see *Teshuvot R. Akiva Eiger* II:53), their argument is with the point that they are the very same law – the basis for comparing the laws of "credibility" would still be valid according to all.

That we are dealing with an acrimonious dispute is certainly the case with Mr. G. (and all future Mr. G.'s); it is

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61. Although *Pitchei Teshuva* there (22) and in 115:28 brings an opinion that that halacha is stated only with regard to someone who has been caught lying in the past about this, from the G'ra 17, the *Chatam Sofer Even Haezer* II:106, the *Yam Shel Shlomo Yevamot* II:18, and the *Chinuch Mitzva* 266, it is clear that there is a consensus that in any case, there is no credibility at all granted to any statement coming during a feud.

62. See *Rambam Issurei Bi'ah* 1:23; *Maharshadam Even Haezer* 9; *Chut Hameshulash* 3; *Divrei Yechezkel* 21.

the opinion of this writer that we can utilize this procedure regarding all such cases and simply refuse to accept his statement as believable.

For all of the above reasons, it seems clear that Mr. G. does not have the credibility which the Torah granted a father acting on behalf of his daughter. Thus, his daughter is not to be considered a married woman.

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This bizarre case has brought to the public's attention a law of the Torah of which most people were unaware. There is no question that it is anachronistic; for that reason, it is not practiced, nor has it been for many hundreds of years. Nevertheless, this does not detract from the status of the law as one of the concerns which the Torah has for the welfare of children. Giving a father the means to provide for his child when she is too young to make a decision for herself is in no way "unfair" or "ridiculous". Indeed, there is not a society today which does not give parents a measure of control over their children's lives. And rightfully so. Who more than father and mother love the child and care for future? It is a sad commentary on the perversity of the modern age that such a loving procedure can be so basely employed—and so widely misunderstood.

# Women and the Reading of the Megilla

*Rabbi Alfred S. Cohen*

## Sources And Reasons

The Sages of the Talmud specifically included women in the obligation to hear the Megilla of Esther read aloud on Purim:

Women are obligated in the reading of the Megilla [even though it is a mitzvah which occurs only at a certain time—Purim—and generally women are absolved of mitzvot which are time-bound] since they too were [saved] in that miracle.<sup>1</sup>

The question we will address in this study is whether a woman may read the Megilla aloud for a group and thereby exempt others, including men and women, or perhaps only women.

Before entering into a detailed discussion of the halachic criteria delineating this question, it would be most instructive to pursue this inquiry as part of a broader understanding of Jewish law as it pertains to women. One of the components of halacha, as in other systems of law, is that it seeks to develop principles which apply in consistent fashion to similar situations. Thus, it would seem desirable to seek a

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1. *Megilla* 4a. Rashi explains that Haman's decree was issued against all Jews—men, women, children.

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definitive answer for our question within the context of other mitzvot which seem to apply equally to men and women, and to find the rationale employed by the halacha in arriving at its conclusions.

In general, a person cannot fulfill a mitzvah for someone else unless he/she has the same level of obligation (*chiuv*) in the mitzvah. Therefore, the first issue we have to clarify is whether a woman's obligation for that mitzvah is equivalent to that of a man. If we say that it is, then it should follow that a woman would be qualified to discharge the obligations for others (barring other reasons not to permit the practice). However, if there is a difference in their level of obligation, women would not be able to discharge men.

The question whether women can act for the group in discharging their mitzvah to hear the Megilla is analogous to other situations where men and women are called upon to perform the same mitzvah.

For example, in *Berachot* 20b, the Gemara discusses whether the obligation for women to recite *Birkat Hamazon* (Grace after Meals) is a biblical or a rabbinic requirement. What is the difference, the Gemara asks, what the source of the mitzvah is? The answer given: "*le'afukey rabim yeday chovotam*", meaning that it is important to know the level of women's obligation so that we may determine whether they "can exempt others"—i.e., men.

Another case in point is Havdala after Shabbat, about which there are conflicting opinions. Rambam considers that Kiddush and Havdala are both required by the Torah.<sup>2</sup> But the Rosh<sup>3</sup> and subsequently R. Akiva Eiger<sup>4</sup> rule that it is

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2. *Mishnah Berurah*, *Orach Chaim* 296:1.

3. *Ibid.*, and *Responsa Rosh*.

only a rabbinic innovation. The *Shulchan Aruch* rules that women cannot discharge men from their obligation to make Havdala,<sup>5</sup> as do *Shulchan Aruch Harav* 296, *Aruch Hashulchan*, and *Pri Megadim*. However, if there is no one else who can do it for him, *Halichot Beita* 15:33 does permit it.

The rationale for these rulings has generated debate,<sup>6</sup> since there are a variety of reasons which might have engendered them:

It is questionable whether Havdala is an aspect of the mitzvah of Shabbat, which applies equally to men and women, or whether, since it takes place *after* Shabbat, it is a time-bound biblical mitzvah, from which women are technically exempt.

Kiddush is an additional example of the situation we are discussing: Women as well as men must hear Kiddush on Friday night, and indeed, the *Shulchan Aruch* rules that a woman's recitation of Kiddush is sufficient "to discharge the obligation for the men present also, inasmuch as they [women] are obligated by the Torah."<sup>7</sup> However, *Bach*<sup>8</sup> and others do not accept this and rule that a woman should not recite the Kiddush for a man. Their reasoning is that it is comparable to the question of Megilla—and just as we do not accept that a woman's recitation discharges a man's obligation to hear the Megilla, so too, her recitation of

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4. *Shulchan Aruch Orach Chaim* 296:16.

5. *Ibid.*, 8.

6. One question which arises is why there should be any difference between Havdala and the kindling of Chanuka lights, which a woman is permitted to do for a man. See the *Mishnah Berurah*, Laws of Megilla.

7. *Orach Chaim* 271:2.

8. *Ibid.*

Kiddush cannot discharge his obligation.

In another case, the *Biur Halacha*<sup>9</sup> in *Mishnah Berurah* discusses whether a woman's chanting of Hallel on Rosh Chodesh can exempt a man from his obligation to recite that prayer. Since the *Mishnah Berurah*<sup>10</sup> indicates that reciting Hallel on Rosh Chodesh is only a custom, which applies equally to men and women, he reasons that there is no reason why a woman should not be able to exempt a man by her public recitation.<sup>11</sup>

Similarly, we know that women must participate in the Seder and recite the Haggada. We would, think, therefore, that a woman could recite the Haggada aloud at the Seder on behalf of all assembled. Yet, writes the *Pri Megadim*,<sup>12</sup> a woman's recitation of the Haggada does not exempt a man from his need to recite it, for the nature of her required participation is not clear—we are not sure whether this is a biblical command for her or one that the rabbis imposed.<sup>13</sup>

Returning to our original question about the Megilla reading, we find two schools of thought emerging: one group of scholars considers that women's obligation with respect to the Megilla is identical with that of men,<sup>14</sup> and another group of authorities posits that it is less. In the latter group,

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9. 422, s.v. *hallel*.

10. *Ibid*.

11. He leaves the issue unresolved.

12. 479 1:1, No. 2. See also *Sefer Hachinuch*, Mitzvah 21:6, regarding women discharging for men the mitzvah of relating the story of the Exodus.

13. See *Tosafot*, *Megilla* 4.

14. Meiri, *Berachot* 47b; Rashi, *Erechin* 3a; Ran, *Megilla*, chapter 2; Rambam, *Megilla* 1:1; Meiri, *Megilla* 2; Rashba, *Ritva*, Rosh, in *Megilla* 4.



we find Tosafot<sup>15</sup> who cite *Behag*, maintaining that therefore women cannot act to discharge men's obligations for them.

The Tosafists<sup>16</sup> reason that there are two ways to approach the issue of a women's degree of obligation in this mitzvah: the Talmud could have stated that "women are obligated to read the Megilla", which would put their obligation on a par with men's. An alternate method would have been to write that "women are obligated to hear the reading of the Megilla," which is not quite the same thing, and would denote a somewhat lesser level of obligation. The text we have cited in *Megilla*, as well as one in *Erechin* 3a, clearly does indicate that the Talmud considered a woman's obligation to be identical to a man's. However, Tosafot<sup>17</sup> cite a text in the *Tosefta* which reads that women are obligated to *hear the reading* of the Megilla, the implication being that it is only the hearing, and not the reading, in which they are obligated. Consequently, Tosafot opine that a woman's public reading would not discharge men from their obligation to read the Megilla.

So far, we have shown that there is lack of agreement on the key issue of whether men and women have an identical or equal responsibility to fulfill the mitzvah of Megilla.

As with many other issues on which the *Rishonim* disagree, we turn to the *Shulchan Aruch* for guidance: does that Code cite both positions, or does it mention only one as being the definitive position of Jewish law? In fact, the

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15. *Megilla* 4a, *Erechin* 3a. In *Mikraei Kodesh*, Purim 33, R. Tzvi Pesach Frank raises the question if a woman is permitted to write a Megilla.

16. *Ibid.*, s.v. "*nashim*".

17. *Megilla* 4a; *Tur* 689.

*Shulchan Aruch* is somewhat ambiguous, first ruling that both men and women must hear the Megilla, but then mentioning that "there are those who maintain" that a woman's reading cannot exempt men.<sup>18</sup>

The Ramo adds a comment:

There are those who say that if a woman is reading for herself, she should recite the blessing "...[who has commanded us] to hear the reading of the Megilla" inasmuch as she is not bound to read.<sup>19</sup>

Based on this text, the Gaon of Vilna also rules that a woman should not read the Megilla aloud on behalf of a man since her obligation is only to *hear* the reading. The *Magen Avraham*<sup>20</sup> even considers that it is preferable for a woman to hear the Megilla being read by a man rather than to read it herself. However, if this option is not available to her, she may and should read it for herself.<sup>21</sup>

### Other Reasons

Does the rationale for the *Shulchan Aruch's* ruling lie in acceptance of the statement of *Behag*, that a woman cannot read for a man since her obligation is of a different nature,<sup>22</sup> or does it arise from a different source altogether? Thus, the

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18. 689:2.

19. Nevertheless, the Gra, the *Kaf Hachaim*, *Turei Even Megilla*, rule that a woman should recite the same blessing as do men, not make a different one. These opinions, however, are all expressed by Ashkenazi rabbinic authorities, and would not impact on the normative practice of Sephardic Jews, who follow the author of *Shulchan Aruch* (see Note 18).

20. No. 6.

21. *Mishnah Berurah*.

22. As cited by *Tosafot*, *Megilla* 4a.

*Mishnah Berurah*<sup>23</sup> explains that women should not read the Megilla for a group due to the similarity between reading the Megilla and reading the Torah—and the Gemara has ruled that a woman should not read publicly from the Torah.<sup>24</sup>

Moreover, the position of *Mishnah Berurah* is that even though women do not read publicly from the Torah because of *Kevod HaTzibbur* (the dignity of the group),<sup>25</sup> nevertheless, even in the privacy of their home, a woman should not read the Megilla for a man. Apparently, once halacha accepts a principle, it applies across the board (*Lo pelug*).<sup>26</sup>

A further reason for a woman's not exempting men by her reading is advanced by the *Kol Bo*.<sup>27</sup> His reasoning is based on the principle that *kol be'isha erva*, loosely translated

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23. 689:7.

24. *Megilla* 22.

25. *Ibid*.

26. As noted in the text, the reason for disallowing a woman's public reading aloud from the Torah is due to the principle of "the dignity of the group." What if the "group" is prepared to forego this aspect of its "dignity" and wishes to have a woman read aloud? Are they permitted to do so? In *Orach Chaim* 54, the *Beit Yosef* writes that "accordingly, if they want to forego their 'honor', it seems that this option is in their hands." However, the *Bach* does not agree that a group's foregoing their "honor" can affect the normative practice. Thus, he writes, "And in my humble opinion, it seems that also the Rambam and Rashba would not accept the group's foregoing [their dignity]...and it is not within the option of the group to forego." In *Orach Chaim* 53:23, the *Mishnah Berurah* rules, without mentioning any dissenting opinion, that the group's forgiving the infringement of their *kavod* does not change the basic ruling that a woman may not read aloud for the group.

27. No. 45.

as meaning that a woman's voice is erotic. Since the reading of the Megilla involves a lengthy singing of the scroll, it is not proper that a woman should be reading it publicly for men.

However, if this principle does indeed apply to recitation of the Megilla, how could any halachic authority ever have considered it, under any circumstances? Yet we have seen that the question has been seriously considered; albeit rejected for a variety of reasons, it was never on the grounds of *erva*. The closest we have seen is that women should not be called up to read from the Torah because it is not "honorable" for the group.<sup>28</sup> We must therefore conclude that a woman's reading from the Megilla does not qualify as "*erva*".

The *Turei Even*<sup>29</sup> and *Or Sameach*<sup>30</sup> have a different reason for disallowing a woman's exempting a man through her reading of the Megilla. Their understanding is that even in rabbinic mitzvot there are two variations: one is a rabbinic level of obligation (*derabbanan*) while the other is termed *divrei kabala*, and is of a higher order or imperative. Thus, women were included by the rabbis in the obligation (*derabbanan*) to hear the Megilla, inasmuch as they too were saved by the miracle; but men have to hear it, *midivrei kabala*. Since they have a higher level of obligation, the woman's

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28. Unlike nowadays, when the honoree simply makes a blessing, in the days of the Gemara, the person who was called up to the Torah chanted the portion which he was called up to read. Moreover, in talmudic times, each person who was called up to the Torah (*aliya*) chanted his portion himself. Thus, if a woman's reading aloud is an *erva*, the Gemara would have cancelled the practice on those grounds, and not be invoking the concept of *kevod hatzibbur*.

29. Megilla 4.

30. Megilla, chapter 1.

reading is not sufficient to exempt a man from his *chiuv*.

On the other hand, the *Avnei Nezer*<sup>31</sup> and *Marcheshet*<sup>32</sup> argue that when the Megilla is being read, two obligations are being fulfilled: (a) *pirsum hanes*, publicizing the miracle of G-d's salvation on Purim, and (b) remembering always that we must eradicate the memory of Amalek, the enemy of Judaism since its inception. Since women are not included in the command to "wipe out Amalek" inasmuch as they do not participate in military battles,<sup>33</sup> therefore they do not have the same obligation as men when it comes to the mitzvah of eradicating Amalek. It follows, then, that they cannot exempt a man from *his* obligation in this part of the mitzvah inherent in Megilla.

Thus, we see that various reasons have been proposed by halachic authorities who do not accept that a woman should read the Megilla aloud for a group:

1—*kol b'isha erva*;

2—similarity to reading the Torah, which the Gemara says not to do;

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31. *Orach Chaim* 511.

32. I, 22.

33. *Sefer HaChinuch*, end of *Ki Tetzeh*. Our understanding of the woman's obligation will impact on how we rule on various ancillary halachic issues. For example, is a deaf woman obligated to read the Megilla? Is there a difference if she reads in the morning and not in the evening, since the reading at night is only *miderabbanan*, and not *midivrei kabbala*? What if the woman did read for men—do they have to hear it again? The resolution of these and other questions depends on the status of a woman's obligation—if it is different from a man's, she cannot exempt him. See *Biur Halacha* 689:2; *Mikraei Kodesh* 29; *Avnei Nezer*, *Orach Chaim* 501.

3—their obligation is of a lesser status;

4—reading the Megilla fulfills other mitzvot (such as remembering to wipe out Amalek) which do not apply to women;

5—rabbinic mitzvot apply differently to men and women.

### Innovation

In considering whether women may read the Megilla aloud, even if only for other women, where the issue of unbecoming or immodest behavior does not arise, there is a very important question which must be addressed. Regardless of any issue's merits on its own, there must always be taken into consideration an "extraneous" question—why is this innovation being contemplated? For two thousand years, Jews have been fulfilling the mitzvah of Megilla in a certain way. If some would like to make changes in that manner of observance, it is not unreasonable to inquire as to their reasons for wanting to make that change. If the motivation for innovation is innocuous, we may be able to proceed. However, such is not always the case, and it would be disingenuous to gloss over that possibility.

The question of changing an old custom or instituting a new one occurs in many situations. A number of years ago, Rav Moshe Feinstein was approached on the issue of women's prayer groups. In his response, he referred to an earlier responsum of his (*Iggerot Moshe O.H. IV 49*) concerning women donning the *tallit* during prayer. There he had indicated that the crux of the matter was really the motivation of the person who want to make some innovation in the accepted practice. If women are donning the *tallit* or attending special prayer groups in an implied rejection of Torah values which consider these things unnecessary, or doing it as an act of rebellion against rabbinic rules, then their mitzvah is actually an *aveirah*.

On purely intellectual or halachic grounds, he concedes that there is nothing wrong per se with a women's *minyan*. However, he continues, it is difficult to find at these prayer groups many women who are motivated primarily by a sincere desire to be able to pray more effectively; most come out of a sense of rebelliousness or rejection of tradition.<sup>34</sup>

Rabbinic decisors have to be concerned lest some innovation, however innocuous, might be suggested in imitation of trends current in popular culture, or arise from a sentiment that perhaps the way things are done on the American scene are more attractive, more desirable, than traditional Jewish custom. There is something disquieting in the current push to create an identity, or even interchangeability, in the roles of men and women. It is very possible that creating opportunities for women to read the Megilla for a group appears desirable to many because it would parallel women's increased participation in all aspects of modern society. Yet the Torah specifically cautions us: "*bechukoteihem lo teleichu*", do not copy the styles, or customs, or values of other societies. The Vilna Gaon defines it as any custom, fashion, or institution which Jews would not have done on their own, but want to do in imitation of Gentile standards.

In *Chullin* 41a, the Mishnah discusses whether a certain manner of slaughtering an animal is halachically acceptable. Even if technically it is permissible, the Mishnah warns not to adopt it, since it is in "imitation" of a heretical sect. Rashi there explains that fostering such an impression would "strengthen the hands of scoffers." This alone suffices to place the suggestion beyond the pale of feasibility.

Thus, aside from the question of whether a suggested

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34. See A. Cohen, "Celebration of the Bat Mitzvah", *Journal of Halacha and Contemporary Society*, Vol. XII, p.5.



innovation is acceptable according to the letter of the law, rabbinic decisors also regard the motivation and the context of a proposal as the seminal issue.<sup>35</sup> If Orthodox Jews "imitate" practices accepted by secular society or by Jews not committed to Torah values, even if those practices may be innocuous in and of themselves—it lends an aura of legitimacy to the secular style—and for that reason alone, it ought not be sanctioned.

There are definitely times when it becomes necessary to conform to the norms of the general society, particularly if failure to do so would arouse hostility and rejection in the hearts of many Jewish people. In this century, the author of *Seridei Eish*<sup>36</sup> permitted girls to join with boys in singing *zemirot* at a communal Sabbath meal, for he saw it as an essential step in making observance of Jewish ritual more attractive to young people. On the other hand, R. Yechezkel Landau some two hundred years ago was quite hesitant about permitting innovation in the construction of synagogues.<sup>37</sup> When asked if a new synagogue could be erected in a circular shape rather than the traditional rectangular one, he responded that, while there was clearly no law requiring a shul to be rectangular, it would be important to know why a novel design was being contemplated. If it were due to the popularity of that design in current architecture, it could not be countenanced.

Consequently, it may really be that the question we should address is not *whether* a woman may read the Megilla publicly—but why she would want to. And that is quite a different issue than the one we have been discussing so far.

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35. See Rabbi David Tzvi Hoffman, *Melamed LeHo'il*, I, 16.

36. II, 8.

37. *Noda Biyehuda*, *Orach Chaim* 18.

### Women Reading For Women

Let us re-phrase our original inquiry: if we concede that a woman should not read aloud for a mixed group, may she yet discharge other *women*? And even if she cannot discharge others, is she at least able to fulfill her own obligation to hear the Megilla by reading it herself?

In his Code, the author of *Mishnah Berurah*<sup>38</sup> distinguishes between a woman's reading for another woman or two, which he permits, and between her reading for a group, which he disallows.<sup>39</sup> The source of his ruling is the opinion of Tosafot to *Succah 38a*, (*dezila beha milta*), and is brought by *Korban Netanel*<sup>40</sup> to prohibit a woman reading aloud in order to exempt other women.<sup>41</sup> However, the *Korban Netanel* himself concedes that *Magen Avraham*<sup>42</sup> interpreted the Tosafot's term *zila beha milta* (improper), as applying only to a woman reading for men.<sup>43</sup>

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38. 689:7.

39. *Sh'ar Hatzion* 9.

40. To *Rosh, Megilla*, Chap.1, sec.4, note 40.

41. Judaism is guided by the principle "*kol Yisrael areivim zeh bezeh*", all Jews are "responsible" for one another. Generally, this means that even if I have performed the mitzvah, I can act to help you discharge your obligation in the mitzvah. But whether this dictum applies in the case of a woman who has already fulfilled the precept of hearing the Megilla, who wants to read it aloud for another women, is a matter of dispute among the *Rishonim*. See *Rosh* and *Rashi* to *Rosh Hashanah* 29a and *Tosafot* to *Megilla* 4a, as well as the *Biur Halacha* 689.

42. 271:2.

43. I have seen it reported that there are modern *poskim* who accept the contention of the *Magen Avraham* and who dispute the position of the *Korban Netanel* which led to the ruling of *Mishnah Berurah*. It is said that they are or may be prepared to sanction a woman's reading for other women. Purportedly,

Based on the ambiguity which seems to attach to this question, it appears arguable that there are situations in which it might be permitted for a woman to read for other women: for example, if a group of female students were on a trip to Russia, where they might not be able to attend a regular Megilla reading, it is feasible that they would be allowed to have one read for all the others. But this theoretical situation is a far step from sanctioning a woman's *minyan* for the reading of Megilla under ordinary circumstances. It is common knowledge that Rabbi Joseph B. Soloveitchik expressed to many American rabbis his opinion that it is improper to permit a special service in shul, whether for prayer, reading of the Torah, Megilla, or *hakafot*.<sup>44</sup>

### Minyan

Regardless of whether a woman may read aloud for an entire group and exempt men, another question arises with respect to the reading of Megilla: The *Shulchan Aruch*<sup>45</sup> rules that the Megilla should preferably be read in the presence of at least ten. This ruling is predicated on the principle that *pirsumei nisei*<sup>46</sup> optimally requires ten people; there is also the principle *berov am hadrat melech*, "a large

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these include R. Moshe Feinstein (according to R. Tendler); the Bostoner Rebbe, R. Pinchas ha-Levi Horowitz; R. David Feinstein, as well as R. Shlomo Zalman Auerbach.

44. Rabbi H. Schachter, *Nefesh HaRav*, p. 145; see also Rabbi M. Meiselman, *Ha-Isha haYehudiah ve-haHalacha*, end of chapter 20.

45. 680:18, "Rav said, 'The Megilla should be read at its proper time, even by a lone individual; [if it is read] not at its proper time, [it requires] ten people.' Rav Asi says, '[It requires ten], regardless of whether [it is read] at its proper time or not at its proper time.'"

46. Rashi, *Megilla* 5a.

multitude is more grandeur for the King".<sup>47</sup> Now the question is — do we count women as part of the ten, since they too are included in the miracle and in the requirement to read the Megilla, or do we say that in this case, as in all other situations which require a *minyan*, we do not include women in the requisite ten?<sup>48</sup>

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47. *Ran*, *ibid.*

48. Recently, it has become the practice in certain places to have a second reading of the Megilla, for women. If a woman attends such a reading, does she fulfill her obligation to participate in *pirsum hanes*? What about men who have not attended a regular reading of the Megilla—can they attend this reading? Are they fulfilling their obligation of *pirsum hanes*? The *Magen Avraham* 689 writes that the custom was for women to have the Megilla read for them at home. Evidently, they are not obligated to be concerned with the principle *berov am hadrat melech* or with *pirsum hanes*. Many halachic authorities consider that women have to hear the public reading of *parashat zachor* before Purim. *Binyan Tzion* 8, however, maintains that even according to these opinions, she would not be counted as one of the ten people required for the public reading of the *parasha*. Rav Frank even goes so far as to disallow reading *parashat zachor* only for women, since it is part of the Reading of the Torah, which requires the presence of ten men.

There is a mitzvah of *kiddush hashem* (sanctifying G-d's name) which is incumbent on both men and women. For an act to be considered a "sanctification of G-d's name", or the reverse, a *Chilul Hashem*, a desecration, it must be done publicly—i.e., in the presence of ten Jews. Do we count women among the ten? See *Pitchei Teshuva* Y.D. 157:7; *Ba'er Hetev* Y.D. 2:15; *Responsa Rav Pe'alim* II O.C. 62. It is even questionable if an act done before ten women, without any men, would be considered a "desecration" or "sanctification." See *Kaf Hachaim* Y.D. 2:49; *Minchat Chinuch* 296; *Margaliot Hayam*, *Sanhedrin* 74a; *Gilyon Hashas*.

However, with respect to a *Brit Milah* where the presence of a *minyan* is desirable, a woman would be considered as part of the ten. Possibly this is because (a) the need to have ten people present is so that it will be publicly known that the child has

The Ramo writes that "it is questionable if women are included in the ten." There are a number of reasons adduced for the Ramo's doubtfulness, which are not necessarily germane to the question of *minyan*.

Women and men do not join together for *zimun*, the formal invitation to recite Grace after Meals together, since it is considered *peritzut*, licentious behavior.<sup>49</sup> So how could they join together for Megilla, even were we to stipulate that they qualify for the quorum of ten?<sup>50</sup> However, we can make a distinction<sup>51</sup> in that the *zimun* occurs directly after a session of eating and drinking, where the mood might be conducive to improper behavior. The reading of the Megilla, however, takes place prior to eating, and therefore this fear does not seem to be appropriate.

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been circumcised, or (b) perhaps the only ones who don't count for this particular quorum of ten are the uncircumcised, and here the woman is considered as equivalent to circumcised.

49. *Berachot* 47b. See the Meiri, footnote 149, who says that a woman should not join in *zimun* even with her husband. As for women joining with the men for recitation of the Hallel at the Seder, see *Orach Chaim*, 479.

50. According to this reasoning, if ten women joined together, they should certainly be considered a *minyan*. See *Chazon Ish* O.H. 155, especially para. 2, who seems to indicate that women are considered part of the ten. See also *Tzitz Eliezer* 13:73.

Furthermore, there is a special *beracha* recited at the conclusion of the Megilla reading, if there is a *minyan* present (*harav et riveinu*). Rav Tzvi Pesach Frank raises the question whether this blessing may be recited by a *minyan* of women. In his note 2, he argues that the Ramo does not raise a question about a *minyan* of ten women, which he would certainly find acceptable, but is only concerned about a *minyan* which is created by the joining of women with men to constitute the quorum. See *Mikraei Kodesh*, Purim 35.

51. This is another opinion cited by the Meiri.

But the Ran<sup>52</sup> reasons as follows: It is not the eating and drinking which necessarily create an atmosphere prone to licentiousness. Rather, it is the fact that when women join the group, a change takes place in the status of the group. That is to say, if two men eating together are joined by a woman, her presence changes the status of the group, and they now have to recite the Grace with *zimun*.<sup>53</sup> In the same way, if six men are joined by four women, the obligations of the group now change, and they can chant the Megilla publicly, with a different blessing than they would otherwise. It is this change in the status, wrought by the inclusion of women, which engenders the fear that an atmosphere of license might be created.

### Conclusion

Our inquiry into the question of women's reading the Megilla indicates the consensus of halachic opinion to be negative, since the obligations in this mitzvah are not the same for men and women.

The issue of women reading for women is more complex than appears at first glance, but we may conclude that under certain circumstances it might be permissible for one woman to read aloud for others. Nevertheless, for this mitzvah as for all others where a quorum of ten is required, it would be advisable for a woman to hear the Megilla read with a *minyan* of ten men.

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52. *Megilla*, end of second chapter, s.v. *matni, hakol kesherim*.

53. Both Ritva and Ran to *Berachot* 47 state that if three men are joined by one woman, there is no difference in the *Birkat Hamazon* and in fact, the woman joins in the *zimun*.

# Thanksgiving: Secular or Religious Holiday?

*Rabbi Michael J. Broyde*

## Introduction

Thanksgiving is a uniquely American holiday. It is no longer (and perhaps never was) a celebration affiliated with any particular religion or faith, although some in America celebrate with religious ceremonies. On a social level, it is celebrated by Americans of a broad variety of religious backgrounds. This article discusses the halachic issues related to the different forms of celebrating<sup>1</sup> Thanksgiving that are current in America.

## I. The History of American Thanksgiving

Before any halachic analysis can be done, it is necessary to place the observance of the holiday of Thanksgiving in American<sup>2</sup> in the proper historical context. The first

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1. Two types of "celebration" are discussed. The first, and most significant, is the eating of a festive holiday meal with turkey and other forms of activity directly celebrating the day (such as attending a parade). The second is a lesser form of celebration: the intentional scheduling of other types of celebratory events — such as weddings — on Thanksgiving to take advantage of the fact that many do not work. Similar to that is the practice of changing the time of daily prayer service to acknowledge this day as one in which people do not normally work.

2. The celebration of Canadian Thanksgiving is a different

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Thanksgiving day celebration was held in response to the survival by the pilgrims of the particularly harsh winter of 1622/3. Not only did the colonists themselves celebrate, but food was sufficiently plenty that even the Indians with whom the colonists were at peace were invited. This celebration took place on July 30, 1623 (in the middle of the summer). Similar such celebrations occurred throughout the New England area throughout the 1600's.<sup>3</sup> However, they were only local (rather than national or even regional) celebrations of Thanksgiving — and only to mark the end of a particularly difficult winter — until 1789.<sup>4</sup>

In 1789, Congressman Elias Boudinot of New Jersey proposed in Congress a resolution urging President Washington to:

recommend to the people of the United States a day of public Thanksgiving and prayer to be observed by acknowledging with grateful hearts the many and signal

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issue from that of its American cousin. Canada celebrated its first Thanksgiving in 1572, but the date of its modern Thanksgiving observance was not fixed until 1957, when the last Thursday in October was agreed on. There still is no common agreement on the appropriate food to eat, and large numbers of individuals simply do not celebrate the holiday, even in Canada. Indeed, there are some provinces that do not treat it as a holiday. For more on this, see Julianne Margvelashvili, "Thanksgiving, the Canadian Way," *Philadelphia Inquirer*, November 9, 1994, at section B1. The halachic issues involved are thus different.

3. Such as the Boston Thanksgiving celebration of February 22, 1630. As will be discussed in text accompanying note , the question of whether it would have been permissible for a Jew to join with the colonists in these spontaneous celebrations is an issue different from whether one may celebrate Thanksgiving now.

4. This history of Thanksgiving is taken from R. & A. Linton, *We Gather Together: The Story of Thanksgiving* at pages 72-85 (1949).

favours of the Almighty God, especially by affording them an opportunity to establish a Constitution of government for their safety and happiness.<sup>5</sup>

After quite a bit of debate, President Washington issued the first National Thanksgiving Proclamation, setting November 26, 1789, as Thanksgiving and a national holiday. President Washington stated in his proclamation:

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favours which He has been pleased to confer upon us.<sup>6</sup>

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5. 1 Annals of Cong. 914 (1789).

6. See J. Richardson, *Messages and Papers of the Presidents*, 1:64. Washington continued, stating:

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render

Notwithstanding the eloquence of Washington's words (and even perhaps because of their overtly religious theme<sup>7</sup>) Thanksgiving did not become a national holiday. From 1790 to 1863 there were no national celebrations of Thanksgiving. Indeed, while proclamations of thanks were issued by some presidents, all of the presidents for more than the next seventy years chose to ignore the day as a national holiday of thanksgiving.<sup>8</sup>

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our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

7. Indeed, Thomas Jefferson strongly objected to these pronouncements. He wrote:

Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it.

A. Lipscomb ed., *Writings of Thomas Jefferson* 11:429 (1904).

8. New York State attempted to revive the holiday of Thanksgiving in 1795. However, this attempt failed because of a basic disagreement between various commercial interests over when the holiday should be celebrated.

Southern states, for many years before 1846, issued Thanksgiving day proclamations, many of which were overtly Christian, and which raised considerable protests from the Jewish community. For example:

When James H. Hammond, governor of South Carolina, announced a day of "Thanksgiving, Humiliation, and Prayer" in 1844, he ... exhorted "our citizens of all denominations to assemble at their

It was not until 1846, when the unity of the country was again in controversy because of the Missouri Compromise and the problems of slavery, that the celebration of Thanksgiving as a national holiday returned to the national agenda. From 1846 to 1863, Ms. Sara Joseph Hale, the editor of *Godey's Lady Book*<sup>9</sup> embarked on a campaign to turn Thanksgiving into a national holiday during which workers would not be required to go to work. Her campaign culminated in President Lincoln's Thanksgiving proclamation of 1863 — the first such proclamation of a national Thanksgiving holiday since 1789. Since 1863, Thanksgiving has been celebrated as a national holiday and a day of rest at the end of November, either the fourth or fifth Thursday of the month.<sup>10</sup>

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respective places of worship, to offer up their devotions to God their Creator, and his Son Jesus Christ, the Redeemer of the world." The Jews of Charleston protested, charging Hammond with "such obvious discrimination and preference in the tenor of your proclamation, as amounted to an utter exclusion of a portion of the people of South Carolina." Hammond responded that "I have always thought it a settled matter that I lived in a Christian land! And that I was the temporary chief magistrate of a Christian people. That in such a country and among such a people I should be, publicly, called to an account, reprimanded and required to make amends for acknowledging Jesus Christ as the Redeemer of the world, I would not have believed possible, if it had not come to pass".

M. Borden, *Jews, Turks, and Infidels* 142 n.2 (1984). Such overtly Christian proclamations have not been signed since 1860.

9. Roughly parallel to the modern *Ladies Home Journal*.

10. There was some controversy concerning the proper date for Thanksgiving, as in 1934 President Roosevelt switched the day of Thanksgiving from the last Thursday in November to the second-to-last Thursday in November. This was done to change the nation's shopping pattern and increase spending. While some objected to this mercantile approach to the holiday, Roosevelt —

One might ask whether Jewish law should simply defer to the American law determination here that Thanksgiving is a "secular" and not a religious holiday. Once this conclusion is reached, the claim is made, little controversy remains. The simple answer is that American law adopts a definition of "secular" that clearly is "religious" in the eyes of Jewish law. For example, in *Cammack v. Waihee*,<sup>11</sup> a court determined that the holiday called "Good Friday" was a "secular" holiday. So too, the Supreme Court has ruled that both Christmas and Chanukah are "secular" holidays and have "secular" displays that lack a religious theme.<sup>12</sup> Certainly Jewish law views neither of them as "secular" and would not accept American law's definition of "secular" as binding on halacha.<sup>13</sup>

## II. A Halachic Analysis of Thanksgiving

Having reviewed the history of Thanksgiving, it is now necessary to turn to the question of halachic issues involved in its "celebration". The first, and most significant, issue is whether it is permissible to eat a Thanksgiving meal, with the classical foods that American tradition indicates one should eat at this meal: turkey and cranberry sauce. Among the authorities of the previous generation, three different positions have been taken on this topic, and these three positions have each been accepted by various halachic

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and mercantilism — triumphed and Thanksgiving has been celebrated in the second to last week of November since that year.

11. 673 F.Supp. 1524 (D. Haw. 1987)

12. *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

13. This is noted quite clearly by Rabbi Menashe Klein, *Mishneh Halachot* 10:116, discussed *infra*.

authorities of the current generation.

However, before these three positions can be understood, a certain background of the nature of the prohibition to imitate Gentile customs is necessary.<sup>14</sup> Tosafot postulate that two distinctly different types of customs are forbidden by the prohibition of imitating Gentile customs found in Leviticus 18:3. The first is idolatrous customs, and the second is foolish customs found in the Gentile community, even if their origins are not idolatrous.<sup>15</sup> Rabbenu Nissim and Maharik disagree and rule that only customs that have a basis in idolatrous practices are prohibited. Apparently foolish — but secular — customs are permissible so long as they have a reasonable explanation (and are not immodest).<sup>16</sup> Normative halacha follows the ruling of the Ran and Maharik. As noted by Ramo:

Those practices done as a [Gentile] custom or law with no reason, one suspects that it an idolatrous practice or that there is a taint of idolatrous origins; however, those customs which are practiced for a reason, such as the physician who wears a special garment to identify him as a doctor, can be done; the same is true for any custom done out of honor or any other reason is permissible.<sup>17</sup>

As will be seen later, there are authorities who favor being strict for the opinion of the Gra, who rules that the

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14. For elaboration on this issue, see Rabbi Tzvi Teichman, "The Jew in a Gentile Society: Chukat Ha'Akum" 3 *Journal of Halacha and Contemporary Society* 64–85 (1981).

15. *Tosafot Avodah Zarah* 11a *ve'ei*. Tosafot, and all the other authorities discussed in this section, are resolving a tension between the Talmud here and in *Sanhedrin* 52b.

16. Ran, commenting on *Avodah Zarah* 11a *yisrael* and *Chidushei HaRan* on *Sanhedrin* 52b; Maharik, *Responsa* 58.

17. Ramo YD 178:1.

only time "secular" customs are permissible is when they have a Jewish origin.<sup>18</sup> According to this approach, secular customs created by Gentiles are prohibited even when their origins are not religious.

Additionally — and independent of the halachic obligation to avoid Gentile religious customs — Jewish law forbids a Jew from actually celebrating idolatrous religious events himself. Thus, a Jew may not attend an idolatrous "Indian"<sup>19</sup> office party or directly facilitate its observance.<sup>20</sup> So too, a Jew may not attend a birthday party for an idol worshipper if the birthday party includes worship of idols.<sup>21</sup>

*A. The Approach of Rabbi Feinstein*

Rabbi Moshe Feinstein published two responsa on the issues related to celebrating Thanksgiving, both of which conclude that Thanksgiving is not a religious holiday, but a secular one. The first responsum, written in 1953/5723,

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18. Gra YD 178:7. For a review of the authorities who disagree with the Gra, see *Seridei Esh* 3:93.

19. For a discussion of why halacha historically discusses the idolatrous practices of "Indian" faiths, see the star footnote in the *Mishnah Berurah* 330:8, the prefatory remarks of Rabbi Chaim Cohen in *Divrei Geonim* and the extremely illuminating remarks of Rabbi Bleich on "self-censorship" and avoidance of "imposed censorship" through the mechanism common in Eastern European works of discussing the practices of the "observant Jews" and "idolatrous Gentiles" of "India" found in his article, "Extraditing Jews," *Techumin* 8:297, 301–302 (5747).

20. *Shulchan Aruch, Yoreh Deah* 147:6–9. The issue of how much assistance is permissible in cases where the violation will occur whether or not the Jew assists is beyond the scope of this article. For more on that, see my "Assisting in a Violation of Noachide Law" forthcoming in the *Jewish Law Association Conference Volume: The Jerusalem Conference*.

21. *Yoreh Deah* 147:4–7.



discusses the deliberate scheduling of weddings and the like on religious holidays of other faiths. Rabbi Feinstein states:

On the question of celebrating any event on a holiday of Gentiles, if the holiday is based on religious beliefs [by the Gentiles], such celebrations are prohibited if deliberately scheduled on that day; even without intent, it is prohibited because of *marit ayin*<sup>22</sup> . . . The first day of the year for them [January 1]<sup>23</sup> and Thanksgiving are not prohibited according to law, but pious people [*ba'alei nefesh*] should be strict.<sup>24</sup>

Rabbi Feinstein reinforces his understanding that Thanksgiving is not a religious holiday in a responsum published in 1980/5741 in the Torah journal *Am Hatorah*. He states:

On the issue of joining with those who think that Thanksgiving is like a holiday to eat a meal: since it is clear that according to their religious law books this day is not mentioned as a religious holiday and that one is

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22. "What others will think".

23. The status of New Year's Day has changed in the last three hundred years. In contemporary America there is little religious content or expression to New Year's Day, and while there might be many problems associated with the way some celebrate it, few would classify it as a religious holiday. However, *Terumat Hadeshen* 195, writing nearly five hundred years ago, classifies New Year as a religious holiday, and this is quoted by Ramo YD 148:12. *Terumat Hadeshen* discusses whether one may give a New Year's Day gift and refers to January First as "the eighth day of Christmas." He clearly understands the holiday as religious in nature and covered by the prohibition of assisting a Gentile in his worship. (The text of the common edition of the *Shulchan Aruch* here has undoubtedly been subject to considerable censorship; for an accurate rendition of the Ramo, see his *Darchei Moshe* in the new edition of the *Tur* published by *Machon Yerushalayim*.)

24. *Iggerot Moshe, Even Haezer* 2:13.

not obligated in a meal [according to Gentile religious law] and since this is a day of remembrance to citizens of this country, when they came to reside here either now or earlier, halacha sees no prohibition in celebrating with a meal or with the eating of turkey. One sees similar to this in *Kiddushin* 66 that Yanai the king made a party after the conquest of Kochlet in the desert and they ate vegetables as a remembrance.

Nonetheless it is prohibited to establish this as an obligation and religious commandment [mitzvah], and it remains a voluntary celebration now; in this manner — without the establishment of obligation or religious commandment — one can celebrate the next year too with a meal. But, I think, nonetheless it is prohibited to establish a fixed day in the year for the celebration and it is only in the first year of the event, like when Yanai conquered, and then they had a party, and not for permanence. There is also a problem of adding commandments . . .<sup>25</sup> Even though one can question the source, it is still a real prohibition.<sup>26</sup>

Thus, Rabbi Feinstein appears to rule that Thanksgiving is not a religious holiday, and there is no problem of "Gentile holidays" while observing it.<sup>27</sup> Nonetheless he prohibits its

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25. Rabbi Feinstein cites *Megilla* 7 and Nachmanides (Ramban), commenting on Deuteronomy 4:2.

26. Rabbi Moshe Feinstein, "Is there a Prohibition of *bechukotayhem* in going to a Stadium where Sports are Played, Sitting in an Office Bare-Headed or Eating a Thanksgiving Meal" *Am Hatorah* 13:1 (*mahadura* 2).

27. Thus, for example, this author suspects that Rabbi Feinstein would feel it not problematic to note Thanksgiving — like Labor Day, Independence Day, and Memorial Day are noted — on synagogue calendars as a secular "holiday." Indeed, Thanksgiving Day (along with Columbus Day, Veterans Day, Election Day,

ongoing celebration as an obligation on a particular day because he feels that it is a prohibited addition to the Jewish calendar or creates a problem of adding commandments. While Rabbi Feinstein's objections to adding observances will be discussed later on, it is clear that he sees no problem in Thanksgiving's celebration as a Gentile holiday, and he appears to see no problem with eating a turkey meal on that day as a matter of choice, and not obligation.

As proof to the fact that Rabbi Feinstein rules eating turkey permissible, one sees that elsewhere in the same responsum, Rabbi Feinstein states:

Thus, it is obvious in my opinion, that even in a case where something would be considered a prohibited Gentile custom, if many people do it for reasons unrelated to their religion or law, but rather because it is pleasurable to them, there is no prohibition of imitating Gentile custom. So, too, it is obvious that if Gentiles were to make a religious law to eat a particular item that is good to eat, halacha would not prohibit eating that item. So too, any item of pleasure in the world cannot be prohibited merely because Gentiles do so out of religious observance.<sup>28</sup>

Rabbi Feinstein then applies this principle to going bare-headed, and rules that even if some Gentiles do so out of religious fervor, since many people do so out of concerns for comfort, this is not considered a religious custom.

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Presidents Day, Memorial Day, Independence Day and Labor Day) are all noted in the *Ezras Torah* calendar published under Rabbis Feinstein's (and Henkin's) auspices. (New Year's Day and Christmas Day are not.) So too, this author suspects that Rabbi Feinstein would permit teaching about Thanksgiving to school children as part of their general studies curriculum, just as he would permit Columbus to be discussed.

28. Rabbi Feinstein, *supra* note .

Rabbi Ephraim Greenblatt also permits the celebration of Thanksgiving by the eating of turkey.<sup>29</sup> He states that he has a responsum set to be published<sup>30</sup> that rules that it is permissible to eat turkey on Thanksgiving, because Thanksgiving is "only a day of thanks and not, heaven forbid, for idol celebration." Rabbi Greenblatt adds that he posed this question more than thirty years ago to Rabbi Eliezer Silver and that Rabbi Silver also ruled that it was permissible to eat turkey on Thanksgiving.<sup>31</sup>

*B. The Approach of Rabbi Soloveitchik*

Rabbi Joseph B. Soloveitchik also agreed that Thanksgiving was not a Gentile holiday, and ruled that it was permissible to eat turkey on Thanksgiving. Rabbi Hershel Schachter, in his intellectual biography of Rabbi Soloveitchik, *Nefesh HaRav*, writes:

It was the opinion of Rabbi Soloveitchik that it was permissible to eat turkey at the end of November, on the day of Thanksgiving. We understood that, in his opinion, there was no question that turkey did not lack a tradition of kashrut and that eating it on Thanksgiving was not a problem of imitating gentile customs. We also heard that this was the opinion of his father, Rabbi Moshe Soloveitchik.

Others have also recounted that Rabbi Soloveitchik ruled this way, and that he found it difficult to comprehend how

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29. In a letter to this author dated 5, *parshat devarim* 5754.

30. In *Revavot Ephraim* on *Yoreh Deah*.

31. Indeed, it is clear from Rabbi Greenblatt's letter that he feels that Rabbi Feinstein agrees with his ruling, in that he refers to the fact that he was the questioner to both Rabbi Feinstein and Rabbi Klein and that only one of them does not agree with him. As will be made clear from Rabbi Klein's responsa, he certainly does not agree that celebration is permitted.

one could consider Thanksgiving a Gentile holiday or that it was prohibited to celebrate it.<sup>32</sup> Indeed, there were instances when Rabbi Soloveitchik implied to his students that he and his family celebrated Thanksgiving, although *shiur* was always held on Thanksgiving.<sup>33</sup>

A similar view is taken by Rabbi Yehuda Herzl Henkin, who states that it is clear that halacha does not consider Thanksgiving to be a religious holiday, and that even if one lived in a society where there are some religious

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32. Rabbi Howard Jachter of Brooklyn notes that he explicitly spoke to Rabbi Soloveitchik about this in July 1985 and that Rabbi Soloveitchik affirmed this ruling and did not see any problem with celebrating Thanksgiving. Dr. Avi Feldblum of New Brunswick also confirmed to this author that he heard such a ruling from Rabbi Soloveitchik, as did Dr. Marc Shapiro of Boston.

33. Dr. Avi Feldblum recounts:

While I do not know whether Rabbi Soloveitchik had turkey for dinner that night or whether he called it a Thanksgiving dinner, it was well known that on the day that is marked on the calendar as Thanksgiving, Rav Soloveitchik started *shiur* much earlier than usual, in order to end earlier than usual and catch the plane back to Boston, to have a festive meal, etc. However, it is of interest to note that while Thanksgiving appeared to be of sufficient importance to change the fixed time for *shiur*, it was not sufficient to end *shiur* if the Rav had not completed what he wanted to understand. On Thanksgiving 1976, there was the famous Thanksgiving *shiur* where the Rav spent about five hours (most of it in silent thought) working through one Tosafot. After the second or third time the *shamash* passed him a note about the flight [back to Boston], the Rav turned to him and said "no one can leave here until we have understood what it is that Tosafot is saying!"

Letter of Dr. Avi Feldblum, published electronically in *mail.jewish*, volume 5, issue 20 available in archives at [mail-jewish@shamash.nysernet.org](mailto:mail-jewish@shamash.nysernet.org).

denominations that celebrate Thanksgiving "religiously" that would not be sufficient to make it a religious holiday, as it is clear that many secular people celebrate it.<sup>34</sup> Rabbi Henkin suggests that it would be a good thing occasionally to skip the Thanksgiving meal, as a way of indicating that this event is not a religious "obligation," but is merely permissive, and thus accommodate the stricture of Rabbi Feinstein. Rabbi Henkin concludes:

Where is there found any prohibition to rejoice on the king's birthday and similar occasions? Common practice proves the opposite. Rather there are two distinctly different rules. On a Gentile religious holiday, it is prohibited to do business [to assist the Gentiles] since they use that which we provide for worship. For this rule, it makes no difference what is the purpose of the holiday, even the coronation or birthday of the king is

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34. Part of the underlying dispute might concern whether Jewish law accepts the opinion of the Gra that customs that have secular origins are prohibited. As noted above, Gra YD 178:7 rules that such customs are prohibited. Rabbi Henkin, in his *teshuvot*, *Benei Banim* 2:30, demonstrates that this is not the normative halachic approach, which is to maintain that absent idolatrous origins, such customs are not suspect. The validity of many secular practices most likely hinges on the resolution of this dispute.

A secondary dispute is also present as to whether the act of commemoration for the survival of the nation is "nonsense" or not. Rabbi David Cohen writes that "...commemorating with turkey specifically is an aspect of nonsense, (חוק הכל ושטות)" and thus prohibited (letter of Rabbi David Cohen, dated 9 Nissan 5755 and elaborated on by letter dated 23 Nissan 5755). Rabbi Yehuda Henkin writes that "Thanks to God is an action written in the Torah, and the eating of turkey is a mere reminder of that gratitude, which is applicable to all residents of this land" and thus not nonsense (Letter of Rabbi Henkin, dated 23 Tevet 5755). Interestingly, Rabbi Klein (*Mishneh Halachot* 10:116) seems to agree with Rabbi Henkin on this point.

included. Such is not the case regarding rejoicing and celebrating alone; in this case one must examine the holiday to determine if its origins are primarily idolatrous or not. . . . However, if the reason for the celebration is primarily secular it is permissible to celebrate, such as the coronation of the king, the Fourth of July in America or Thanksgiving. For this it makes no difference that some Gentiles celebrate these holidays in churches.<sup>35</sup>

This, however, comes with one significant caveat, that Rabbi Henkin notes. As stated in *Shulchan Aruch*, it is clearly prohibited to celebrate even a completely secular holiday (such as the coronation of a king) with those Gentiles who are celebrating that "secular" day with religious observances.<sup>36</sup> However, one may join with a Gentile if one is certain that this particular Gentile does not worship in a manner or faith prohibited to Gentiles according to Jewish law.<sup>37</sup> Thus, even those authorities who would permit marking Thanksgiving with a meal would not permit doing so with Gentiles who are religiously celebrating the day. (The same is true for a birthday party, wedding or funeral.)

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35. Letter of Rabbi Henkin, dated 23 Tevet 5755. Rabbi Henkin notes that it is not prohibited to delay the time of morning services to reflect the fact that many are off from work on Thanksgiving. However, on a legal holiday that is also a Gentile religious holiday — such as December 25 — he advises that it is better to ignore the secular holiday for scheduling purposes. Rabbi David Cohen writes that it is best not to change the time of prayer, even on Sunday, and certainly to do so on a Gentile holiday is frowned upon; letter of Rabbi David Cohen, dated 9 Nissan 5755.

36. *Shulchan Aruch*, *Yoreh Deah* 148:6.

37. *Ibid*, 148:5. See also comments of *Beit Yosef* on *Tur*, *Yoreh Deah* 148 s.v. *ubegoy shemakirin be she'ano oved avodah zara, hacol mutar*.



C. *The Approach of Rabbi Hutner*

An exactly opposite approach to the rulings of Rabbis Feinstein and Soloveitchik appears to have been taken by Rabbi Yitzchak Hutner.<sup>38</sup> Rabbi Hutner argues that it is obvious and apparent that — whatever the merit of celebrating Thanksgiving the first time in the 1600's — the establishment of an annual holiday that is based on the Christian calendar is, at the very least closely associated with idol worship and thus prohibited. Rabbi Hutner argues that such a celebration becomes a "holiday" through the creation of an annual observance, and celebrating Gentile holidays is obviously wrong. Rabbi Hutner concludes:

In truth, one must distance oneself from these types of customs and even from those events that are similar to these types of customs . . . The truth is simple and obvious.<sup>39</sup>

An analogous approach, albeit less certain of a prohibition, is adopted by Rabbi Menashe Klein, who also rules that

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38. Rabbi Yitzchak Hutner, *Pachad Yitzchak: Iggerot umechtavim shel Harav Hutner* (5751), 109. The word "appears" is appropriate because it is from the title of the letter (which was not written by Rabbi Hutner, but by the editor) that it is clear that Rabbi Hutner is dealing with Thanksgiving. Since this volume of Rabbi Hutner's was published posthumously, it is possible that the letter was in fact in reference to some other event. Indeed, Rabbi David Cohen (of Gvul Yavetz) writes:

"Once I heard from my teacher Rabbi Yitzchak Hutner that he saw no prohibition in this [eating turkey on Thanksgiving]; to the contrary he saw something positive in it as the Gentile is acting out of a sense of thanks and a form of Jewishness (based on the Talmud *Menachot* 73b, *akum lebo leshamayim* . . .)"

Letter of Rabbi David Cohen, dated 9 Nissan 5755.

39. A similar type of argument can be found, relating to a different holiday, in *Kovetz Iggerot Me'et HeChazon Ish*, 97.

halacha prohibits the celebration of Thanksgiving.<sup>40</sup> Rabbi Klein notes that halacha divides Gentile rituals into two distinctly different categories. The first category is those things that Gentiles do out of silliness and irrationality. The second are those that are done for religious purposes or for purposes of immodesty. Rabbi Klein then cites the Gra, who rules that Gentile customs and law that have no Jewish basis should be avoided because they might have an origin in the idolatrous customs of the past.<sup>41</sup> Rabbi Klein then states:

Thus, those who eat fowl as a commemoration for the fact, as I heard it, that they did not have what to eat, and they found this bird, and they were very happy and rejoiced over having found this bird, this appears not to be a Gentile custom. Nonetheless, one must examine this to determine if it is, as it states in *Yoreh Deah* 147:6, a case of one who makes a private holiday, and worships many gods, on the day that he was born or was first shaved or any similar case. It is possible that Thanksgiving is such a case; even though they claim that they are worshipping God, and not idols, it is possible that there is a mixture here and thus it is possible that this is a Gentile ritual. Thus the spirit of the Sages does not approve of one who celebrates, and it is possible that there is a biblical violation.<sup>42</sup>

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40. *Mishneh Halachot* 10:116.

41. Gra YD 178:7.

42. *Mishneh Halachot* 10:116. There seem to be two completely different issues raised by Rabbi Klein. The first is the problem posed by the celebration by Jews of idolatrous holidays. The second is the problems of imitating Gentile customs. It is important to realize that these two issues are quite separate and distinct. The first is discussed in *Shulchan Aruch Yoreh Deah* 148 and the second in *Yoreh Deah* 178. Conceptually, the two issues are unrelated.

Rabbi Klein thus strongly discourages and perhaps forbids the celebration of Thanksgiving.<sup>43</sup>

A similar view is expressed by Rabbi David Cohen (of *Gvul Yavetz*), who writes:

The celebrating of Thanksgiving is something that has been disputed by many rabbis — some prohibited and maintain that it is a derivative prohibition of idol worship and there are others who completely permit [its celebration]. In my opinion, to eat turkey for the sake of a holiday is prohibited by the rule of Tosafot, *Avoda Zara* 11a, since this is an irrational rule of theirs and following it is improper. Nonetheless, there is no prohibition for a family to get together on a day when people do not go to work and to eat together; if it is their wish to eat turkey not for the sake of thanks but because they like turkey, that is not prohibited, but the spirit of the Sages does not approve of such conduct, as they are functioning as if they follow the practice of Gentiles.<sup>44</sup>

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43. Rabbi Klein, writing to Rabbi Ephraim Greenblatt who posed the question, states that he would withdraw his response if the approach of Rabbi Feinstein on this issue were known. It is unclear how the recent publication in *Am Hatorah* of the opinion of Rabbi Feinstein, discussed above, would affect the ruling of Rabbi Klein.

44. Letter of Rabbi David Cohen, dated 9 Nissan 5755.

Rabbi Feivel Cohen also writes that halacha prohibits the celebration of Thanksgiving; undated letter to this writer received Nissan 5755. He indicates that, in his opinion, based on the language of Rambam, *Melachim* 10:9, there is a significant problem when a Gentile celebrates this holiday, as that Gentile has the status of one who observes a day of rest and it is as if he observed his own festival, both of which are prohibited according to Rambam for a Gentile. Such a holiday, Rabbi Cohen writes, is created by Thanksgiving, which is an attempt by a Gentile to create a special day of festivities, and thus prohibited. Indeed, in Rabbi Cohen's opinion, even if there is no difference between

*D. Summation of the Approaches*

In sum, three premier authorities of the previous generation have taken three conflicting views. Rabbi Hutner perceived Thanksgiving as a Gentile holiday, and thus prohibited any involvement in the holiday. Rabbi Soloveitchik permitted the celebration of Thanksgiving and permitted eating turkey on that day. He ruled that Thanksgiving was not a religious holiday, and saw no problem with its celebration. Rabbi Feinstein adopted a middle ground. He maintained that Thanksgiving was not a religious holiday; but nonetheless thought that there were problems associated with "celebrating" any secular holiday. Thus, while he appears to have permitted eating turkey on that day, he would discourage any annual "celebration"<sup>45</sup> that would be festival-like.

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Thanksgiving and Independence Day, both are prohibited festivals, as Gentiles may not add festive days to the calendar.

45. The question of observing or attending a Thanksgiving day parade can only be answered after one decides what is the status of the day itself. Applying the three positions developed above to parades, one observes that:

1) If one rules that Thanksgiving is a Gentile holiday, it would be prohibited to participate or benefit in any way from the parade honoring the day.

2) If one maintains that Thanksgiving is not a Gentile holiday, but prohibited because of the rule against Gentile customs, observing the parade would not be prohibited, as observing parades is not irrational; even then, however, care must be exercised, lest people be taught to observe such customs generally. (Letter of Rabbi Cohen, dated 9 Nissan 5755.)

3) If one concludes that Thanksgiving is a secular holiday, with a rational basis in national rescue, and thus may be celebrated, there would seem to be no problem in attending a parade, as a Thanksgiving day parade is no different from an Independence Day parade.

### III. Issues Related to Celebrating Thanksgiving

The issue of adding a day of celebration to the Jewish calendar is referred to by both Rabbis Feinstein and Hutner and deserves elaboration. Rabbi Hutner asserts that the dating of such a holiday through the Christian calendar is clear evidence that such a holiday is "Gentile" in nature and thus prohibited.<sup>46</sup> Rabbi Feinstein understands this problem differently. Rabbi Feinstein maintains that there are specific halachic problems associated with adding holidays to the Jewish calendar, independent of whether they are "secular", "Jewish," or "gentile." Indeed, these types of objections have been raised to the modern observances of *Yom Hasho'a*, *Yom Ha'atzmaut*, and *Yom Yerushalayim*, and have nothing necessarily to do with the presence of a Gentile origin. There is an extensive literature on this issue with many different opinions advanced.

Some authorities maintain, as Rabbi Feinstein appears to do, that it is absolutely prohibited to add holidays to the calendar as an annual observance.<sup>47</sup> These authorities rule that while individuals can annually celebrate such events on the day that they happen, these celebrations never get incorporated in the general Jewish calendar, and it is prohibited to do so. Others maintain that such events can only be incorporated in the calendar after they receive unanimous (perhaps multi-generational) rabbinic

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46. It would seem that Thanksgiving is poor example of the phenomenon that Rabbi Hutner is criticizing, as Thanksgiving does **not** have a fixed date on the secular calendar — rather it is the fourth Thursday of the month of November, whatever date that happens to be.

47. This is clearly stated by Rabbi Hutner above and can also be found in Rabbi Moshe Shternbuch, *Teshuvot veHanhagot* 2:721.

sanction.<sup>48</sup> Yet others rule that every Jewish society can incorporate days of thanksgiving (or mourning) to reflect significant manifestations of God's will toward the community.<sup>49</sup> Yet others limit this to rituals that require no specialized blessings, and are technically permitted all year round.<sup>50</sup> No consensus has developed on this issue, and each community follows its own custom on this issue.<sup>51</sup>

However, in this author's opinion, a strong case can be made that this dispute is **not** really applicable to the way Thanksgiving is, in fact, celebrated in America, and that even those who flatly prohibit any additions to the Jewish calendar are not referring to the festivities of American Independence Day, Thanksgiving or Labor Day. Rather, these authorities are referring to the highly ritualized religious expressions of thanks to God that accompany days of religious observance, such as the services on *Yom Ha-atzma'ut* or the like. Thanksgiving, like Independence Day and Labor Day, lacks any ritualized prayer component, formal activities of any kind, obligatory liturgy or a festival (*mo'ed*) attitude.<sup>52</sup> Even

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48. See e.g. Kovetz *Iggerot Chazon Ish* 97.

49. Rabbi Herzog, *Pesakim Umechtavim shel harav Herzog* OC 99–100 and 104; Rabbi Unterman, *Shevet Meyehuda* 2:58.

50. For an example of this, see Rabbi Ovadia Yosef, *Yabia Omer* OC 6:41–42.

51. For a review essay on the various issues, see Rabbi Moshe Tzvi Nariah, "Adding Days of Joy to the Jewish Calendar" 3 *Hatorah VehaMedinah* 77–85 (2nd ed. Tzomet, 5752).

52. It is important to realize that such was not always the case in the United States. In the early 1950's, in response to the perceived threat of "godless communism", "prayer books" containing rituals and pseudo-religious "reflections" on the various American "holidays" were published in order to encourage the ritualization of the celebration. For an example of this, see Mordecai Kaplan, Paul Williams and Eugene Kohn, *The Faith of America: Prayers*

the holiday meal that many eat is not obligatory under American law.<sup>53</sup> Given the way that the completely secular<sup>54</sup> holidays are celebrated in this era in America, one would not think that any of them — including Thanksgiving — is an additional "festival" in the Jewish calendar.<sup>55</sup> Under this approach, Rabbi Feinstein's caveat would only limit the ritualized celebration of Thanksgiving.<sup>56</sup> Indeed, it is precisely this type of limitation of "celebration" that Rabbi Feinstein seems to be calling for, and which Rabbi Henkin

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*Reading, and Songs for the Celebration of American Holidays* (New York, 1951).

53. Nor for that matter is the Independence Day cookout or the Veteran's Day parade obligatory.

54. Besides Thanksgiving, they are: Martin Luther King Day (celebrating the birthday of the civil rights leader), President's Day (celebrating the birthdays of Lincoln and Washington), Memorial Day (celebrating the end of the two World Wars), Independence Day (celebrating the establishment of the Union), Labor Day (celebrating worker's rights), Columbus Day (marking the day Columbus discovered America), and Veterans Day (commemorating those who have died fighting for this country).

55. In this significant way, these American holidays are markedly different from their Israeli counterparts, which more clearly appear to be additions to the Jewish calendar. This article is not the place for a full and complete discussion of the significance of the establishment of the State of Israel and the proper halachic responses to it. Rather the purpose of this section is to note that this issue is **not** relevant when discussing halachic issues involved in celebrating modern American secular holidays.

56. Consistent with this is Rabbi Yehuda Herzl Henkin's proposal (found in the previous section) that one skip the Thanksgiving meal every couple of years to indicate that this is not a religious ritual. He, too, feels that these ritualization concerns are what Rabbi Feinstein is referring to.



endorses.<sup>57</sup>

One other issue is worth noting. All three of these authorities appear to agree that the celebration of a one-time day of thanksgiving to mark the first time an event worthy of thanks occurs, is not problematic.<sup>58</sup> Thus, for example, President Bush declared a day of thanksgiving in 1991 in response to the victory in the Persian Gulf war<sup>59</sup> and it would not be problematic according to any of these opinions to mark that one-time event with some form of a celebration. Indeed, as noted by Rabbi Feinstein, there is some talmudic precedent for that form of thanksgiving.<sup>60</sup>

### Conclusion

Three basic approaches are taken by contemporary decisors (*poskim*) on the question of celebrating Thanksgiving. Some rule that Thanksgiving is not a Gentile

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57. In this author's opinion, it is quite possible that the changes in American society and sociology since the 1950's account for the differences between Rabbi Feinstein's first responsum in 1953 and his second in 1980. When Rabbi Feinstein first addressed this topic in 1953, Thanksgiving was not a religious holiday, but there were those who wanted to make it one (see note for a discussion of this). Thus, Rabbi Feinstein thought pious people should be strict on this matter. By 1981 that movement had completely disappeared from the American scene, thus eliminating even the possibility that one might think this a religious holiday, and thus Rabbi Feinstein does not indicate in his later teshuva that pious people should be strict on this matter.

58. It is not clear that Rabbi Hutner would agree to that, although a close reading of the letter does imply that.

59. For a discussion of this, see *California School Employees Association v. Governing Board of the Marin Community College District*, 33 Cal.Rptr.2d 109 (1994).

60. See text accompanying note .

holiday, but yet limit "celebration." They would, apparently, permit eating a turkey meal. Others prohibit any form of involvement in Thanksgiving, as they rule it a Gentile holiday. Yet others view the day no different from Independence Day and allow any celebration appropriate for a secular observance.

Indeed, there remains a basic dispute that permeates this review and divides contemporary American halachic authorities of the last seventy five years. The relevant issue is whether it is appropriate to distinguish between "secular society", "Gentile society" and "idol-worshiping society" in modern American culture. The validity of this distinction — which was not generally made by the decisors of Eastern Europe two hundred years ago for the society of that time and place — is extremely relevant to a broad variety of halachic issues related to contemporary American society.

Like many areas of Jewish law where there is a diversity of legitimate approaches, individuals should follow the practices of their community, family or rabbi, all the while respecting and accepting as halachicly permissible other community's practices. It is for the ability to respect and accept as legitimate the conduct of fellow observant Jews — sanctioned by rabbinic authority — that true thanksgiving to the Almighty is needed.

# Taking Medicine in A Gel-Cap

*Rabbi Howard Jachter*

## Introduction

The pharmaceutical industry commonly packages medicines in gelatin capsules. This presents potential complications in taking many medications since the practice of Orthodox Jews in North America<sup>1</sup> is to follow the opinions of Rabbi Moshe Feinstein, Rabbi Aharon Kotler and Rabbi Pinchas Teitz, who rule that gelatin is not kosher. Of course, if life is in danger, there is no question that the gel-caps may be taken. The question is whether someone who is not dangerously ill, such as someone with a headache, may take aspirin in a gel-cap.

In order to properly answer this question we must review the extensive halachic literature concerning gelatin. We will then review the decisions of contemporary halachic authorities regarding the permissibility of taking gel-caps for those who are not dangerously ill.

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1. The Israeli Rabbinate follows the opinion of Rabbi Zvi Pesach Frank, Rabbi Eliezer Waldenburg, and Rabbi Ovadia Yosef that gelatin is permissible. One who plans to move to Israel and wishes to know whether he may rely on this lenient approach after his move to Israel, should consult a competent halachic authority.

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## I. The Halachic Status of Gelatin

The McGraw-Hill *Encyclopedia of Science and Technology* (1992) defines gelatin as "a protein extracted after partial hydrolysis of collagenous raw material from the skin, white connective tissue, and bone of animals." The source for gelatin is almost always non-kosher animals or animals which have not been slaughtered according to the dictates of Jewish law. Since in the manufacturing process of gelatin the raw materials are rendered inedible (as they have been placed in acids and then evaporated),<sup>2</sup> perhaps this process

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2. The McGraw-Hill *Encyclopedia of Science and Technology* describes the manufacturing process as follows: "Collagen, the precursor of gelatin, is pretreated for 10-30 hours with a 1-5% mineral acid for type A gelatin production or 35-90 days with a lime slurry for type B gelatin production. Type A gelatin exhibits the isoionic point at pH 7.0-9.5, whereas type B gelatin, due to domination in the liming process, exhibits the isoionic point at 4.8-5.2.... Type A gelatin is manufactured from frozen and fresh edible-grade pig skins [Rabbi Shimon Eider informs this author that almost all the gelatin currently produced in the United States is produced from edible grade pig skins] or from bone ossein.. Most of type B gelatin comes from bones.. Most edible gelatin is of type A but type B gelatin is also used.... The bone pieces are first demineralized in 4-7% hydrochloric acid for 7-14 days before liming after pretreatment with either acid (type A) or lime (type B), the materials are washed and are subjected to four to five 4-8 hour extractions at increased temperatures of 131-212F. The extracts, containing 3-7% gelatin, are filtered, concentrated in a vacuum evaporator, chilled and extruded as noodles, and dried at 86-140F. The dry gelatin is then ground and blended to specifications".

It is important to note that currently there is a firm that manufactures kosher gelatin from kosher animals that meets the standards of both Rabbi Aharon Kotler and Rabbi Moshe Feinstein. This author has been informed that the major kashrut certifying

renders the resulting product kosher, despite its non-kosher origin. This question is of major importance because many food products such as yogurt, ice cream, (see *Iggerot Moshe Yoreh Deah* II:32) jello and marshmallows contain gelatin.

There are five major issues involved in the question of the halachic status of gelatin. We will presently address each of these issues.

1. Since some gelatin is derived from bones, halachic authorities have focused on the kashrut status of bones from non-kosher sources. On one hand, Rambam based on the *Torat Kohanim* (Leviticus 11:8) states (*Hilchot Maachalot Asurot* 4:18) : "One who eats from a non-kosher source its skin, its bones, its sinews, its horns, its hooves, its nails....even though it is forbidden, he is excused from punishment, because they are not fit for consumption." Rambam indicates that bones are forbidden at least rabbinically.<sup>3</sup> On the other hand, Tosafot (*Avoda Zara* 69a s.v. *Hahu*) question the commonly accepted halachic practice of the time to eat bee honey that had bees' legs (a non-kosher animal) mixed in.

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agencies in this country will certify as kosher, gelatin manufactured according to these standards.

3. Rabbi Aharon Kotler (*Mishnat Rabbi Aharon* I: 16-17) seeks to demonstrate that the prohibition is biblical in nature. He asserts that even though the *Sifra* excludes bones from the prohibition of "*neveilah*" (a kosher animal that has not been slaughtered in a halachically proper manner) they are biblically prohibited because of the principle of "*yotzei min ha-tamei, tamei*" (*Bechorot* 5b), "That which emerges from what is forbidden, is forbidden". He states that when the bones are not fit to be eaten, then there exists no biblical prohibition to eat them (*achila shelo kederech hanaatan*, see *Pesachim* 24b and Rambam *Hilchot Maachalot Asurot* 14:10-11). However, if they are rendered fit to be eaten, such as in a food product containing bone gelatin, the biblical prohibition of *yotzei min ha-tamei tamei* applies.

Rabbeinu Tam's explanation of this practice is that since the bees' legs are "mere bones", they are permitted. Rosh (*Avoda Zara* (5:11) adds that the bee's legs are "mere dust" and hence they are not included in the prohibition of eating bees.<sup>4</sup> Apparently, Tosafot and the Rosh appear to believe that there exists no prohibition to eat bones of non-kosher animals.

Rabbi Yechezkel Abramsky (in a responsum published in the introduction to the fourth volume of Rabbi Eliezer Waldenburg's, *Tzitz Eliezer*) and Rabbi Chaim Ozer Grodzinski (*Achiezer* III:33:5) try to reconcile these seemingly opposing views by maintaining that the Rambam believes that only "soft bones"<sup>5</sup> are prohibited, but that hard bones are permitted. However, Rabbi Moshe Feinstein (*Iggerot Moshe Yoreh Deah* 2:27-end) and Rabbi Aharon Kotler (*Mishnat Rabbi Aharon* 1:16-17) reject this distinction, and believe that the Rambam's prohibition applies even to hard bones. Accordingly, Rabbi Abramsky and Rabbi Grodzinsky (who suggests other reasons for a lenient ruling) rule that gelatin derived from hard non-kosher bones is permissible, and Rabbi Feinstein and Rabbi Kotler believe it is prohibited.

It should be noted that according to kashrut experts, in this country there is no commercially available gelatin derived from hard bones. In fact, the halacha considers pig skins (from which most gelatin is made) to be fit for human consumption (*Chullin* 122a).

2. A second lenient approach is to state that since gelatin has changed its form from its original state – bones or skin –

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4. For talmudic examples of the principle that when a prohibited substance is reduced to dust the prohibition ceases to apply, see *Temura* 31a and *Pesachim* 21b.

5. A source for this distinction can be found in the comments of the *Shach*, *Yoreh Deah* 99:1, and the sources cited therein.

then it can be said that it is a new entity ("*panim chadoshot*") hence, its previous non-kosher status is no longer relevant and it is now kosher. The source for this leniency is the opinion of Rabbeinu Yonah, cited by the Rosh (*Berachot* 6:38) regarding the status of musk. The Rosh writes: "Rabbi Zerachia Halevi (the *Baal Hamaor*) forbade eating musk out of concern that it originated from blood, and Rabbeinu Yonah explained that it might be permitted because it is a 'mere secretion';<sup>6</sup> even though it originally was blood we are not concerned with this, because we are concerned only with its present status." At the conclusion of his citation, the Rosh expresses some reservations about the former's lenient approach.<sup>7</sup>

Rabbi Chaim Ozer Grodzinski (*Achiezer* 3:33:5), Rabbi Ovadia Yosef (*Torah She-Ba'al Peh* 5753 p.23-25), and Rabbi Eliezer Waldenburg (first comment to Rabbi Yechezkel Abramsky's responsum on gelatin mentioned earlier) both apply Rabbeinu Yonah's ruling<sup>8</sup> to gelatin because it has

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6. See *Chullin* 116b and *Bechorot* 7b.

7. *Poskim* debate the validity of Rabbeinu Yonah's lenient opinion; see *Taz*, *Orach Chaim* 216:2; *Magen Avraham* 216:3; *Chatam Sofer* commenting on that *Magen Avraham*; *Har Zvi*, *Yoreh Deah* 102; Rabbi Hershel Schacter, *Mesora* 1:54-56. Also see *Mishkenot Yaakov*, *Yoreh Deah* 34, for an application of this ruling.

8. Rabbi Yosef seeks to demonstrate that Rabbeinu Yonah's ruling is accepted as normative. In *Yechave Daat* 2:62, he applies Rabbeinu Yonah's ruling as a consideration to permit the use of citric acid derived from *chametz* for Passover use. He urges one to be strict on this matter, but this does not contradict his lenient ruling on gelatin. The reason for this is that *poskim* in general are exceptionally strict regarding Passover laws (*chumrah d'chametz*).

Rabbi Grodzinski applies Rabbeinu Yonah's ruling only in a case when the product became completely dry in the manufacturing



changed its form from its original form of bones and skin. Rabbi Yechezkel Abramsky, however, did not believe Rabbeinu Yonah's lenient ruling could be applied to the case of gelatin. He writes (at the beginning of his aforementioned responsum):

It is clear that gelatin derived from bones<sup>9</sup> is not a "new creation" which has changed from one form into another by a chemical process. Gelatin is the same product that existed in the bones beforehand. All the chemical means used in the manufacturing process of gelatin are used only to separate other materials present in bones that would negatively impact on the quality of the gelatin. Hence, it is not appropriate to apply Rabbeinu Yonah's lenient ruling to gelatin derived from non-kosher sources.<sup>10</sup>

3. The third possibility for leniency is that the gelatin becomes inedible during its manufacturing process. The Talmud records that non-kosher foods which become inedible lose their status as non-kosher<sup>11</sup>. Although for Passover use, the food must become inedible even to a dog to be considered permissible,<sup>12</sup> regarding other areas of Torah law, most authorities believe that when food becomes inedible for human consumption it is no longer non-

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process and was thus rendered "mere dust." This approach is based on the Ran (*Avoda Zara* 16b in the pages of the Rif, s.v. *Misrach*).

9. It is clear that his logic applies equally to gelatin derived from skin.

10. Rabbi Avraham Rappaport (a rabbinic judge who served on the London Rabbinic Court) appears to persuasively prove the correctness of Rabbi Abramsky's assertion, in his essay on gelatin which appears in the *Memorial Volume* published in honor of Rabbi Yechezkel Abramsky pp.525-527.

11. *Pesachim* 21a, and 45b, and *Avoda Zara* 67b-68a.

12. *Pesachim* 45b and *Shulchan Aruch, Orach Chaim* 442:9.

kosher.<sup>13</sup> Accordingly, Ramo (*Yoreh Deah* 87:10) cites from the *Shibbolei Haleket* (2:34) that "the stomach lining that is occasionally salted and dried and becomes likened to a tree and is subsequently filled with milk, is permissible since it has dried and become 'mere wood' as it does not retain any drop of meat."<sup>14</sup>

The *Shach* (*Yoreh Deah* 114:21) applies this rule to the general practice in his time to consume saffron ("*karkom*") produced by non-Jews ("those excellent people who are strict regarding this matter are few," he writes) despite the concern that the non-Jewish producer introduced some non-kosher dried out meat into the product. He justifies the practice by stating that "in these lands, the saffron is as dry as wood; therefore even if a strand of dry meat was introduced to the food, we do not have to be concerned, as the Ramo explained in *Yoreh Deah* 87:10."

A major question, however, is the status of non-kosher

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13. *Biur Halacha* 442:9 s.v. "*ad she-aino ra-ooy*"; *Aruch Hashulchan* 442:30, *Achiezer* 3:31 :4, the many authorities cited by Rabbi Ovadia Yosef, *Torah She-Baal Peh* 5753 pp.17-20. See, however, *Noda Biyehuda* I *Yoreh Deah* 26 and *Har Zvi*, *Yoreh Deah* 83 who require the food to be rendered inedible even to a dog.

14. The *Shach* (*Yoreh Deah* 87:33) comments to this Ramo that the same rule applies to dried intestines, but initially should not be done (i.e. it is permitted only after the fact when the product has been made). The reason given by *Acharonim* for this limitation is the concern that the product has not become sufficiently dry to be considered "mere wood" (see *Teshuvot Rabbi Akiva Eiger* 207 and *Teshuvot Chatam Sofer* 81). Some authorities contend that this concern is not relevant when a product is thoroughly evaporated in a modern manufacturing procedure. See also *Noda Biyehudah* (*Yoreh Deah* 26) for a discussion of this comment of the *Shach*. Rabbi Grodzinsky (*Achiezer* 3:33:5) contends that the *Shach's* ruling does not apply to hard bones.

food which becomes as dry as wood but later becomes edible once again. Four major authorities have ruled leniently on this matter. The *Shach* indicates that the food does not regain its non-kosher status. He writes, "Even though occasionally the saffron will contain a moist strand [of meat], this is because it was stored in a cold and wet environment, and perhaps originally it was as dry as wood."<sup>15</sup>

Rabbi Yechezkel Landau (*Noda Biyehuda*, *Yoreh Deah* 26) also indicates that the food does not regain its previous non-kosher status when it is rehydrated. He endorses the practice of German and Polish Jewry of his time to partake of a drink in which the gullet of a non-kosher fish is placed to settle the sediments and to make the drink clear. His approval is based mostly on the fact that the non-kosher component is dry and therefore loses its non-kosher status. He does not regard the fact that the gullet is placed in water and thus rehydrated as relevant. *Pitchei Teshuva* (*Yoreh Deah* 87:20) cites *Teshuvot Tiferet Tzvi* as permitting red ants that are dried and then used to color drinks.<sup>16</sup> Finally, the *Aruch Hashulchan* (87:43) rules leniently on this matter. The *Ritva* (*Avoda Zara* 39a, s.v. *halam*) clearly supports the lenient view.

On the other hand, many prominent authorities rule

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15. It is unclear why the *Shach* regards as praiseworthy the policy to be strict on this matter. One possibility is the concern that perhaps the meat in the "*karkom*" was not as dry as wood. The other possibility is that he believes it is best to avoid relying on and extending the Ramo's rule.

16. A contemporary analogy is carmine, an insect product which is thoroughly dried and then used as a coloring agent. This author was informed that the major kashrut agencies in this country have a policy to rule strictly and not to certify a product containing carmine.

that "dry as wood" non-kosher products which become rehydrated regain their former status as non-kosher. *Pri Megadim* (*Yoreh Deah* 87, 33 and 103) and *Teshuvot Chatam Sofer* (*Yoreh Deah* 81) rule strictly on this matter.<sup>17</sup>

Contemporary authorities are divided on how to decide this matter. Rabbi Chaim Ozer Grodzinski (*Achiezer* 2:11 and 3:33:5) and Rabbi Zvi Pesach Frank (*Har Zvi*, *Yoreh Deah* 83) rule leniently,<sup>18</sup> Rabbi Aharon Kotler (*Mishnat Rabbi Aharon* 1:17) marshals many talmudic sources to prove that the strict opinion is correct, and Rabbi Moshe Feinstein (*Iggerot Moshe*, *Yoreh Deah* I:37 and II:27) concludes that the matter is in doubt and hence prohibited because it may

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17. Also see *Chavat Daat* (103: *Biurim* 1), who distinguishes between a non-kosher product which has disintegrated and become inedible and a non-kosher product which has become inedible because bitter items are added to it. In the former case, its non-kosher status cannot be restored. However, in the latter case, if the bitter items are subsequently neutralized and the food becomes edible again, its non-kosher status is restored. Rabbi Avraham Rappaport (*Memorial Volume* to Rabbi Yechezkel Abramsky, p.527) suggests that since the collagen and ossein from which the gelatin product is taken are never rendered inedible by the acid or lime in which the skin or bones are placed, the manufacturing process of gelatin is analogous to the situation in which the non-kosher item did not disintegrate but rather became inedible due to the bitter item added to it. Hence, according to the *Chavat Daat*, gelatin should regain its former non-kosher status.

18. Rabbi Ovadia Yosef (*Torah She-Baal Peh* 5753, pp.21-33) endeavors to demonstrate that the consensus of authorities follow the lenient opinion. It is important to note that Rabbi Frank's lenient ruling regarding gelatin explicitly applies even to gelatin derived from pigskin. Interestingly, Rabbi Frank suggests that a chemist should be consulted to determine if a food product has become unsuitable even for canine consumption. Other authorities, however, do not mention this requirement and seem to believe that a layman's judgment is sufficient in this matter.

not be kosher ("safek issur"). Rabbi Yosef Eliyahu Henkin (*Edut Leyisrael* pp. 176-177) decides this issue in an interesting manner. He writes that bones of non-kosher animals that are converted into something edible remains permissible since it was originally permitted.<sup>19</sup> However, Rabbi Henkin believes that the question of edible non-kosher food which was rendered inedible but subsequently made edible, has not been resolved and therefore, one should be strict.

Accordingly, four opinions emerge regarding gelatin that is rendered inedible during its manufacture. Rabbi Frank believes it is permissible regardless of its origin, Rabbi Henkin believes it is permissible if it comes from hard bones,<sup>20</sup> Rabbi Feinstein regards gelatin as forbidden because of doubt, and Rabbi Kotler seems to believe that gelatin derived from non-kosher sources is certainly forbidden.<sup>21</sup>

4. Rabbi Kotler advances the creative and persuasive argument<sup>22</sup> that even according to the opinion that once gelatin has been rendered inedible, it remains permissible even if restored to being edible, gelatin would still be forbidden because it is analogous to yeast.

Yeast,<sup>23</sup> explains the *Chavat Daat* (*Yoreh Deah* 103:1

19. Rabbi Aharon Kotler strongly rejects this opinion in his essay on the halachic status of gelatin.

20. This may to be the opinion of Rabbi Grodzinsky, though, because of differing considerations.

21. Rabbi Kotler writes at the beginning of *Mishnat Rabbi Aharon* 1:16 "I have demonstrated that [gelatin] is forbidden according to most opinions, and even according to the minority opinion there is no clear manner to permit [gelatin]."

22. Ibid. 1:17.

23. For a summary of the sources regarding yeast see *Biur Halacha* 442:9, s.v. *Chametz Shenitapesh*.

*Biurim*), is forbidden even though it is not fit for human consumption, because it can impact upon and improve other foods. Since "this is its purpose," it is biblically forbidden. *Chavat Daat* states that this rule applies not only to yeast, but also to anything similar.

Hence, argues Rabbi Kotler, even if gelatin is considered inedible, it is biblically forbidden as "its purpose" is to improve other foods. The lenient opinions would probably reply that the analogy to yeast is inaccurate because unlike yeast, the purpose of the bones and skins from which the gelatin is extracted is not to improve other foods. Moreover, the aforementioned lenient opinions of the *Shach* and *Noda Biyehuda* clearly do not accept the approach of Rabbi Kotler.

5. Rabbi Kotler raises another reason to forbid consumption of gelatin from a non-kosher source, the concept of "*achshevai*." This refers to the rabbinic<sup>24</sup> prohibition to consume inedible foods. The fact that one consumes it indicates that he regards it as food.<sup>25</sup>

Rabbi Grodzinski and Rabbi Frank rule that "*achshevai*" is not a relevant concern for gelatin, because this principle does not apply if the forbidden inedible object is mixed with edible kosher food. It is forbidden only if it is consumed by itself. By consuming inedible items mixed into food one does not indicate he considers them to be food. This would explain the medieval practice endorsed by Tosafot and the

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24. See *Mishnah Berurah* 442:43 and *Aruch Hashulchan* 442:30, citing *Taz* 442:8.

25. The Rosh (*Pesachim* 2: 1) articulates this prohibition, and it is accepted as normative (*Mishnah Berurah* 442:43 and *Aruch Hashulchan* 442:30.) However, the Rosh cites opinions that do not believe that there exists even a rabbinic prohibition to consume inedible objects. The talmudic source for this concept is in *Shavuot* 24b.

Rosh of eating bees' honey, even though bees' legs were in the mixture, because the legs were inedible. Eating this honey did not constitute a forbidden act of "*achshevai*" because one did not eat the bees' legs alone.

Rabbi Kotler argues that "*achshevai*" does apply to gelatin. He writes that the analogy to the bees' legs case is inaccurate. In that situation the bees' legs were not intentionally mixed into the honey. However, in our case, the gelatin is intentionally added to the food product and thus the prohibition of "*achshevai*" applies. Note that the previously mentioned *Shach* (concerning saffron) and *Noda Biyehuda* (concerning fish gills) appear to contradict Rabbi Kotler's thesis. In addition, Rabbi Kotler does not cite a source to substantiate his assertion.

## II. Conclusion Regarding Gelatin

We have seen that there are four opinions regarding gelatin: 1) It is always permitted.<sup>26</sup> 2) It is permitted when manufactured from hard bones. 3) It is forbidden because of doubt, and 4) it is forbidden because of certainty. The accepted practice among Orthodox Jews in North America is to consider gelatin derived from non-kosher source as not kosher.<sup>27</sup>

Rabbi Yechezkel Abramsky, who permits gelatin

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26. If in the future, the process to manufacture gelatin changes and the bones or skins are not rendered inedible, then Rabbi Frank would say that gelatin is forbidden, but Rabbi Yosef and Rabbi Waldenburg might still believe it permissible because it has changed its form (Rabbeinu Yonah's lenient ruling).

27. Rabbi Kotler rules (*Mishnat Rabbi Aharon* 1:16) that gelatin from a kosher source is considered pareve and Rabbi Feinstein (*Iggerot Moshe*, *Yoreh Deah* I:37 and II:27) rules that gelatin produced from skin of a kosher animal is considered pareve.



produced from hard bones, nevertheless adds another reason to forbid consumption of gelatin even if it is produced from hard bones. He<sup>28</sup> notes a public policy concern to forbid eating a gelatin product:

Since until now [1951] it has been accepted that gelatin is forbidden....it is not an unwarranted fear that if we will issue a responsum permitting gelatin, it will strengthen the hand of those who profess the erroneous view that halacha is in the hands of rabbinic decisors, as is clay in the hands of the artist. Regarding an analogous situation, the Rabbis (*Yoma* 40b) stated, 'Do not strengthen the hand of the [heretical] Sadducees' who, Rashi explains, claimed that the Rabbis rule according to their whims.

### III. The Halachic Status of Gel-caps

We have seen that food which is inedible is permitted on a biblical level, but forbidden rabbinically because of "*achshevai*." However, almost all rabbinic authorities rule<sup>29</sup>

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28. This appears in his responsum on gelatin, mentioned earlier. Rabbi Waldenburg's comments to this responsum are added. He to accept this aspect of Rabbi Abramsky's essay, unlike other sections of the responsum to which he does not hesitate to express his disagreement.

29. *Iggerot Moshe*, *Orach Chaim* 2:92, *Chazon Ish Orach Chaim* 116:8, *Tzitz Eliezer* 6: 16; 7:32:8; 10:25:20, *Yechave Daat* 2:60, Rabbi Shlomo Zalman Auerbach, *Minchat Shlomo* 17, following *Ramo*, *Yoreh Deah* 155:3 and *Yad Avraham* commenting on this text. The opinion of *Shaagat Aryeh* (responsum 75) that "*achshevai*" applies even to ingesting medicine appears to be a lone opinion (although Rabbi Grodzinski does take it into consideration (*Achiezer* 3:31)).

Two excellent essays (written in Hebrew) discussing this matter have been recently published: Rabbi David Heber (*Mesora* 7:91-96) and Rabbi Yoezer Ariel (*Techumin* 15:348-362).

that "*achshevai*" is not a concern when consuming medicine. When an individual consumes medicine he does so for healing purposes and does not regard the medicine as food.

Accordingly, since gel-caps are tasteless and taken for medicinal purposes, it would appear to be permissible to ingest them. Moreover, since the gelatin has not been introduced to food and become a component of an edible substance, the opinions which led Rabbi Feinstein to rule stringently do not apply. Moreover, two of Rabbi Kotler's primary concerns are not relevant regarding gel-caps. The issue of "*achshevai*" is not a concern with medicine according to almost all authorities, and gel-caps are not analogous to yeast since their purpose is not to improve other foods. Therefore, Rabbi Yosef Eliyahu Henkin writes<sup>30</sup> (*Edut Leyisrael* p.177), "It is common practice to ingest [medicine wrapped in gelatin] capsules. It appears that what is relied on is the evaporation [of the gelatin during its production, rendering it inedible] and the fact that one does not intend to consume [the gel-caps] as food."

Rabbi Hershel Schachter, Rosh Kollel of Yeshiva University, informed this author that Rabbi Joseph B. Soloveitchik told him that it is permissible to ingest a gelatin coated medicine tablet. Rabbi Waldenburg (*Tzitz Eliezer* 10:25:20 2) also rules permissively. Moreover, Rabbi Schachter believes that even one who wishes to take medicine for relief from minor pain (*meichush b'alma*) is permitted to ingest a gel-cap<sup>31</sup>. Of course, if one has an alternative, he

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30. From Rabbi Henkin's writings on this issue (*Edut Leyisrael* p.177) we see that he was aware that the commercially available gelatin would be forbidden according to his approach as it is not derived from hard bones.

31. Even Rabbi Auerbach (*Minchat Shlomo* 17), who raises the possibility that one who suffers merely a slight ache might not

should avoid the gel-cap in favor of medicine which does not contain non-kosher ingredients. One should make a reasonable effort to seek such an alternative (*Ramo, Yoreh Deah* 155:3).

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be permitted to ingest tasteless non-kosher medicines, might rule leniently regarding gel-caps. This is because regarding gel-caps, there exists a *s'fek sefaika* – a double doubt. First, perhaps even one who has a slight pain is permitted to ingest non-kosher medicines. Second, Rabbi Feinstein regards gelatin as a "*safek issur*", something which is forbidden because of a halachic doubt. However, according to the approach of Rabbi Kotler who considers gelatin to be certainly forbidden, it is possible that gel-caps may not be permitted for someone suffering only a minor degree of pain.

# The Obligation of Married Women To Cover Their Hair

*Rabbi Mayer Schiller*

## Introduction

The obligation of married Jewish women to cover their hair is subject to considerable discussion in halachic literature.<sup>1</sup> Its exact parameters are far from clear. Our goal will be to trace, in brief, the sources of this obligation as they unfold in biblical, talmudic/midrashic works and subsequently in the later *poskim* (decisors). Having concluded this overview, we hope to stake out the various halachically acceptable modes of conduct for contemporary married women. This is an involved and often emotion-charged topic. Our task will be to delineate the boundaries between law, custom and cultural passion so that those

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1. There are several sources that deal with our topic at length. Among them are *Otzar ha-Poskim* (Jerusalem, 1965) *Even Haezer*, 21:2; R. Shelomoh Carlebach, "Mareh Mekomot le-Issur Periat Rosh be-Ishah ve-Dinei Peah Nokhrit," in Simon Eppenstein et al., eds., *Festschrift zum Siebzigen Geburtstage David Hoffman's* (Berlin, 1914) Hebrew; *Dat Yehudit ke-Hilkhato* (Vaad le-Mishmeret Zeniut; Jerusalem, 1980); *Dat Moshe ve-Yehudit* (Brooklyn, n.p., 1988); R. Moshe Weiner, *Glory of the King's Daughter* (Empire Press: New York, 1980); Dov I. Frimer, *Grounds for Divorce Due To Immoral Behavior (Other Than Adultery) According To Jewish Law* (Hebrew with English Synopsis) (Hebrew University, 1980); Elyakim Gezel Elinson, *Hazne Lekhet* (World Zionist Organization, 1987).

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confronting this area will be able to make informed decisions concerning their own lives. The reader interested in further pursuing this matter may effectively do so by consulting the sources listed in note one below. The comments to follow should be viewed as providing an introductory framework for further research and consultation with halachic authorities.

### Midrashic Sources

Before proceeding to the talmudic codification of hair covering it will be beneficial to note the midrashic (exegetical) wellsprings of our law. These are the bases for the Gemara text upon which our major attention must eventually be centered.

In *Parshat Naso* (5:18) (where the *sotah's* ordeal is outlined) we read, "And he [the priest] shall "*parah*" the head of the woman." In most current editions of the *Sifrei* the above text is commented on as follows:

The priest turns [to stand] behind her and is "*parah*" in order to fulfill the commandment of *periah*. [These are the] words of R. Yishmael. Another opinion [is], this teaches us concerning the daughters of Israel that they should cover their heads.<sup>2</sup>

Problems abound with the passage as quoted. If we are to assume that the word *parah* means uncover (as we will soon see, the basic Gemara dealing with hair covering indeed does so), then why is the teaching that the "daughters of Israel ... cover their heads" cited as "another opinion" ? If *parah* is to mean something else, what would that meaning

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2. *Sifrei, Naso, Piska* 11. See the editions of H.S. Horovitz (Wahrman Books: Jerusalem, 1966) and Meir Ish Shalom (Vienna: 1968) where the reading is as we have quoted.

be, and will it be possible to derive anything concerning normative behavior from this alternative understanding?

A possible alternative explanation (although not without its own ambiguities) of *parah* is to be found in the Gemara *Sotah* where we read:

Our Rabbis have taught: "And he [the priest] shall *parah* the head of the woman" (*Bamidbar* 5:18) I only have here [mention of uncovering (?) ] the] head, how do we know that it [uncovering (?) ] applies to the body as well?<sup>3</sup> [This is derived from] that which it says, "the woman." If so, [what is derived from] that which it says, "And he shall *parah* the head?"<sup>4</sup> It teaches that the priest undoes (*soter*) her hair.<sup>5</sup>

The sequence of this Gemara seems to be: 1) The assumption was that the word *parah* meant uncover. 2) How can we extend this to include the "body" as well? 3) It is derived from the word "the woman". 4) If so, why single out the head? 5) Because from "head" we derive that an additional act is to be performed, the unraveling of the braids. Apparently, at the end, the word *parah* serves a double function: its primary meaning, which is uncover, and a secondary meaning of unravel.

This double halachic meaning of *parah* is substantiated by several versions of the *Tosefta* where we are told that the accused wife (*sotah*) is treated "with the measure that she

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3. The Gemara's assumption that the woman's "body" must be uncovered is based on the preceding Mishnah which states, "A priest seizes her garments ... until he uncovers her heart" (*Sotah* 7a).

4. In other words, why wouldn't the obligation to uncover the body include the head as well?

5. According to Rashi he "increases the uncovering in that he unravels her braids."

measured out." Accordingly,

She spread the sheet before him, therefore the priest takes her hat from her head and spreads it under foot. She braided her hair for him, therefore the priest loosens it.<sup>6</sup>

Rashi in his Torah commentary weaves both meanings of *parah* together. "He [the priest] unravels her braids in order to make her look despicable." This follows the translation of *parah* as unravel. However, Rashi then concludes, "This teaches us concerning the daughters of Israel that an uncovered head is a disgrace to them."<sup>7</sup>

Mizrachi is troubled with the connection Rashi establishes between the commandment to unravel braids and the obligation to cover hair. At most we might derive an imperative to braid the hair of Jewish women. His answer, along the lines that we have been pursuing, is that *parah* definitely means "uncover". The commandment to "unravel" that Rashi refers to is derived from the exegesis found in the Gemara *Sotah* quoted above. Nonetheless, Rashi's conclusion about the "daughters of Israel" is based on the plain meaning of *parah*.<sup>8</sup>

Having established that *parah* means uncover, there remains the matter of the *Sifrei* which seems to separate the law of uncovering the *sotah's* hair from its derivative of

6. *Tosefta*, *Sotah* 3. See the *Tosefta* edited by R. Moshe Shmuel Zukermantel (Wahrman: Jerusalem, 1963) for a listing of editions that include or omit the latter phrase.

7. *Bamidbar* 5:18.

8. As a proof to this, Mizrachi cites Rashi's translation of *paru'a* (*Sh'mot* 32:25) as "uncovered" (*megulah*). In addition, Rashi there states that his comment is based upon the meaning of *parah* in our verse.



hair covering. In an apparent attempt to solve this quandary the Vilna Gaon proposes an alternative reading of the *Sifrei* which will eliminate all of the above-mentioned difficulties. In place of the phrase that reads, " [These are the] words of R. Yishmael. Another opinion [is]", Gra would have, "R. Yishmael said, 'From here we [derive] a warning' ..." Thus, the corrected version of the *Sifrei* is:

The priest turns to stand behind her and is *parah* in order to fulfill the commandment of *periah*. R. Yishmael said, "From here we [derive] a warning concerning the daughters of Israel that they should cover their heads."<sup>9</sup>

According to this reading it is R. Yishmael himself who, based upon understanding *parah* to mean uncovering, is the authority who states that the "daughters of Israel" may not have uncovered hair. (Conceivably, Gra's basis for amending the *Sifrei* was that when R. Yishmael is quoted in the Gemara he is given as the basis for the prohibition of uncovered hair.)<sup>10</sup>

We have spent some time on the source of the prohibition in order to establish its obligatory nature despite its being derived from an inference. However, the different expressions used by Rashi as he explains the primary sources to describe this practice seem confusing. Rashi in his Torah commentary, apparently based on *Sifrei* (although not quoting it literally), describes the inference as yielding that uncovered hair is a "disgrace",<sup>11</sup> while the original text merely says that it is common practice to cover hair. In his Gemara commentary we read, "it is not the way of the

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9. *Sifrei* (With Glosses of the Gra) (Jerusalem, 1974) p.9.

10. *Ketubot*, 72a.

11. *Bamidbar*, *ibid*.

daughters of Israel to go about with uncovered heads."<sup>12</sup> Rashi as he appears on the Rif writes, "It is a custom of the daughters of Israel even though it is not written."

Exactly what is the legal status of this prohibition? The question of the halachic status of this prohibition depends on the meaning of the "warning" of R. Yishmael. In the Gemara in *Ketubot*, which we will turn to shortly, uncovered hair is described as biblically prohibited (*"d'oraitha hu"*)<sup>13</sup> based on R. Yishmael's statement. In *Dvarim Ahadim* we are cautioned to take this statement literally. Rashi's comment in *Ketubot* to the effect that it is "not the practice of the daughters of Israel to go about with uncovered heads" should not be understood to mean that "the matter depends on custom. It is a biblical law ..."<sup>14</sup> Even *Shiltei Giborim*, who adopts a lenient position on the manner of hair covering, is also of the opinion that uncovered hair is "prohibited

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12. *Ketubot*, *ibid.*

13. See *Otzar ha-Poskim* (*Even Haezer* 21:2) for an extensive listing of those who state clearly that woman's hair covering is a biblical requirement. Particularly interesting is the *Shach* who is cited (*Choshen Mishpat* 28:14) as maintaining that any law about which the Talmud declares *"d'oraitha hu"*, such as ours (see below), must be seen as biblical, even if it be derived from an inference. The *Meharam Hagiz* in his *Eleh Ha-Mizvot* (262) sees uncovered hair as a transgression of the prohibition of "going in Gentile ways" and therefore biblical. (See below note 27) The silence of those who list biblical mizvot on this matter is explained by *Tashbaz* in *Zohar Rakia* (Positive Commandments 137 where he rules that the prohibition is biblical), who finds many laws which, although decidedly *min ha-Torah*, are not listed in the major compendia. For an encyclopedic array of *poskim* who see this prohibition as biblical, see Weiner, *op.cit.* (Hebrew section) p.3.

14. *Dvarim Ahadim* 45.

*min ha-Torah.*"<sup>15</sup>

However, the matter is far from simple. *Sdei Hemed* lists an impressive array of sources to prove that *d'oraitha hu* may not imply a biblical obligation, but merely "a hint (*remez*) in the Torah."<sup>16</sup> *Terumat ha-Deshe*n writes that "the prohibition of uncovering the head of a woman has a support (*s'mach*) in the Torah." To adequately understand the difference between these two views we must first turn to the talmudic text which forms the primary basis for the law. It is important to remember that despite disagreements as to its ultimate source the prohibition was regarded as mandatory in *mishnaic* and *talmudic* literature.<sup>17</sup>

### The Text in *Ketubot*

In *Ketubot* (72a) we read as follows:

These are to be divorced without receiving their *Ketubah*: A wife who transgresses the law of Moshe (*Dat Moshe*) or Jewish practice (*Dat Yehudit*). And what is [regarded as transgressing the] law of Moshe? Feeding her husband with untithed food, having

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15. As quoted in *Otzar ha-Poskim*, *ibid*.

16. *Sdei Hemed*, (Section *Dalet*: 19).

17. There are many sources that indicate it was common practice for Jewish women to cover their hair in *mishnaic/talmudic* times. See Carlebach in "*Mareh*" for extensive references. In particular the *Midrash Rabbah* (*Bamidbar* 9:16) commenting on the word *paruah* is telling. "Why [should the priest uncover her hair]? Because it is the way (*derech*) of the daughters of Israel to have their heads covered. Consequently when he uncovers the hair of her head he says to her, 'You have departed from the way of the daughters of Israel, whose way it is to have their heads covered, and you have walked in the ways of the Gentile women, who walk about with their heads uncovered. Here then you have what you have wanted!' "

intercourse with him during the period of menstruation, not setting apart her dough offering (*challah*), or making vows and not fulfilling them.

And what is [regarded as transgressing] Jewish practice? Going out with uncovered head, spinning in the street, or conversing with every man.<sup>18</sup>

There is much discussion as to what the phrase "to be divorced" in the Mishnah actually means. Is it obligatory, merely meritorious, or simply permissible?<sup>19</sup> What is more significant for our purposes, though, is the explanation of the terms *Dat Moshe* and *Dat Yehudit*. *Dat Moshe*, to quote Meiri, refers to "commandments that are written in the Torah or alluded to in it" while *Dat Yehudit* are "customs which the nation has adopted due to modesty since the daughters of Israel are more modest than other woman."<sup>20</sup> This is the approach of several *Rishonim* including Rashba who sees the uncovering of hair as transgressing *Dat Moshe* and the

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18. Mishnah, *Ketubot* 7:6. The Mishnah goes on to list a few other instances as well.

19. *Gittin* 90a; Mordechai, *Ketubot* 72a; *Shulchan Aruch*, *Even Haezer* 115:4-5. There is some disagreement among *Acharonim* as to whether this divorce imperative has changed in our days due to widespread indifference to the hair covering obligation. See, for example, *Mishneh Halachot* (6:261) who views matters as unchanged and divorce as obligatory, and *Iggerot Moshe* (*Even Haezer* 1:114) who adopts a lenient view. In a comprehensive responsum Rabbi Ovadiah Yosef writes that the law of divorcing the women without her *ketubah* being paid is still in force, unless it is clear that the husband is using this accusation as a cover for his desire to be rid of his wife for personal reasons. (*Yabiaiah Omer* 3, *Even Haezer* 21).

20. *Beit ha-Bechirah*, *Ketubot*, *ibid*. His words are echoed by Rashi on the Mishnah who writes that *Dat Yehudit* are those practices which "the daughters of Israel are accustomed to do even though they are not written."

latter as intrinsically biblical.<sup>21</sup>

Rambam's opinion is subject to some dispute. The approach of several commentators on his work is that he adopts the novel view that uncovered hair violates *Dat Moshe*, but it is nonetheless a rabbinic law.<sup>22</sup> This leads to some confusion as to what *Dat Moshe* means according to Rambam. *Radam* (a commentator on Rambam's *Sefer Ha-Mitzvot*) describes it as a "custom of the daughters of Israel of the Torah."<sup>23</sup> It is something more than a custom which carries the force of Rabbinic law once it is accepted (*Dat Yehudit*), but less than *d'oraitha*. Yet a third contingent of *Rishonim*, prominent among them the Rosh,<sup>24</sup> move the entire prohibition into the realm of *Dat Yehudit* and views the *d'oraitha* of the Gemara as not meant literally.

The Gemara which will be crucial for our discussion appears with slight variations in different *Rishonim*. We present the text as it is printed in our Gemara:

And what is [regarded as transgressing] Jewish practice (*Dat Yehudit*)? Going out with uncovered head. Is not [the prohibition of going out with] uncovered head biblical; for it is written "And he shall uncover the women's head" and this was taught in the house of R. Yishmael as a warning (*azharah*) that the daughters of Israel should not go out with an uncovered head? Biblically it is permissible if her head is covered with a basket; Jewish practice (*Dat Yehudit*) prohibits a basket as well.

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21. *Teshuvot ha-Rashba*, (246, 471).

22. *Terumat ha-Deshen* (10) sees Rambam as viewing the prohibition as a "warning (*zehirut*) of the Rabbis."

23. *Chidushei ha-Radam on Sefer ha-Mitzvot* (Positive Commandments 175).

24. Rosh, *Ketubot* (72a-b) 8.

R. Asi said in the name of R. Yohanan, "With a basket there is no [transgressing the] prohibition of going about with an uncovered head."

R. Zaira analyzed this, "Where [is this woman assumed to be]? -- If you will say in the street; [then it will be objected that this is already] prohibited by *Dat Yehudit*. If you will say 'in the courtyard' [then it will be objected that] if this is true then you will not leave our Father Abraham any daughter who could remain under her husband!"

Abaye, or it might be R. Kahana said, "[The statement refers to a woman who walks] from a courtyard to a courtyard by way of an alley."

The step-by-step continuity of this Gemara is difficult to follow. Our opening paragraph above postulates that biblically a basket will suffice as a head covering for women in the street. However, *Dat Yehudit* prohibits a basket alone and requires some form of more thorough covering. (Rashi and Tosafot are both silent on the precise nature of this superior covering.) Apparently in opposition to this statement R. Asi in the name of R. Yohanan is quoted as saying that there is nothing wrong with the basket covering even in the street.

Rashi and Tosafot both maintain that at least the second half of R. Zaira's statement is returning to the original statement which prohibits the basket, asking how that could possibly be applied in the courtyard against common practice. Following this understanding, Abaye is limiting the prohibition of the basket by R. Yohanan to an alley.

Despite *p'shat* difficulties, what emerges from the Gemara according to Rashi and Tosafot<sup>25</sup> is the following: 1) In a

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25. This is codified by the *Piskei Tosafot*. Rashi is explained

courtyard no covering at all is required. 2) In an alley running from courtyard to courtyard a basket alone will suffice. 3) In the street something more than a basket is required.

Rif and Rosh both add a further distinction on the basis of the *Yerushalmi* that the courtyard where uncovering is permitted is only one that the public does not frequent. Concomitantly the alley where it is prohibited is only one that is frequented.

### **Rambam, Tur and Shulchan Aruch**

Rambam presents us with a stricter presentation of our law's final resolution which is traceable to a slightly different understanding of the original text.

And these are the things that if she transgresses one of them she has violated *Dat Moshe*: Going out into the street with the hair of her head uncovered. And what is *Dat Yehudit*? It is any custom of modesty to which the daughters of Israel have accustomed themselves. And these are the things that if she transgresses one of them she has violated *Dat Yehudit*: Going into the street or an open alley with her head uncovered without the veil (*radid*) as is the way of all women, even if her hair was covered with a shawl (*mitpachat*)...<sup>26</sup>

Apparently Rambam is equating the basket of our Gemara with the insufficient covering of a "shawl", which although biblically permitted in the street becomes prohibited under the rubric of *Dat Yehudit*. We have also now encountered for the first time a specific description of the type of covering which *Dat Yehudit* obligates. *Perisha* explains the *radid* to

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along these lines by the *Beit Yosef* on *Tur*, *Even Haezer*, 115.

26. *Mishneh Torah*, *Ishut* 24:11, 12.

"cover her whole body similar to a *talit*."<sup>27</sup> He points out that the phrase "as is the way of all women" refers to "all women" in a place where the *radid* is customary, but *Dat Yehudit* would not obligate a *radid* if it is not the custom of women in a given place to wear one. Alternatively, he sees the *radid* as obligatory only on top of a "shawl", but not on top of a "hat."<sup>28</sup>

Apparently *Dat Yehudit* refers to forms of behavior which according to the standards of the surrounding culture become accepted as the definition of "modesty" even if they go beyond the simple demands of the Torah. Alternatively, they may also be standards which Jewish women have rendered normative by their popular usage throughout time, even though, once again, they go beyond halachic requirements. In the time and place of Rambam this meant that, in addition to normative (*Dat Moshe*) hair covering (the exact nature of which we have yet to precisely define), a shawl of some type had to be worn.

Interestingly enough, the *Tur*<sup>29</sup> seems to include totally uncovered hair under the category of *Dat Yehudit* as does the *Shulchan Aruch*.<sup>30</sup> The *Tur* does not list any law concerning hair covering under *Dat Moshe*. Thus, it might be that they felt the very prohibition of uncovered hair to be *Dat Yehudit* based and therefore conceivably capable of being influenced by time and place.<sup>31</sup> Alternatively, their listing

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27. *Perisha, Even Haezer* 115:10.

28. *Mishneh Torah*, *ibid*.

29. *Tur*, 115.

30. *Shulchan Aruch, Even Haezer* 115:4.

31. See *Beit Shmuel, Even Haezer* 115:9 where this inference is disputed because the example of *Dat Yehudit* given in *Shulchan Aruch* is of going into the street without a *radid*. This argument



of uncovered hair as transgressing only *Dat Yehudit* is due to the example they give, which is "going out with hair uncovered without a shawl even though her hair is covered with a hat."<sup>32</sup> Thus, the example they cite is clearly one that all would agree is *Dat Yehudit*. Of course, this explanation leaves unanswered why the primary prohibition is not listed under *Dat Moshe*. In the pages to follow we will see how the *poskim* responded to the possibility of *Dat Yehudit* being the sole source of the prohibition.

### Women's Hair Covering: The Obligation's Magnitude

The married woman who uncovers her hair is transgressing assorted laws besides those involving *Dat Moshe* and *Dat Yehudit*. A woman's hair is to be considered a "form of nakedness".<sup>33</sup> Thus, one is forbidden to utter words of prayer or Torah study while facing it.<sup>34</sup> It is also forbidden to stare (*histaklut*) at a woman's *erva* (nakedness).<sup>35</sup> Therefore, many authorities conclude that it is prohibited for a married woman to uncover her hair because she would be transgressing the prohibition of *lifnei iver* ("not placing a stumbling block before a blind man" – referring to any action which leads another to sin).<sup>36</sup> Also,

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still leaves unanswered the question of why *Shulchan Aruch* completely omits the prohibition when listing *Dat Moshe*.

32. *Tur*, *ibid*.

33. *Berachot* 24a.

34. *Shulchan Aruch*, *Orach Chaim* 75:2.

35. *Mishneh Torah*, *Issurei Biah* 21:1 and especially 21:17 where Rambam restates the prohibition of uncovered hair while discussing the laws of immodest behavior and illicit "gazing".

36. See Weiner, *Glory* (Hebrew section) p.14 for a lengthy list of authorities who make precisely this point.

there are authorities who see uncovered hair as a violation of the prohibition of "not going in their statutes" which refers to any non-Jewish custom adopted for reasons of immodesty. According to this analysis, since hair covering was at one time accepted by non-Jews, we must view the move away from this practice as one calculated to lessen the bounds of modesty and, therefore, a Gentile practice which Jews may not imitate.<sup>37</sup>

## Women's Hair Covering : Practical Questions

### I . Partially Uncovered Hair

There is a major disagreement between the *poskim* as to whether a woman's hair may be partially uncovered. There are those who maintain that any uncovering of a woman's hair would represent a transgression of a biblical prohibition.<sup>38</sup> One of the major authorities who adopts this position is Chatam Sofer. He cites the talmudic statement of Rav Sheshet that, "A women's hair is an *erva*, as it is written, 'Your hair is like a flock of goats.' "<sup>39</sup> This phrase is the continuation of the verse, "You are beautiful my love",<sup>40</sup> which the *Amoraim* use as a basis for designating the parts of a women's body to be seen as "nakedness." Chatam Sofer points out that the previous phrase in the verse is "from under your kerchief." He posits that the verse is praising two attributes, 1) beautiful hair compared to the "flock" and 2) "that this hair which would be beautiful if revealed is covered 'under your kerchief.' " The function of the

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37. See *ibid.* p.16 for a listing of authorities.

38. This position is advocated by the *Teshurat Shay* (1:51) and *Dovev Mesharim* (1:124) as well as many other authorities.

39. *Berachot*, 24a.

40. *Shir ha-Shirim* 4:1.

"kerchief" was to hold together all of a woman's hair in order that it should be totally covered under a "hat."<sup>41</sup> (This double covering is similar to that of Rambam [see above]). This follows the understanding that the problem with the "basket" in the Gemara was that it was not a complete covering of all the woman's hair.

Others maintain that partial uncovering might be permissible. Rashba (*Berachot* 24a) also maintains that "hair which normally extends outside the kerchief and her husband is used to it" is not to be considered "nakedness" in his presence. It seems that Rabbi Moshe Feinstein extends this leniency of Rashba to all women.<sup>42</sup> *Maharam Alshakar* was an early advocate of this view.<sup>43</sup> He is quite emphatic that the custom "in the time of the Talmud and at present" was to cover all of one's hair, but to allow some hair to dangle out of the front of the covering ("between the ear and forehead"). In fact, he goes so far as to suggest that the Cabalistic references to not allowing any hair ever to be seen are not discussing these bangs, but only hair which it is the custom to cover. In conclusion, he notes that there are many things that "our sages are lenient with in order not to make a woman despicable to her husband."

Some extend the amount of hair that may be uncovered

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41. *Chatam Sofer, Orach Chaim* 36.

42. *Iggerot Moshe, Even Haezer* 1:56.

43. *Maharam Alshakar* (35). Worried that errant conclusions might be drawn from this position of *Maharam Alshakar*, the *Shevilei David* (*Orach Chaim* 75:2) writes, "One should not mistakenly assume, based on *Maharam Alshakar*, that the prohibition of uncovered hair is dependent on mere custom and therefore in a place where women brazenly go about with uncovered hair that this would be permitted. This is not so. ... the prohibition of uncovered hair is not dependent on popular custom at all."

to a *tefach* (handbreadth).<sup>44</sup> Rabbi Moshe Feinstein, who advances this thesis, maintains that a woman's hair should be considered the same as any other part of her body which is normally covered. Just as these other parts of the body are forbidden to be seen only if a *tefach* (handbreadth) is revealed, so too on a woman's head. Interestingly Rabbi Feinstein personally advocates complete covering and maintains that it is "proper" to do so, but those who follow the lenient approach should not be viewed as violating *Dat Yehudit*. In the end, he limits the actual space that may be uncovered to the width of two fingers, this being in his opinion a square *tefach*.

In fact, Ramo rules that the prohibition of "nakedness" would not apply to hair that is "outside the kerchief." *Mishnah Berurah* feels that this opinion only relates to hair which is placed in a kerchief which is under a "hat" in order to keep it in order. This "small amount which it is impossible to keep together is permitted."<sup>45</sup> Perhaps, according to Rabbi Feinstein, Ramo could be understood to be referring to a larger amount of hair. However, there are those who feel that even this hair "outside the kerchief" would be biblically prohibited.<sup>46</sup>

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44. See *Iggerot Moshe, Even Haezer* I:58 where the opinion is advanced that a partial uncovering of hair would not be considered a violation and the above quoted stance of Chatam Sofer is refuted at length.

45. Ramo, *Orach Chaim* 75:2.

46. See Weiner, pp.30-36 for a lengthy presentation of sources.

The position that permits hair which extends beyond the confines of a garment which is on top of a woman's head is severely criticized by many *poskim*. The *Magen Avraham* (*Orach Chaim* 75:4) notes that the *Zohar* (*Parshat Naso* 239) advises against the uncovering of any hair on a woman's head. He concludes "This is the proper way to conduct oneself". The lenient group led

What emerges here is that since the question of partial uncovering falls under the category of *Dat Yehudit* it is subject to the influences of custom. However, the salient question is to what degree this custom may override established communal practice. No *poskim* suggest that custom may impact upon *Dat Moshe* prohibitions so that total uncovering of a woman's hair could be allowed based upon changing fashions. This would be possible only if the *Dat Moshe* prohibition would be rendered *Dat Yehudit*; in environments where social practice no longer accepts it, possibly modifications might arise.

## II. Wearing of Wigs

As far as the wearing of wigs goes, we once again enter into an area of fierce controversy among the *poskim*. There are those who see it as permissible.<sup>47</sup> Their opinion is based

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by *Maharam Alshakar* is seen by *Maharaz Hayot* (53) as reflecting standards that were only applicable in Arab countries. He writes, "since in Arab lands it was the custom to [allow partial uncovering] therefore those hairs would be considered a place which is normally uncovered... and this would, accordingly, not cause sinful thoughts... but in our lands which from time immemorial the custom was to cover all hair, it attains a status of something permissible which some are stringent about and no man is allowed to change this custom... especially since this has been the custom from the earlier days, these hairs would once again be considered a place which is normally covered."

47. It is worth noting here the opinion of *Sitre U-maginei* (2:44) quoted in *Otzar ha-Poskim* (ibid.) who sees wigs as the lesser of two evils. He writes, "Due to our many sins in most countries many women have removed the yoke of *Dat Yehudit* from themselves and go about with uncovered hair in public. At a time such as this it is improper to search after stringencies ... therefore, it seems to me that it is better to rely on those authorities who permit [wigs] in order that they not transgress a more severe prohibition ... "

upon *Shiltei Giborim* (*Shabbat* 375) who rules that the prohibition of uncovered hair applies only to hair which is unattached to the skin, as does the rule of "the hair of a woman is nakedness." He writes, "It seems that there is no difference whether the hair [of a wig] be made of the wearer's own hair, or of that of another woman, so long as it provides a covering for her real hair... there is no prohibition." This also seems to be the opinion of *Ramo* and of *Magen Avraham* (*Orach Chaim* 75:2) who quote *Shiltei Giborim* approvingly in relation to the reciting of prayers in front of a woman wearing a wig. *Pri Megadim* (*Aishel Avraham* 75:5) writes that "in those lands where women are accustomed to wear uncovered wigs, they may rely upon this opinion."<sup>48</sup>

However, the historic response of *poskim* to the wearing of wigs was in the past centuries largely negative.<sup>49</sup> The list of authorities who opposed the wearing of wigs includes

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48. The acceptance of wigs was far more widespread in recent decades amongst Ashkenazic authorities. Rabbi Ovadiah Yosef in his works frequently denounces this practice and describes it as one whose influence should be "shunned". He says that it is a meritorious act to publicize that the wearing of wigs is prohibited and "this is especially so for Sephardic women among whom the custom was always to prohibit [wigs] from time immemorial." He concludes that, "any woman who accepts upon herself to observe this law in all its strictness, only to go into the street if her hair is totally covered with a hat or a *tichal*, will be blessed with all the blessings of the Torah and will merit to see children great in Torah and the pure fear of God." (*Yabia's Omer* 5, *Even Haezer* 5).

49. This position is succinctly expressed by Rabbi Avraham T'umim who writes, "Even though *Beit Shmuel* prohibits wigs because of *marit ayin*, I am of the opinion that they are biblically prohibited. Since the prohibition forbids immodesty, what difference is it if the hair is her own or made to look like her hair?"

among many others R. Ya'akov Emden,<sup>50</sup> the Vilna Gaon,<sup>51</sup> R. Shlomo Kluger,<sup>52</sup> *Maharaz Hayot*,<sup>53</sup> Chatam Sofer,<sup>54</sup> the Zanze Rav,<sup>55</sup> and Maharsham<sup>56</sup> to cite a few from assorted times, places, and orientations. Rabbi Ovadiah Yosef concludes his overview of the subject by saying, "The law is like the majority of *Acharonim* who prohibit [wigs]."<sup>57</sup>

*Mishnah Berurah* cites both opinions on the subject and concludes by quoting *Magen Giborim* who rules that "definitely in a place where there is no established custom to wear wigs the law is with the stricter view because of *marit ayin*."<sup>58</sup>

A third opinion permits the wearing of wigs only if it is obvious that it is not the woman's own hair. Rabbi Yehoshua Leib Diskin writes, "That which the *Shiltei Giborim* permits [wigs] only applies when it is obvious to all that she is not

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50. *Sheilat Ya'vez* (1:9) where wigs are seen as prohibited due to *Dat Yehudit*.

51. See *Shnot Eliahu*, *Shabbat* (6:8).

52. See *Shnot Chaim* (316).

53. *Teshuvot Maharaz* (53), prohibits wigs and offers some historical perspective, "Since the days of my childhood I have not heard of any who are lenient in this matter in all of Poland. It is a recent thing which has begun where many are 'breaking the fence' and it is proper to return them to the old ways."

54. *Orach Chaim* (75) comment on *Magen Avraham* (5).

55. *Divrei Chaim*, *Orach Chaim* (2:59) *Yoreh Deah* (1:30).

56. *Da'at Torah*, *Orach Chaim* (75) where wigs are regarded as biblical "*erva*" and blessings may not be recited in front of a woman wearing one.

57. *Yabiah Omer* 5, *Even Haezer* 5.

58. *Mishnah Berurah*, *Orach Chaim*, (75:15) The *Shulchan Aruch ha-Rav* (75:4) merely cites the lenient ruling without qualifications.



wearing her own hair, but without this it would be prohibited because of *marit ayin* and also because of the prohibition of 'nakedness' which can lead to sinful thoughts."<sup>59</sup>

### III. Unmarried Woman

There are a few authorities who maintain that unmarried women must also cover their hair. *Bach* writes that since "the source of the prohibition is the phrase 'the daughters of Israel should not go about with hair uncovered' and it does not say specifically married women, therefore both married and unmarried women are included."<sup>60</sup> However, the vast majority are of the opinion that there is no such obligation.<sup>61</sup> The reason appears to be based upon the fact that it was never the practice of unmarried girls to cover their hair. Therefore, this could not become an obligatory practice of modesty. This reasoning is alluded to in *Perisha*<sup>62</sup> and stated explicitly by Chatam Sofer who writes, "Our ancestors were never strict concerning uncovered hair of unmarried women."<sup>63</sup>

Here we see that there is an element (at least according to Chatam Sofer) in which the law is influenced by the practices of modesty in the surrounding society. However, we must view with caution the impulse to derive from this that Torah requirements for woman's hair covering are based upon the normative practices of any society. The *Mishnah*

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59. *Kuntres Acharon* (203). There were others, such as *Ri Asad* (*Yoreh Deah* 366) who saw the wearing of wigs prohibited as a gentile custom.

60. *Bach* (*Even Haezer* 21). See also *Gra* who agrees with *Bach* and offers the same reasoning. (*Even Haezer* 21:11).

61. *Beit Shmuel* and *Chelkat Mechokek* (*Even Haezer* 21:5).

62. *Perisha*, *Even Haezer* (21:3).

63. Chatam Sofer, *Nedarim* 30b.



*Berurah* is quite clear that "normative practices" influence halachic standards of modesty only when they are in accordance with certain objective norms. For example, he lists the uncovering of a woman's thigh or of her hair as examples of objective standards of modesty which may not be compromised on the basis of social trends.<sup>64</sup>

In fact, *Shulchan Aruch* does seem to rule that unmarried women must also cover their hair,<sup>65</sup> but this is dismissed by many commentaries<sup>66</sup> as referring to widowed or divorced women. *Magen Avraham* adopts a novel approach which serves to explain a custom: He maintains that the prohibition of "uncovering" as it applies to unmarried women refers to undoing their braids.<sup>67</sup> To this day there are communities whose unmarried women braid their hair.<sup>68</sup>

#### IV. Shaving the Hair of Married Women

A custom fairly widespread in Hungarian, Galician and Ukrainian Jewish communities was that a woman upon marriage would shave off all her hair. She would then cover her head with a *tichal* (kerchief). After WWI, the *tichal* was to greater or lesser degree, at times replaced by a partial or total wig. Nonetheless, the custom of shaving one's hair has remained in some circles today.

There were *poskim* who were very much in favor of

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64. *Mishnah Berurah* 75:10-14. Theoretically, though, if the prohibition is merely *Dat Yehudit* based it could be influenced by popular custom.

65. *Even Haezer* (21:2).

66. *Beit Shmuel*, *Even Haezer* (21:5) et al.

67. *Magen Avraham*, *Orach Chaim* (75:3).

68. This practice is widespread among Jerusalem's traditional Ashkenaz community (*yishuv ha-yashan*), the *Toldot Aharon* community and some Hungarian Jews.

this custom. There were two reasons for this. (1) It was seen as a means to guarantee that no hair of a married woman would ever be exposed. (2) It was viewed as eliminating the possibility of a woman's hair rising to the surface during her ritual immersion in the mikveh, thus rendering her *tevilah* invalid.<sup>69</sup>

Others fervently opposed the custom. They denounced it because it would render a woman ugly in the eyes of her husband.<sup>70</sup>

### Contemporary Practice

Today we find assorted legitimate approaches regarding married women's hair covering. There are those who still maintain the initial opposition to wigs of any sort and cover their hair completely with a *tichal*.<sup>71</sup> Others have

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69. *Shulchan Aruch, Even Haezer* (9:10).

70. *Yabia Omer* (4 *Yoreh Deah* 1). See also *Iggerot Moshe Even Haezer* 1:59 where the question of conflicting family traditions on the matter of a woman shaving her head is dealt with.

71. This is the practice to this day of *yishuv ha-yashan*, *Toldot Aharon* and some Hungarian Jews. It was also advocated as the ideal by many Hungarian and Galician leaders. For example, Rabbi Joel Teitelbaum (Satmar Rav) often demanded of his followers that they adopt this practice. However, his requests met with limited success. At present less than half of Satmar Hasidim in America follow this practice. The others, by and large, cover their wigs with hats. Interestingly, in post-World War I Hungary the Orthodox of *Oberland* (operating within the Ashkenaz-Chatam Sofer tradition) began to wear wigs, while the *Unterland* Orthodox (heavily influenced by Hasidism of Galicia) maintained the traditional opposition to the practice. This occurred despite Chatam Sofer's own position on the matter. The *yishuv ha-yashan* custom actually involves the wearing of two coverings, a kerchief and a shawl. Perhaps this ancient practice stems from Rambam's opinion which requires two coverings.

compromised this practice in a very limited way by covering their head completely with a *tichal*, while wearing at the front of the *tichal* a small piece of a wig. They hope thereby to eliminate the problem of *marit ayin* by using a wig-piece small enough that it cannot be mistaken for the woman's own hair. This practice is sanctioned by R. Ya'akov of Emden (a staunch opponent of wigs) who writes, "If the wig is placed on the front or side of her head below the point of the hairline there is no prohibition."<sup>72</sup>

There are others who, while wearing a wig, cover most of it with a hat or other covering of some sort. This appears to be an attempt to combine the opinion of those authorities who permit a small amount of hair to be uncovered with those who permit wigs. In other words, if the wig be prohibited, at least the majority of it is covered; and if the wig be permitted then there is certainly no problem.

Other women rely completely upon those who permit wigs. This is common practice in the "Yeshiva world" and among Polish or Lithuanian Hasidim (who in the wake of World War I adopted wigs as the norm). German Orthodoxy also followed this practice (especially in the *Austritt* community), as do their spiritual descendants today.<sup>73</sup>

Finally, there are those women who cover most of their own hair with a hat or *tichal* and expose less than a *tefach*.<sup>74</sup>

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72. *Sheilat Ya'avez* (1:9); this became common practice amongst many after WWI. It is the norm today amongst the rabbinic family of Skver, among others. Prior to that time the practice in Skver was to wear a bonnet which completely covered the head and tied under the chin.

73. The Yeshiva world's approach is notable given the Vilna Gaon's opposition to wigs.

74. This is becoming widespread among some in the Religious Zionist camp in Israel as well as among the Modern Orthodox.

As a sub-category of this group are those who expose more than a *tefach* relying upon the opinion that hair which extends beyond the hairline is not subject to any prohibitions.

### Completely Uncovered Hair

Within the confines of their own home, *Magen Avraham* and many other *poskim* would permit a married woman to go about with her hair uncovered.<sup>75</sup> *Beit Shmuel* rules that it is prohibited due to *Dat Yehudit*.<sup>76</sup> Certainly the Cabalistic tradition rejects it.<sup>77</sup>

*Mishnah Berurah* cautions that even according to the lenient opinions, the women's hair would still be considered "nakedness". This would mean that it is still forbidden to study or pray in her presence.<sup>78</sup> However, we shall see that not all *poskim* accept this.

However, in public there appears to be no accepted

75. *Magen Avraham, Orach Chaim* (75:2) However, based on Cabalistic reasons he also concludes that it is best to cover one's hair in the home as well. *Darkei Moshe (Even Haezer 115:4)* permits a woman to go about in her own home with her hair uncovered. However, he concludes that because of modesty a woman should not uncover her hair at all, even in the house.

76. *Beit Shmuel, Even Haezer* (115:9).

77. *Bach (Even Haezer 115)* writes, "the uncovering of a woman's hair is prohibited even in her own courtyard and thus is the custom in all parts of Israel... that even in front of the members of her house she should not be found without a shawl on her head." The *Chatam Sofer (Orach Chaim 36)* based upon *Bach* and *Zohar (Parshat Naso)* prohibits uncovering even in the privacy of one's home. However, Rabbi Moshe Feinstein (*Iggerot Moshe, Even Haezer 1:58*) extends the prohibition only to an actual courtyard and permits uncovered hair in the privacy of one's home.

78. *Bi'ur Halacha, Orach Chaim* (75:2).

halachic source to permit a married woman to have her hair totally uncovered. The method and degree of covering is a subject of legitimate dispute, but a covering of some sort there should be. Nonetheless, we remain perplexed by the lenient approach taken to the law in some circles. It is fairly well known that among Lithuanian Jews after World War I many married women uncovered their hair. This was common even among rabbinic families. Indeed, when large numbers of Lithuanian Jews and their leaders came to America in the twenties and thirties they largely ceased to observe this law. Although many of the leaders' wives eventually began to wear wigs in the post World War II period, their original reluctance seems strange. Was their practice in any way justifiable, or are we simply dealing with the inability of a segment of the Jewish people to withstand the tremendous force of social pressure?

There are those who offer the opinion of Rabbi Yehiel Michel Epstein as a possible source for the popular practice. Since his statement in *Aruch ha-Shulchan* is relevant to our topic, it is worth quoting directly:

And now let us denounce the practice which for many years, due to our many sins has become widespread, in which the daughters of Israel have "broken the barriers" and go about with their hair uncovered. The more we scream about this it does not help and the plague has spread ... Woe unto us that this has happened in our days! However, as far as the law is concerned it seems that it would be permissible to pray and recite blessings in front of their uncovered heads. Since now the majority do this, [their hair] has the status of parts of the body which are normally uncovered ... and there is no fear of lust.<sup>79</sup>

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79. *Aruch ha-Shulchan, Orach Chaim* (75:7). This position is

Clearly Rabbi Epstein has only ruled in relation to the law of *erva* and not that of a married woman's hair covering. Nonetheless, two factors do emerge. First, there need not be a linkage between the definition of *erva* and the requirement of hair covering. Second, at least as far as *erva* goes, its definition may be affected by changing times. Yet, we do see that *Aruch ha-Shulchan*, for some reason, did not feel that the prohibition of uncovered hair could be affected by differing environments.

There is an interesting passage in the Responsa of Rabbi Yehoshua Babad where he seems to be basing the entire structure of the law on social conditions:

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 about uncovered ... All is dependent on the tradition (*minhag*) of the women.<sup>80</sup>

In addition, Rabbi Yosef Hayim goes a step further in his discussion of Ashkenaz "custom" to completely uncover hair (which he rejects for Sephardim) when he writes:

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 the uncovering of hair, like the uncovering of face and hands, as not causing provocative thoughts.<sup>81</sup>

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directly opposed in *Mishnah Berurah* (75:10).

80. *Sefer ha-Naim*, *Sefer ha-Vatik*, *Even Haezer* (21).

81. *Sefer Chukei Nashim* (17). This translation as well as that of the previous footnote are taken from Michael Broyde, "Further on Women's Hair Covering: An Exchange", *Judaism* (Vol. 40, Winter 1991) pp. 79-89. This fascinating article is a refutation of a previous article by Marc Shapiro who claimed ("Another Example of

What is the possible justification which R. Hayim refers to? As far as I have been able to uncover there are only three rabbinic works (all of twentieth century origin) written by Orthodox authors that permit married women to completely uncover their hair in public.<sup>82</sup> Basically their view was that since hair covering is no longer a standard of modesty a woman's hair can no longer be considered "a place which is normally covered." However, none of the accepted mainstream authorities ever so much as considered the legitimacy of their view.

In order to permit total hair uncovering it would seem necessary to view the original law as *Dat Yehudit* and, as such, subject to changing standards. There are *poskim* who adopt this view. Nonetheless, none of them suggested that the requirement is environment-based to the extent of permitting total uncovering.

It would take us beyond the confines of this essay to explain why one should not rely on a handful of isolated sources. Suffice it to say they have not been accepted by the halachic world. The Lithuanian practice is probably best seen as an aberration which, when the time became more receptive, was quickly abandoned. It may be understood in the context of the general laxity which enveloped East

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'Minhag America' ", *Judaism*, Vol. 39, Spring 1990) that the non-compliance with this law may be seen as an example of "Minhag America" which has "triumphed over a law" (p. 148). Broyde, although not advancing his theory as *halacha l'ma-aseh*, attempts to offer an approach which would provide some legal basis for those who uncover their hair.

82. Rabbi Isaac S. Hurewitz, *Yad ha-Levi*, pp. 143a-b; Rabbi Yosef Masas, *Mayim Chaim* (2:110) and *Ozer Michtavim* (1884); Rabbi Ephraim Zalman Slutzki, *Etz Ephraim, Orach Chaim* (12); See also Broyde, op. cit. p.85, where a fourth opinion is cited via oral testimony.

European Orthodoxy concerning this halacha in the post World War I era. Other areas witnessed the adoption of total or partial wigs.

The two major twentieth century Lithuanian codes, *Mishnah Berurah* and *Aruch ha-Shulchan*, are both clear that the hair covering requirement remains unchanged. Today, woman's hair covering is seen as an objective norm throughout the halachic world, the method of which may be influenced by social change, but not the basic requirement.

The standard a woman should use to determine which of the above practices she should adopt is subject to the forces of family tradition, personal rabbinic guidance, individual, emotional and spiritual makeup and a host of other factors. How a woman is to arrive at this decision is a matter beyond the scope of the present article.



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