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HAIR COVERING AND JEWISH LAW: A RESPONSE

The Fall 2009 issue of *Tradition* contained, as a special supplement, a lengthy article by R. Michael Broyde, in which he advances the rather startling thesis that, according to many classical authorities, the prohibition of *periat'rosh* (which forbids a married woman to go out in public with her hair uncovered), which the Gemara² derives from Scripture, is, in fact, not an actual prohibition, but merely *dat yehudit*, a custom of modest Jewish women, and that therefore in communities where this custom is not practiced, it has no force. Moreover, R. Broyde derives this conclusion not from some recondite *pilpul* or obscure source, but from what he claims is the plain reading of Rashi, the *Tur*, and the *Shulhan Arukh*, among others. If his reading of these sources is correct, it seems well-nigh incredible that the classical commentators on the *Tur* and the *Shulhan Arukh*, as well as the great halakhic authorities of the past centuries, should have remained unaware of this finding.³ In fact, as I hope to show, his reading is untenable.

I should stress at the outset that it is not my purpose to malign Jewish women, past or present. Certainly our mothers and grandmothers, who upheld Judaism in the face of far more difficult challenges than we encounter, were greater than us, regardless of whether they covered their hair. Nevertheless, my primary responsibility must be to an accurate presentation of the halakhic sources.⁴

¹ The transliteration of Hebrew terms has been rendered in conformity with *Tradition* editorial policy.

² *Ketubot* 72a.

³ R. Broyde himself (p. 174) professes to be astounded by this.

⁴ I will confine myself in this rejoinder to addressing R. Broyde's central thesis, rather than seeking out every possible error in his 80 page article. However, there is one particularly egregious mistake which I feel compelled to point out, even though it is peripheral to the core issue at hand:

I would begin by pointing out a basic distinction that seems to have been effaced in R. Broyde's article: There is a clear difference between prohibition – even a rabbinic prohibition – and custom. *Dat yehudit* – as Rashi, Rambam, Rashba, the *Meiri* and the *Shulhan Arukh* state clearly⁵ – refers to customary Jewish standards of modesty, and it is at least possible that, like other customs, it may be subject to local variation.⁶ A rabbinic prohibition is law, not custom. This distinction is self-evident; it also emerges from the Gemara (*Ketubot* 72a), which explicitly distinguishes between the prohibition of *periat rosh* – which, according to some

The Gemara in *Berakhot* 20a records that it was R. Yohanan's practice *to sit at the gates of immersion* so that the women would see him on their way home and conceive children of similarly lustrous beauty. It hardly needs stating that R. Yohanan did not sit by the water where the women immersed but, rather, by the *gates* where they exited the precincts after dressing; the point is made explicit by *Tosafot* (*Pesahim* 110a), *Tosafot ha-Rosh* (*Berakhot* *ibid.*) and *Tosafot R. Yehudah Hassid* (*ibid.*). The *Sefer ha-Hinnukh* (§188) adds that R. Yohanan certainly did not look at the women even when they exited the gates, but only positioned himself so that he could be seen – and even so his behavior would not have been appropriate for an ordinary person.

Ritva (*Kiddushin* 82a) explains how it was permissible for R. Yohanan to do this: "...if he sees in himself that his desires are subdued and under control... he may look at and speak to a woman who is an *ervah* to him, or ask after the welfare of a married woman... and this explains the conduct of R. Yohanan, *who sat at the gates of immersion* (דתיב אשערי טבילה), and was not concerned about his evil inclination... and likewise of various rabbis who spoke with [Roman] matrons ..." This seems straightforward.

This is how R. Broyde (p. 120) renders the words of Ritva: "...this explains the conduct of R. Yohanan, *who looked at the women as they were immersing...*" (emphasis mine). Somehow, "sitting at the gates of immersion," has been transformed into, "looking at the women as they were immersing." R. Broyde then proceeds to argue that just as R. Yohanan could watch naked women (!), since he didn't find it arousing, he would permit women going bareheaded in a context where it is not erotic.

Later in the article (p. 161), R. Broyde quotes this very same Ritva, but translates it somewhat differently – but no more accurately. This is how he renders Ritva's words there: "...this explains the conduct of R. Yohanan who sat at the gates *as the women were immersing, looking on* without any erotic intent" (emphasis mine).

I leave it to the reader to examine the original and judge just how far R. Broyde has allowed his enthusiasm to take him.

⁵ Rashi to *Ketubot* *ibid.*; Rambam, *Hil. Ishut* 24:12; *Teshuvot ha-Rashba* vol. V, 246; *Meiri* to *Ketubot* (*ibid.*); *Shulhan Arukh, Even ha-Ezer* 115:4.

⁶ This is strongly indicated by Rambam: One of the customs of *dat yehudit*, as defined by Rambam, is for a married woman to refrain from going into the marketplace without wearing a shawl (in addition to the kerchief that is required by law) (*Hil. Ishut* 24:12). Yet Rambam himself (*ibid.* 13:11) indicates that not in every locality was it customary for women to wear such a shawl. See *Drisha, Even ha-Ezer* 115, who makes this point. For a different understanding of Rambam, see *Teshuvot R. Azriel Hildesheimer*, §36. *Mishna Berurah* seems to maintain that the customs of *dat yehudit* cannot be abrogated (*Sha'ar ha-Tsiyyun* 75:5; *Be'ur Halakha* 75:2).

authorities,⁷ is a rabbinic prohibition – and *dat yehudit*. I emphasize this because R. Broyde in many places in his article (including the title) speaks of *dat yehudit* as denoting a rabbinic and subjective prohibition. This is doubly inaccurate: *dat yehudit* does not denote a prohibition at all – rabbinic or otherwise – but a customary standard of modesty; and if indeed it varies according to location, that is not because it is “subjective,” but because it is customary, and custom is always local custom.⁸ The point is important, because each time R. Broyde encounters a source that indicates to him that the prohibition of *periat rosh* is rabbinic he takes it as evidence that it is merely *dat yehudit*; in fact, however, these are two separate categories.⁹

The centerpiece of R. Broyde’s article is the ruling of the *Tur* and the *Shulhan Arukh* (*Even ha-Ezer* 115), which echoes the words of Rashi,¹⁰ that a wife who goes out into the marketplace with her hair uncovered forfeits her *ketubah* because she violates *dat yehudit*. Apparently, he argues, these authorities maintain that the prohibition of *periat rosh* is not really an “objective” prohibition at all, but merely *dat yehudit*, a custom of modest Jewish women.

Actually, there is no warrant for such an inference. We begin by noting that a wife does not forfeit her *ketubah* just because she violates a prohibition. (Rosh states this explicitly, and it is really implicit in the Mishna.¹¹) Even a wife who eats pork on Yom Kippur is entitled to her *ketubah*. Forfeiture of the *ketubah* results only from two kinds of acts,

⁷ See *Terumat ha-Deshen* 242.

⁸ The conflation of *dat yehudit* with rabbinic prohibition recurs throughout R. Broyde’s article. In one place (p. 126 n. 41), R. Broyde writes explicitly, on the authority of *Encyclopedia Talmudit* (s.v. *dat moshe* and s.v. *dat yehudit*) and *Sdei Hemed* (s.v. *dat*), that *dat yehudit* is equivalent to rabbinic prohibition. In fact, *dat yehudit* denotes customary standards of modesty, not rabbinic prohibition, nor is there anything in either of the sources he cites to indicate otherwise. Elsewhere (p. 108 and 111), he cites *Tosafot* and *Tosafot ha-Rosh* (*Gittin* 90b) to the effect that the prohibition of *dat yehudit* is rabbinic. As we will see later, this is based on a very flawed reading of these sources.

Moreover, even were we to discover *Rishonim* who define *dat yehudit* as rabbinic prohibition, it would then follow that those hypothetical *Rishonim* do not define it as custom; it cannot be both law and custom. Hence, we would have to presume that they do not agree with Rambam that it is subject to local variation. This would still undermine R. Broyde’s central thesis.

⁹ Thus, for example, he devotes an entire section (p. 145 ff.) to adducing evidence that the expression, “a warning to...” – which the Gemara uses in reference to the prohibition of *periat rosh* – indicates a rabbinic, rather than a Biblical, prohibition, as if this somehow buttressed his thesis that it is *dat yehudit*.

¹⁰ *Sotah* 25a, s.v. “overet al dat”.

¹¹ *Ketubot* *ibid*.

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which, in different ways, subvert the marriage: a) if she deliberately misleads her husband into violating prohibitions (for example, she serves him non-kosher food for dinner but tells him it is kosher); b) if she behaves in a way that flouts accepted standards of modesty. It follows from this that if a woman goes out bareheaded, the reason she forfeits her *ketubah* is not on account of her having violated a prohibition. She could violate far worse prohibitions and still be entitled to her *ketubah*. Rather, the reason she loses her *ketubah* is that she has violated accepted standards of modesty. Rashi and the *Tur* therefore write that a woman who goes out bareheaded loses her *ketubah* because she violates *dat yehudit* – accepted community standards of modesty. The fact that she also violates a prohibition – perhaps even a Biblical prohibition – is irrelevant to the issue of her *ketubah*.¹²

There are at least three compelling reasons to reject R. Broyde's explanation in favor of one along the lines that I have suggested:

1) Although Rashi (*Sotah* 25a) indeed states that a woman who goes out bareheaded forfeits her *ketubah* because she violates *dat yehudit*, he immediately goes on to state that a married woman who is closeted with another man likewise forfeits her *ketubah* because she also violates "*dat*." Rashi clearly means that she violates *dat yehudit*, as is evident from the following consideration: The context in which Rashi's remarks appear is an inquiry in the gemara regarding whether a woman who violates "*dat*" must be forewarned before losing her *ketubah*; the gemara concludes that, indeed, she must. Rashi interprets the Gemara's inquiry as referring to violations of *dat yehudit*; evidently Rashi maintains that a woman who violates *dat moshe* forfeits her *ketubah* even without warning.¹³ The gemara proves that such a warning is required from the fact that a wife who violates the prohibition of *yihud* loses her *ketubah* only if she was forewarned. Rashi explains the gemara's proof by pointing out that a wife who is closeted with other men likewise violates "*dat*." But since Rashi has already made it clear that the Gemara's inquiry relates only to violations of *dat*

¹² Rambam, however, unlike the *Tur*, writes that a woman who goes out bareheaded forfeits her *ketubah* because she violates *dat moshe* (Torah law), and reserves the term *dat yehudit* for mere violations of custom (e.g. going out with a kerchief, but without a shawl). Apparently Rambam maintains that a woman who violates a prohibition regarding modesty does forfeit her *ketubah* on account of the prohibition itself, and not just because she flouts a community standard of modesty. Although a wife does not ordinarily forfeit her *ketubah* for violating a prohibition, prohibitions regarding modesty, in Rambam's view, are different.

¹³ This is pointed out by the *Beit Shmuel*, *Even ha-Ezer* 115:17.

yibudit, he must mean that she violates *dat yehudit*. If *yibud* were a violation of *dat moshe* then no warning would be required for her to forfeit her *ketubah*.

It emerges that Rashi characterizes – not only *periat rosh*, but also *yibud* – as *dat yehudit*.¹⁴ What are we to make of this? Are the laws of *yibud* only customs? Obviously not. Rather, we have to understand Rashi's view along the lines I suggested earlier: While *yibud* is itself a prohibition,¹⁵ in the context of forfeiture of the *ketubah* it is classified as *dat yehudit*, since she loses her *ketubah* – not on account of the prohibition but, rather – because she violates accepted standards of modesty, which is the definition of *dat yehudit*. The term *dat moshe* is reserved for cases in which she causes her husband to violate a prohibition.¹⁶

This contradicts R. Broyde's understanding that Rashi classifies *periat rosh* as *dat yehudit* because it is not actually a prohibition at all. Since Rashi includes such a clear-cut prohibition as *yibud* in the same category, it is clear that the classification of these prohibitions as *dat yehudit* has nothing to do with the force of the prohibitions themselves.

2) The *Tur* (*Even ha-Ezer*, *siman* 21) writes: "Jewish women may not go out into the marketplace with their heads uncovered." There is an obvious difficulty here. The *Tur* himself (*ibid.* *siman* 115) states that *dat*

¹⁴ This is pointed out by R. Akiva Eiger (*Teshuvot* I:114), among others.

¹⁵ According to Rashi, *Shabbat* 13a, *yibud* is a Biblical prohibition.

¹⁶ R. Akiva Eiger (*ibid.*) explains Rashi somewhat differently: Rashi uses the term *dat yehudit* loosely, as a generic term for violations of modesty, regardless whether it refers to law or custom, all of which are similar in that they require warning. Presumably, he would explain the usage of the *Tur* in the same way. I was gratified to find the explanation I suggest in the text elaborated by R. Baruch Frenkel, author of the *Barukh Ta'am*, in a gloss to *Beit Meir*, *Even ha-Ezer* 115. (I am indebted to R. Broyde's article for this reference.) The difference between the two explanations is one of nuance; for the purpose of our discussion they amount to the same thing.

It is worth noting that the *Tur* and *Shulhan Arukh* (*Even ha-Ezer* 115:4) mention the requirement of warning only in regard to *dat yehudit*, but not in regard to *dat moshe*. Apparently, they follow Rashi in this regard. (But cf. *Beit Shmuel*, *ibid.*) It follows that they must likewise agree with Rashi in classifying *yibud* as *dat yehudit*, since the gemara states clearly that *yibud* does require warning. This is consistent with – and sheds light on – their view that *periat rosh* is a violation of *dat yehudit*; in their view, all prohibitions regarding modesty – including *yibud* and *periat rosh* – are classified as violations of *dat yehudit*, insofar as forfeiture of the *ketubah* is concerned.

Rambam (*Hil. Ishut*, 24:14), on the other hand, requires warning both for *dat moshe* and *dat yehudit*. This is consistent with his view that *periat rosh* is *dat moshe*. Rambam classifies all prohibitions regarding modesty, including *yibud* and *periat rosh*, as violations of *dat moshe*. Since the gemara states that *yibud* requires warning, it follows that warning is required even for *dat moshe*.

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yehudit forbids a woman to go out, not only bareheaded, but even wearing a kerchief without a shawl; moreover, *dat yehudit* forbids her going bareheaded even in an alley or a courtyard. Why, then, in *siman 21*, does he limit the prohibition to going out a) into the marketplace, and b) with her hair uncovered?

The answer is obvious. In *siman 21*, the *Tur* is discussing what is forbidden by force of law, rather than by force of custom. The law forbids only going bareheaded in the marketplace, as the gemara in *Ketubot* states. In contrast, in *siman 115*, the *Tur* is discussing forfeiture of the *ketubah*; in that context he tells us that she forfeits her *ketubah* even for violating the customs of *dat yehudit*.

If this is correct, it proves that, according to the *Tur*, going bareheaded in the marketplace is forbidden by law, and not merely by *dat yehudit*.

3) The most insuperable bar to R. Broyde's thesis is the passage in the gemara which lies at the heart of the entire discussion: The mishna in *Ketubot* (72a) states that a woman who violates *dat moshe* or *dat yehudit* forfeits her *ketubah*. The mishna gives various examples of violations of *dat moshe*, all of which are cases in which she causes her husband to violate a prohibition (for example, by serving him non-kosher food and telling him it is kosher). It also gives various examples of *dat yehudit*, all of which involve immodest behavior. One of the examples of *dat yehudit* is a woman who goes out into the marketplace with her head uncovered. The gemara questions this. How, asks the gemara, can the mishna describe a woman who goes out bareheaded as violating *dat yehudit* when the prohibition of *periat rosh* is "*de-oraita*," being derived by R. Yishmael from a Biblical verse regarding a *sotah*? The gemara answers that R. Yishmael only forbids going into the marketplace bareheaded, whereas *dat yehudit* requires that she not even go out wearing a "*kalta*" (According to Rambam and the *Tur*, *kalta* is a kerchief which covers her hair; *dat yehudit* requires the addition of a shawl).

How can this gemara be reconciled with R. Broyde's thesis that R. Yishmael's prohibition is itself *dat yehudit*? This would make nonsense out of the entire passage, the whole point of which is to distinguish between R. Yishmael's prohibition and *dat yehudit*! The gemara explicitly differentiates between *dat yehudit* and R. Yishmael's prohibition, stating that a woman who goes out wearing a kerchief, but not a shawl, violates the former, but not the latter. I see no way to reconcile this with R. Broyde's contention that – according to some *Rishonim* – R. Yishmael's prohibition is identical with *dat yehudit*.

It should be noted that *Rishonim* debate whether R. Yishmael's prohibition is literally *de-oraita* or, perhaps, merely a rabbinic prohibition with a Biblical allusion.¹⁷ For the purposes of our discussion the issue is moot; either way, the Gemara states clearly that it is an actual prohibition, in contradistinction to *dat yehudit*, which is custom.¹⁸

It is, above all, because of this gemara that all *poskim*, past and present, take it as axiomatic that *periat rosh* is an actual prohibition, and not merely *dat yehudit*.

Surprisingly, R. Broyde devotes little attention to the implications of this gemara and the direct challenge it poses to his entire thesis. At one point (p. 143), however, he offers the following point. Later in the *sugya*, R. Yohanan (according to some *Rishonim*'s understanding of the Gemara) permits *periat rosh* in a courtyard, forbidding it only in a marketplace or in an alleyway. R. Broyde posits that R. Yohanan could not possibly maintain that *periat rosh* is a Biblical prohibition, because if it were, then the rabbis would surely have extended the prohibition, at least rabbinically, to include a courtyard. Since R. Yohanan allows *periat rosh* in a courtyard, he must maintain that even in a marketplace it is no more than *dat yehudit*. Although the gemara earlier takes it for granted that the prohibition of *periat rosh* in a marketplace is *de-oraita*, and cites R. Yishmael's derivation of this prohibition from Scripture without demur, R. Yohanan evidently disagrees, and those *Rishonim* who characterize *periat rosh* as *dat yehudit* follow his view.

This can hardly be entertained, even as *pilpul*. In the first place, the assumption that, were the prohibition of *periat rosh* a Biblical one, the rabbis would surely have extended it to a courtyard – and not merely to an alleyway – is pure and unfounded speculation;¹⁹ it is certainly not

¹⁷ The *Meiri* and *Piskei Riaz* (*Ketubot* *ibid.*) write that the prohibition is Biblical. *Terumat ha-Deshen* (n. 242) infers from the language of Rambam (*Hil. Issurei Biah* 21:17) that *periat rosh* is a rabbinic prohibition, and R. Yishmael's exposition merely an allusion. It is worth noting that there is also, according to Rambam, a prohibition for a man to see the hair of a married woman, or any other woman who is an *ervah* to him, under the heading of "Do not approach uncovering nakedness" (*ibid.* 21:2, cited by *Shulhan Arukh, Even ha-Ezer* 21:2).

¹⁸ It should also be noted that the gemara contradicts, not only R. Broyde's central thesis, but also his persistent identification of *dat yehudit* with rabbinic prohibition: According to those authorities – such as *Terumat ha-Deshen* – who maintain that the prohibition of *periat rosh* is rabbinic, the gemara must be understood as distinguishing between the rabbinic prohibition of *periat rosh* and *dat yehudit*, which is only custom.

¹⁹ In fact, the *Meiri* (to *Ketubot* *ibid.*) explicitly rules that *periat rosh* is a Biblical prohibition, yet it is permitted in a courtyard.

sufficient basis upon which to posit a disagreement within the *sugya* that has no absolutely no basis in the text. Moreover, none of the *Rishonim* suggests such a thing. It is inconceivable that the *Rishonim* would have rejected the gemara's seemingly uncontested statement that the prohibition of *periat rosh* is *de-oraita* on such a basis, and even more inconceivable that they would have done so without bothering to explain themselves. Finally, even were we to accept this assumption, the most we could extrapolate is that according R. Yohanan, the prohibition of *periat rosh* must be rabbinic;²⁰ this still falls short of R. Broyde's thesis that it is *dat yehudit*.²¹

²⁰ *Yad David*, cited by R. Broyde (p. 142), indeed speculates that those *Rishonim* who permit *periat rosh* in a courtyard follow *Terumat ha-Deshen's* view (ibid.) that even in a marketplace the prohibition is only rabbinic. (This is contradicted, however, by the *Meiri*, cited in the previous note.) He certainly never suggests that *periat rosh* is *dat yehudit* (which would contradict the gemara), nor does he invent a dispute in the *sugya* itself on such a basis.

²¹ Elsewhere (p. 140), R. Broyde addresses the Gemara in *Ketubot* differently. He adduces a comment of *Netsiv*, who draws a parallel between R. Yishmael's derivation of the prohibition of *periat rosh* and *Ra'avad's* derivation of the obligation of mourning. According to *Ra'avad*, we derive from the fact that the Torah forbade Aharon's surviving children to mourn for Nadav and Avihu – forbidding them to tear their clothing or let their hair grow long – that in general, mourners are required to do those things. Rosh disagrees; according to him, all that can be proven from the verse is that it was customary in Biblical times for mourners to do so. The requirements of mourning, according to Rosh, are merely rabbinic. Similarly, according to Rosh all that can be proven from the fact that the *kohen* was told to uncover the *sotah's* hair is that it was customary – but not necessarily obligatory – in Biblical times for married women to cover their hair. It follows, writes R. Broyde, that according to Rosh the prohibition of *periat rosh* must be merely a custom, i.e., *dat yehudit*.

But this really avails R. Broyde nothing. Let us assume for the moment that he is correct in his understanding of *Netsiv's* comments and that, indeed, according to Rosh, all that can be derived from the verse is that it was customary in Biblical times for women to cover their hair. What, then, shall we do with the gemara, which differentiates between R. Yishmael's prohibition of *periat rosh* and *dat yehudit*? What shall we do with the gemara's conclusion that a woman who goes out bareheaded violates the former, but if she goes out with a kerchief she violates only the latter? Shall we say that Rosh simply rejected this gemara? And shall we also say that the *Rishonim* on whom R. Broyde builds his thesis all likewise rejected this explicit gemara, since it does not comport with the view that the laws of mourning are rabbinic? This would be highly surprising, to say the least.

Perhaps R. Broyde means that according to Rosh, R. Yishmael's derivation must be no more than an allusion, and the prohibition of *periat rosh* is merely rabbinic (like the laws of mourning). That is certainly possible; indeed, it is the view that *Terumat ha-Deshen* (ibid.) ascribes to Rambam. We would then have to understand the gemara to be distinguishing between the rabbinic prohibition of *periat rosh*, and *dat yehudit*, which is mere custom. A woman who goes out bareheaded violates a rabbinic prohibition, but if she goes out with her hair covered with a kerchief, but without a shawl, she

Clearly, the view of Rashi and the *Tur* must be understood along the lines I suggested above: a woman who goes out bareheaded violates a (Biblical or rabbinic) prohibition, but loses her *ketubah*, not on account of the prohibition, but on account of having violated *dat yehudit*. The gemara is then quite straightforward: initially, it was assumed that the limits of modest behavior beyond which she loses her *ketubah* are defined by what is actually forbidden by law. The gemara therefore asks

violates only the customs of *dat yehudit*. But this would still contradict R. Broyde's thesis that *periat rosh* is itself merely *dat yehudit*!

This is all even were R. Broyde correct in stating, on the authority of the Netsiv, that the prohibition of *periat rosh*, according to Rosh, must be rabbinic. Actually, however, I do not see anything in the words of the Netsiv to indicate even that much. The Netsiv (in his commentary to *Sifrei*, Bemidbar 5:11) addresses Rashi's explanation of R. Yishmael's derivation of the prohibition of *periat rosh*. R. Yishmael derives this from the verse regarding a *sotah*: "and he [the *kohen*] shall uncover the head of the woman"; from here, says R. Yishmael, we derive that Jewish women may not go out into the marketplace with their hair uncovered. Rashi (*Ketubot*, *ibid.*) offers two alternative explanations of this derivation. The first is rather elaborate: The *kohen* uncovers her hair as a *midah-keneged-midah* punishment for her having uncovered her hair for her paramour. This indicates that uncovering a married woman's hair is associated with adultery and therefore forbidden. (See also Rashi, first edition, quoted in *Shitah Mekubetset*, *ad loc.*, where this explanation is further elaborated.) The second explanation is far more straightforward: Since the Torah states that the *kohen* uncovers her hair, it must assume that until that point it was covered. This indicates that it was the practice of Jewish women to cover their hair.

Netsiv explains that these two explanations correspond to the respective views of Rosh and Ra'avad regarding mourning. The second and simpler explanation of Rashi parallels the view of Ra'avad. Since the Torah instructs the *kohen* to uncover the *sotah's* hair, it follows that women ordinarily wore their hair covered, and this is a source for the prohibition of *periat rosh*, just as the Torah's indicating that mourners ordinarily tore their clothing and let their hair grow serves as a source for those obligations. But according to Rosh, this is not sufficient. The most this could indicate is that it was customary for women to cover their hair, whereas R. Yishmael seems to be deriving an actual prohibition. Therefore Rashi, in his first explanation, must go further and offer a more complex explanation of R. Yishmael's derivation. The derivation is not from the mere fact that the *kohen* encounters the *sotah* with her hair covered; rather it is from the fact that the Torah considers this poetic justice for her having uncovered her hair for her paramour, thus associating uncovered hair with adulterous activity, and it is *this* that indicates that it is forbidden. Netsiv concludes that Rosh would follow Rashi's first explanation.

There is nothing in the words of the Netsiv to indicate that *periat rosh* is anything less than a full-fledged prohibition. On the contrary, Netsiv's major point is that Rosh must follow Rashi's *first* explanation, because if he followed Rashi's *second* explanation then all that we would be able to derive from the verse would be a custom, whereas the gemara indicates that it is deriving an actual prohibition. Certainly there is nothing in the words of Rashi or Netsiv to indicate that *periat rosh* is merely *dat yehudit*; nor could there be, since that would render the gemara – which Rashi is explaining – unintelligible.

why the mishna describes a woman who forfeits her *ketubah* because of immodest behavior as having violated *dat yehudit*, Jewish custom. The gemara answers that since Jewish customs of modesty include more than what the letter of the law requires – e.g., the law would be satisfied with a kerchief, but custom requires the addition of a shawl – it is Jewish custom that defines the limits beyond which she loses her *ketubah*. Once that is established, all violations regarding modesty are classified as *dat yehudit* insofar as forfeiture of the *ketubah* is concerned, as I have explained.

R. Broyde also ascribes to other *Rishonim* the view that a woman who goes out bareheaded forfeits her *ketubah* on account of *dat yehudit*. If these *Rishonim* did indeed write this, we would explain their views just as we explained those of Rashi and the *Tur*. In fact, however, most of the ascriptions R. Broyde makes cannot withstand close scrutiny.²²

To sum up: R. Broyde cites the words of Rashi and the *Tur*, who write that a woman who goes into the marketplace bareheaded forfeits

²² Thus, for example, R. Broyde cites Ritva (to *Ketubot* *ibid.*) as maintaining that going out bareheaded is merely a violation of *dat yehudit*. Actually there is nothing in the words of *Ritva* to even remotely indicate this. *Ritva* is discussing the *halakhot* regarding hair covering for different types of public space: a marketplace, an alley, and a courtyard; he gives the halakha for each, based on his understanding of the gemara: In a courtyard she can go bareheaded, in an alley a *kalta* suffices, and in a marketplace even a *kalta* is insufficient to satisfy *dat yehudit*. R. Broyde infers from this last phrase that if she goes out entirely bareheaded in a marketplace – without even a *kalta* – she also only violates *dat yehudit*. But there is nothing in the words of *Ritva* to suggest this – nor could there be, since *Ritva* is explaining the gemara, and the gemara states explicitly that there is a distinction between going bareheaded in a marketplace and going there wearing a *kalta*; the former is an actual prohibition, while the latter is only a violation of the customs of *dat yehudit*.

R. Broyde also claims that *Tosafot* and the *Tosafot ha-Rosh* characterize going out bareheaded as a violation merely of *dat yehudit*. This is based on a mistaken understanding of their words, which needs some elaboration:

The gemara, towards the end of *Gittin* (90a), cites a beraita to the effect that it is a mitsva to divorce a woman who goes out bareheaded or engages in the various other immodest behaviors enumerated in the mishna in *Ketubot*. Rashi – based on his understanding of the *sugya* – understands the beraita to imply that such a divorce is *only* a mitsva, but it is not obligatory. *Tosafot* (and similarly *Tosafot ha-Rosh*) question Rashi's view, as follows:

קשה דהא טוהה בשוק ויוצאה וראשה פרוה נמי חובה לגרשה ולא מצוה, דבעיא היא בסוטה (דף כה). אי עוברת על דת יהודית מותר לקיימה או לא ולא איפשיטא, ואמאי לא פריך נמי עלה. ויש ולומר דכיון דבעיא בסוטה לא הוויא אלא מדרבנן, קאמר שפיר דמצוה לגרשה.

her *ketubah* because she violates *dat yehudit*. He takes this as evidence that they hold that there is no “objective” prohibition of *periat rosh*, only the force of custom. But we have seen that the *Tur* himself indicates that

Tosafot's meaning (as explained by Maharsha) is quite straightforward. The beraita, according to Rashi, states that it is only a mitsva – but *not* an obligation – to divorce a woman who engaged in immodest behavior. But the gemara in *Sotah* (25a) inquires whether one is obligated to divorce a woman who violates *dat yehudit*; why didn't the gemara there adduce this beraita as proof that there is no such obligation? *Tosafot* answer that the beraita, by stating that there is a Biblical mitsva to divorce her, implies only that there is no Biblical obligation to do so; the gemara in *Sotah* inquires whether there might still be a rabbinic obligation.

R. Brojde (p. 111) renders *Tosafot* as follows:

This seems difficult, for [according to this view] one must also divorce a woman who spins in the marketplace or goes out with her head uncovered – not just that one should divorce her, yet the question in *Sotah* 25a as to whether or not a husband may choose to stay married to a woman who violates *dat yehudit* remains unresolved – why did the Talmud not raise this issue there [by bringing these cases as clear proof]? One may answer that because the question in *Sotah* was only in regard to a rabbinic violation, it is reasonable for the Talmud to posit that one ought to divorce such a woman, but here [in *Gittin*], one is biblically obligated to divorce [a woman who bathes with other men].

This is hardly even coherent. How does it follow from Rashi's view that one must divorce a woman who spins in the marketplace or goes out with her head uncovered? On the contrary, according to Rashi, the beraita states that there is only a mitsva, but no obligation, to do so! And how can *Tosafot* answer that the question in *Sotah* was only in regard to a rabbinic violation, when the gemara in *Sotah* tries to resolve its inquiry by bringing proof from cases of *yihud* (see there)? And what do *Tosafot* mean when they conclude that here in *Gittin* one is biblically obligated to divorce a woman who bathes with other men; what does that have to do with *Tosafot*'s question, which was never from the case of a woman who bathes with other men (which the gemara states explicitly is treated more severely than violations of *dat yehudit*, since it is considered evidence of infidelity), but from the case of a woman who spins in the marketplace or goes out bareheaded? R. Brojde would have been well served to examine the comments of Maharsha, who explains *Tosafot* quite clearly.

Based on his mistaken reading of *Tosafot* (and a similarly mistaken rendering of *Tosafot ha-Rosh*; p. 108), R. Brojde infers that going out bareheaded is only a violation of *dat yehudit*. But there is no such inference to be drawn here. *Tosafot*'s reference to *dat yehudit* relates to the gemara in *Sotah* (which makes no mention of going bareheaded), and all that can be inferred from their language is that the gemara there – which considers whether one must divorce a woman who violates *dat* – refers to violations of *dat yehudit*. (*Tosafot* need to emphasize this, because otherwise we could have deflected their question by positing that the beraita – which considers it only a mitsva to divorce – refers to violations of *dat yehudit* (e.g., she goes out with a *kalta*),

periat rosh is an actual prohibition; moreover, we have seen that Rashi classifies even such an outright prohibition as *yibud* as *dat yehudit*. Add to this the fact that R. Broyde's thesis founders on the gemara in *Ketubot*, and the case against it seems conclusive.

I should mention briefly R. Broyde's treatment of another gemara that discusses the status of women's hair in a different context. The gemara in *Berakhot* (24a) quotes R. Sheishet who derives from a verse in *Shir ha-Shirim* that a woman's exposed hair is an *ervah* in regard to *kriat shema*. R. Broyde (p. 150) writes that R. Sheishet in the *sugya* in *Berakhot*, who derives the *ervah* status of hair from a verse in *Shir ha-Shirim*, differs with R. Yishmael in the *sugya* in *Ketubot*, who derives the *ervah* status of hair from the verse in the Torah regarding a *sotah*. Moreover, he writes (p. 103 n. 7) that according to R. Sheishet and the *sugya* in *Berakhot*, the prohibition is merely rabbinic, since its source is in *Shir ha-Shirim* rather than in the Torah itself, and it is therefore *dat yehudit* and subject to local variation.

This is untenable, and not only because it repeats the error of confounding rabbinic prohibition with *dat yehudit*. I know of no authority who suggests a disagreement between the two *sugyot*, for the obvious reason that they relate to separate issues. The gemara in *Ketubot* discusses the prohibition for a woman to go bareheaded in the marketplace, and it derives this from the verse regarding a *sotah*; the gemara in *Berakhot* discusses the status of hair as an *ervah* in regard to *kriat shema*, and it derives this from a verse in *Shir ha-Shirim*.

It is true that there is a certain correlation between the two issues, in that – according to Ra'avyah (cited by the *Mordekhai*), Rosh, Rashba, and

whereas the gemara in *Sotah* – which considers that it might be an obligation – refers to violations of *dat moshe*.)

(One might, of course, wonder how *Tosafot* knew that the gemara in *Sotah* refers to (or at least includes) violations of *dat yehudit*: perhaps when the gemara there inquires whether one is obligated to divorce a woman who violates *dat* it refers only to violations of *dat moshe* – especially since the proof that the gemara adduces concerns a woman who violates the prohibition of *yibud*? The answer, presumably, is that in the context of the obligation to divorce *Tosafot* consider even *yibud* a violation of *dat yehudit*, for the obligation to divorce, like forfeiture of the *ketubah*, results from her flouting accepted norms of modesty, rather than from violation of a prohibition; a woman does not forfeit her *ketubah*, or her right to remain married, for violating a prohibition. This is similar to what we suggested above regarding Rashi's characterization – earlier in the same *sugya* in *Sotah* – of *yibud* as a violation of *dat yehudit*.)

R. Broyde's misunderstanding of *Tosafot* leads him into another error. Elsewhere in his article (p. 126 n. 41) he cites *Tosafot* and *Tosafot ha-Rosh* here as stating that

many other *Rishonim* – the hair of single women, who do not generally cover their hair, cannot be considered an *ervah* in regard to *kriat shema* either.²³ The converse, however, need not follow: one might easily imagine that although married women are obligated to cover their hair, it might still not rise to the level of an *ervah* regarding *kriat shema* (either because only married women cover it, or because it is not part of the

dat yehudit is the same as rabbinic prohibition. We have repeatedly stressed that, in fact, *dat yehudit* is custom, not prohibition. As for *Tosafot* and *Tosafot ha-Rosh*, they say nothing of the kind; rather, what they say is that *the obligation to divorce* a woman who violates *dat yehudit*, which the gemara in *Sotah* contemplates, is a rabbinic obligation (i.e., there may be a rabbinic obligation to divorce a woman who flouts locally accepted norms of modesty).

²³ R. Broyde misstates the position of these *Rishonim*, writing as follows (p. 153 n. 81): “In particular, those who adopt the view of Ra’avad (cited in Rashba, *Berakhot* 24) or Ra’avyah who permit the exposure of what would otherwise be considered *ervah* biblically, based on the widespread practice of women, undoubtedly maintain as well that the prohibition of going with one’s hair uncovered is classified only as *dat yehudit*.”

Let us consider what these *Rishonim* say, in context: The gemara (ibid.) says that an exposed area of a woman’s body the size of a handbreadth is considered an *ervah* in regard to *kriat shema*. A simple reading of the gemara would indicate that this refers even to parts of her body that are normally exposed, such as her hands and face, and that one may not recite *kriat shema* in sight of any part of a woman’s body at all. (This is, in fact, the view of Rambam, *Hil. Kriat Shema* 3:7.) Ra’avad (cited by Rashba), Rosh, and many other *Rishonim* write that this is not so: those parts of a woman’s body that are normally exposed, such as her hands and face, cannot be considered an *ervah* regarding *kriat shema*. Similarly, the gemara states that women’s hair is an *ervah* in regard to *kriat shema*; here, too, one might have thought that this is true of all hair, even such hair as is commonly exposed, such as the hair of an unmarried woman. Ra’avyah (cited by the *Mordekhai*) Rosh, and Rashba write that this, too, is not so: the gemara refers only to the hair of married women, which is normally covered. (Rashba adds that the hair of the temples, which is not usually covered, is likewise not an *ervah* in regard to *kriat shema*.)

These *Rishonim* do not address the question of *why* unmarried women do not cover their hair, any more than they address the question of why Jewish women don’t cover their faces and hands; they simply take it as given that they do not do so, and posit that therefore these areas are not considered *ervah* in regard to *kriat shema*.

We, of course, might wish to know why unmarried women don’t cover their hair; for that matter, we might wish to know why Jewish women don’t cover their faces. The simplest answer would be the same in both cases: because the Torah does not require it. In any event, these are not questions that these *Rishonim* address; and there is certainly nothing in the words of these *Rishonim* to indicate that custom determines the parameters of the prohibition of *periat rosh*, still less that they consider that prohibition to be *dat yehudit*.

body, or because it is intrinsically less erotic than the body itself).²⁴ R. Sheishet therefore needs to derive from a Scriptural source in *Shir ha-Shirim* that it does.²⁵

²⁴ Moreover, I believe that there is a fundamental conceptual difference between the two issues. The *ervah* status of hair and other parts of the body in regard to *kriat shema* is related to their intrinsic erotic quality, and that is aptly derived from the verse in *Shir ha-Shirim*. In contrast, the prohibition of *periat rosh* is not based on the intrinsic erotic quality of hair; if it were, there would be no room to distinguish between a marketplace and a *mavui*, or between a married and a single woman. Rather, *periat rosh* is forbidden because the behavior of uncovering her hair and thereby making herself attractive for others in that particular way is forbidden. This is aptly derived from the verse regarding a *sotah*. Therefore the fact that the Torah forbids *periat rosh* does not establish it as an *ervah* regarding *kriat shema*.

This distinction facilitates the resolutions of an otherwise vexing problem. *Shulhan Arukh* (*Orah Hayyim* 75), following Ra'avyah *et al*, rules that the hair of unmarried women is not an *ervah* in regard to *kriat shema*. Yet he himself (*Even ha-Ezer* 21) rules (based on Rambam and the *Tur*) that both married and unmarried women may not go out into the marketplace bareheaded!

The contradiction cannot be resolved by positing that *Even ha-Ezer* 21 refers to the more inclusive category of *dat yehudit*; were that the case, it would have included going out even to a *mavui*, and even wearing a kerchief without a shawl. The fact that *Even ha-Ezer* 21 limits itself to going bareheaded into the marketplace indicates (as I indicated earlier in the text) that it refers only to that which is prohibited by law – rather than by the mere custom of *dat yehudit*; apparently this prohibition extends even to unmarried women. How can this be resolved with *Orah Hayyim* 75?

Beit Shmuel (*Even ha-Ezer* *ibid.*) resolves the contradiction by suggesting that *Even ha-Ezer* refers to widows and divorcees, whereas *Orah Hayyim* refers to women who were never married. This is not, however, the plain sense of the text. (See also *Beur ha-Gra*, *Even ha-Ezer* *ibid.*, who does not seem to follow *Beit Shmuel*.)

In view of the above distinction we can suggest the following: *Shulhan Arukh* (following Rambam) indeed maintains that the prohibition of *periat rosh* applies to all women, both married and unmarried, as he writes in *Even ha-Ezer*. Hence, unmarried women are forbidden to go bareheaded into the marketplace. However, the customs of *dat yehudit* – which require covering her hair even in a *mavui* – apply only to married women; unmarried women regularly uncover their hair in a *mavui* or courtyard. Therefore, the hair of unmarried women is not considered an *ervah* regarding *kriat shema*, just as any part of the body that is commonly exposed is not considered an *ervah* in that regard. (The fact that they are required to cover their hair in the marketplace does not, in itself, render it an *ervah*, since the prohibition is not based on hair's erotic quality, as explained above.) Only the hair of married women, who observe the customs of *dat yehudit* and never expose their hair except in private, is considered an *ervah* in regard to *kriat shema*, just as any part of the body that is normally covered is considered an *ervah* in that regard.

Of course, if this explanation is correct, then the almost universal practice of single women going bareheaded even in the marketplace does not follow Rambam and *Shulhan Arukh*, but rather the plain sense of Ra'avyah and the other *Rishonim* in *Berakhot* who state without qualification that unmarried women do not cover their hair.

²⁵ Similarly, Rashba (*Berakhot* *ibid.*) questions why the gemara needs a special verse to teach that the *shok* (authorities debate whether this denotes the thigh or

R. Broyde's concluding paragraph is fraught with ambivalence. He begins by stating that everything he wrote was meant only to justify the practice of modest Jewish women. I presume that by this he means the time-honored practice of *limud zekhut*, of seeking to defend – but not to endorse – even seemingly indefensible widespread practice, and that this caveat reflects his awareness of the fact that generations of *poskim* have seen the same sources and not understood them as he does. He

the calf; Rashba seems to take it to mean the calf) of a woman is an *ervah* regarding *kriat shema*; since women habitually cover it, it seems obvious that it is an *ervah*. He answers that since men generally do not cover their *shok*, one might have thought that even the *shok* of a woman does not rise to the level of an *ervah* regarding *kriat shema*. R. Hisda therefore needed to derive from a Scriptural source that it does.

See also *Iggerot Moshe* (*Orah Hayyim* I:42), who makes this point regarding hair, and then take it further, arguing that, since the prohibition of *periat rosh* and the *ervah* status of hair are separate issues, in societies where the prohibition of *periat rosh* has fallen into disuse uncovered hair cannot be considered an *ervah* regarding *kriat shema*, even though the prohibition of *periat rosh* continues in force, since prohibitions are not voided by disuse. A similar view is maintained by *Arukh ha-Shulhan* (75:7).

The *Ben Ish Hai* (*parshat Bo*), cited by the *Kaf ha-Hayyim* (75:17), likewise writes that in countries where women do not cover their hair, it is not considered an *ervah* regarding *kriat shema*. R. Broyde (p. 156) takes this to mean that in such countries they are permitted to go bareheaded. In fact, these are two separate issues.

Even more egregiously, R. Broyde (*ibid.*) cites the *Kaf ha-Hayyim* (*ibid.* n. 18) as writing that “women who move from lands where the practice is to cover one’s hair to a place where the practice is not to cover are permitted to go without a head covering, provided they have no intention of returning”. R. Broyde then continues: “Indeed, he [the *Kaf ha-Hayyim*] maintains that one who moves to a place where the practice is not to cover one’s hair is permitted to go without her hair covered, and it makes no difference whether it is partially or fully uncovered” (emphasis mine).

If this were accurate, it would represent a highly original view of the *Kaf ha-Hayyim*, and it would be very surprising that no one had noticed it before. In fact, the *Kaf ha-Hayyim*'s words are simply a *verbatim* citation from the *Magen Avraham* (*ibid.* §4), based upon *Teshuvot Maharam al-Ashkar* (§35), both of which sources the *Kaf ha-Hayyim* cites explicitly. *Magen Avraham* and *Kaf ha-Hayyim* are addressing the comment of Rema, who rules that the hair of the temples, which even married women normally leave uncovered, is not an *ervah* regarding *kriat shema*. (This is based on Rashba to *Berakhot* 24a, which I cited earlier.) *Maharam al-Ashkar* (*ibid.*) rules that, moreover, married women are permitted to leave those hairs uncovered, although there are locations where the practice is not to do so. The *Magen Avraham* and *Kaf ha-Hayyim* cite his conclusion: “women who move from lands where the practice is to cover those [hairs] to lands where the practice is not to cover them are permitted not to cover them.”

For the readers' benefit, I will cite the original:

then, however, continues: “Women and families who have a clear custom not to cover their hair²⁶ should know that there is a firm foundation for such a practice in the Rishonim and Shulhan Arukh.”²⁷ This seems to go a good deal beyond mere *limud zekhut*. In any event, I hope to have made clear that the foundation which R. Broyde claims to have discovered is illusory. I am concerned, however, that no rebuttal, howsoever persuasively argued, will entirely undo the impression that the publication of such an article, in such a forum, and in such a format, will have made upon the general public. I am sure R. Broyde agrees that it would be unfortunate if, as a result of the publication of his article, women who might otherwise have covered their hair will be dissuaded from doing so. It is perhaps still within R. Broyde’s power to allay that concern.

שו"ע (סי' ע"ה סעי' ב'): שער של אשה שדרכה לכסותו אסור לקרות כנגדו... אבל בתולדות שדרכן לילך פרועות ראש מותר. הגה: והוא הדין השערות של נשים שרגילין לצאת מחוץ לצמחן....
 מגן אברהם (שם ס"ק ד'): שרגילים לצאת מחוץ. וכתב ר"מ אלשקר סי' ל"ה אותן נשים הבאים מארצות שאין דרכן לגלותן למקום שדרכן לגלותן מותרים לגלותן אם אין דעתן לחזור.
 כף החיים (שם ס"ק י"ח): שם, שרגילין לצאת וכו'. אותם הנשים הבאות מארצות שאין דרכן לגלותן למקום שדרכן לגלותן מותרין לגלותן אם אין דעתם לחזור. מהר"ם אלשקר סי' ל"ה. מ"א ס"ק ד'. סו"ב אות ב'.

There is nothing here to even remotely suggest the view that R. Broyde ascribes to the *Kafha-Hayyim*.

²⁶ This is misleading. Even regarding those practices that are merely *dat yehudit*, the determining factor is *local* custom, not *family* custom, as R. Broyde himself repeatedly acknowledges (see, for example, pp. 99, 127, 128, 154, 158 and 163). It is therefore incorrect to talk of “women and families who have a clear custom not to cover their hair.”

²⁷ It is worth adding that, even with regard to what are indisputably the customs of *dat yehudit* and not outright prohibitions (e.g. covering one’s hair in an alley or courtyard), the assumption that these customs have fallen into disuse and are no longer normative is highly debatable – even if we grant that the customs of *dat yehudit* are capable of being abrogated. There has been a sea change in nearly all segments of the Orthodox community. Today, unlike two generations ago, most modest women who are scrupulous in their observance of other halakhah are likewise careful about covering their hair, and it is modest and observant women, presumably, who determine the parameters of the customs of *dat yehudit*.

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HAIR COVERING AND JEWISH LAW: A RESPONSE

I. PREFACE

In my article “Hair Covering and Jewish Law: Biblical and Objective (*Dat moshe*) or Rabbinic and Subjective (*dat yehudit*)?” (*Tradition* 42:3, Fall 2009), I presented the following arguments as a *limmud zekhut*¹ for the practice of the multitudes of married Orthodox women who do not cover their hair.

- The *Tur*, *Shulhan Arukh* and *Levush* do not classify hair covering as *dat moshe*, but instead classify it as *dat yehudit*, a custom or practice of Jewish women.
- This view is supported by a group of *Rishonim* who also classify even complete uncovering of hair as *dat yehudit* and only a rabbinic violation.
- This view is supported by a group of *Abronim* who explain that in a society where married modest women do not cover their hair generally, Jewish women need not either.
- This view has a number of different possible ways to explain the Talmudic source found in *Ketubot* 72a-b.

After all is said and done, nothing in R. Shulman’s rejoinder undermines or controverts the central or main points of my theses.² Indeed, his

¹ See the Postscript for a brief explanation of the mechanism of *limmud zekhut*.

² R. Shulman does make a number of valuable comments and corrections. Thus, I concede that note 41 of the original article is not persuasive; however, while my explanation is not demonstrably wrong, it is no better an explanation than R. Shulman’s, and it requires a more novel reading of the sources. So too, R. Shulman’s criticism of my understanding of the *Kaf ha-Hayyim* (in his note 23) is reasonable.

acknowledgement that hair covering is a *dat yehudit* further strengthens the validity of my basic *limmud zekhut*.

In fact, R. Shulman's reply challenges the whole enterprise of providing a *limmud zekhut* for those married women who do not cover their hair. It ought to be sufficient to note, he claims, that "certainly our mothers and grandmothers, who upheld Judaism in the face of far more difficult challenges than we encounter, were greater than us, regardless of whether they covered their hair."

I would like to note my disagreement with him on the issue of whether we ought to be searching for justifications (*limmud zekhut*). I think that it is incumbent upon halakhic authorities to search far and wide for Jewish law explanations and justifications for common practices within the Orthodox community.³ It is both unhealthy and unwise to ponder the possibility that the generation of leadership which built Orthodoxy in the United States and many other places simply acted without any foundation at all in Jewish law in this or in any other area. I wrote the article to provide some explanation for their practices in a technical halakhic sense, and not merely to posit, as R. Shulman seems to be comfortable doing, that they were great even if they sinned on this matter of halakha.

Nor am I alone in my view that putting forth a *limmud zekhut* for why married women did not cover their hair is proper. For example, R. Mordechai Willig (who certainly maintains that normative Jewish law requires married women to cover their hair) recently suggested a different *limmud zekhut* on this topic: He concluded that it is the view of the Rambam that in a society where women do not generally cover their hair, Jewish women need not either.⁴

I read the *Kafha-Hayyim* as both incorporating the comments of the *Ben Ish Hai* and the *Magen Avraham*, but R. Shulman is correct that they can be read as being based solely on the *Magen Avraham*. (On the other hand, R. Shulman takes me to task for citing the *Ben Ish Hai* incorrectly, when a careful reading of the *Ben Ish Hai*'s own work *Sefer Hukei ha-Nashim* (which I cited on the previous page of my article) makes it clear that, in fact, I am reading the *Ben Ish Hai* consistently with his other works.) R. Shulman's point in his note 24 is correct, and I should have written "both a family and a local custom," and, as he notes, that is the formulation I used many other times in the article.

³ As the *Arukh ha-Shulhan* (OH 345:18) states, "Because it is a commandment and an obligation to justify the practices of the community of Israel, I have therefore devoted myself to developing a permissive ruling."

⁴ Audio from R. Mordechai I. Willig, *Kol Isha and the Requirement of Women to Cover their Hair*, (Wednesday April 28, 2010). R. Willig stated:

The Rambam maintains that all women have to cover their hair: single and married. It's a simple read of the Rambam [*Isbut* 24:11]. Jewish women should not go out to the market with their hair undone, whether single or married. As a matter of fact, the

Of course, normative halakha is not determined simply by a reference to the Rambam or *Tur* or *Shulhan Arukh*, and I repeat here that which I noted in the introduction to the original article: The deep consensus of *Abronim* of the last four centuries has been that there is a Torah-based objective obligation upon married women to cover their hair, and that remains the normative halakha. It was not my intent to challenge that understanding of the halakha, but merely to explain as a *limmud zekhut* that the conduct of centuries of women fully observant of Jewish law was consistent with the baseline minimum endorsed by a classical code, whether or not it is considered normative by the decisors of the last centuries.

Before rooting my response to R. Shulman's criticism in the core halakhic texts of the *Tur*, *Shulhan Arukh*, and the *Levush*, it is worth noting that his proposed understanding of the foundational Talmudic text is subject to trenchant criticism as well. R. Shulman's assertion that hair covering, according to the *Tur* and *Shulhan Arukh*, is *dat yehudit* and not *dat moshe*, yet still remains an objective violation, does nothing to make the 'flow' of the Talmud in *Ketubot* 72a-b any more intelligible. The central pillar in R. Shulman's criticism of my approach is his insistence that the halakha must be consistent with a straightforward reading of *Ketubot* 72a-b. However, his understanding of the *Tur* and *Shulhan Arukh* is patently inconsistent with the simple understanding of *Ketubot* 72a-b. He claims the *Tur* and *Shulhan Arukh* rule that if a married woman goes out bareheaded then (a) she violates an objective prohibition found

Terumat ha-Desben [10], one of the later *Rishonim*, says that according to the Rambam, the entire requirement for covering the hair is only rabbinic, even though the gemara says *de-oraita* and *dat moshe*; *Terumat ha-Desben* still insists it is rabbinic. How did he know? Rambam doesn't say so. You know how he knew? Because the Rambam equates the obligation of single women and married women in the area of hair covering. And it is inconceivable that a single woman should have to cover her hair by Torah law. If the Rambam equates them, then the whole enterprise is rabbinic in nature...So too, according to the Rambam perhaps hair has changed. Perhaps there's no need to cover twice, as the Gemara in *Ketubot* indicates we must, perhaps in certain places there wouldn't be a need to cover at all if that would be the custom in those places. That's only the Rambam, we don't follow the Rambam. At least, normative halakha does not follow the Rambam. The *Shulhan Arukh* doesn't, the Rema doesn't, certainly Ashkenazim don't...

See, http://www.yutorah.org/lectures/lecture.cfm/744548/Rabbi_Mordechai_I._Willig/Kol_Isha_and_the_Requirement_of_Women_to_Cover_their_Hair. (minutes 44 to 46). (Transcribed and edited slightly stylistically, with Hebrew translated.)

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in *Ketubot* 72a-b derived from R. Yishmael's rule obligating women to cover their hair and (b) she risks losing her *ketuba* for immodest behavior based on the *dat yehudit* prohibition mentioned in the mishna. To paraphrase R. Shulman, this makes nonsense out of the gemara's whole question in *Ketubot* 72a-b! The whole structure of the Talmudic question is that the mishna (which classifies hair covering as a *dat yehudit*) is in tension with the statement that hair covering is an objective prohibition. If R. Shulman's reading of the Talmud is correct, then why did the Talmud see any contradiction between the mishna's statement obligating hair covering as a *dat yehudit* (b) and R. Yishmael's statement that hair covering is prohibited (a)? Both are true and there is no contradiction at all. Rather, his explanation of the Talmudic source strains credulity, which is why many other authorities throughout the centuries have not suggested it.⁵ I will review the reasonable explanations of the Talmud in my section IV.

In the remainder of this reply I will focus on my understanding of the *Tur*, *Shulhan Arukh*, and *Levush* (three central pillars of halakha), and will show that my understanding of them – that they see the obligation to cover hair as subjective and dependent on societal norm – is the only reasonable way to read them, and that there are many ways to understand them so that they are consistent with the gemara. My article was based on this insight, and thus it is a worthy focus for the rest of this reply.

II. INTRODUCTION

R. Shulman acknowledges that I am correct that the *dat yehudit* prohibition obligating hair covering in *Even ha-Ezer* (henceforth, *EH*) 115 is not the source for the immutable Jewish legal obligation for married women to cover their hair. Instead, R. Shulman argues that I have overlooked the obvious source of the obligation for married women to cover their hair found in the *Tur* and *Shulhan Arukh*, *EH* 21, both of which state simply: "A Jewish woman should not go bareheaded in the market whether she is single or married."⁶

It is surprising that when R. Shulman quotes the *Tur*, he does not quote the last five words of the *Tur* or *Shulhan Arukh*, which are quite central to understanding their view. Indeed, R. Shulman does not factor

⁵ See my original article pp. 125-126 for a discussion of this issue.

⁶ The *Tur* has a slightly different grammatical formulation in the text, which reads תלכנה ילכו instead of תלכנה.

into his analysis of this problem the view of *Tur* and *Shulhan Arukh* (as well as our normative practice) that single women are not obligated to cover their hair. R. Shulman further maintains that my distinction between Torah obligation and rabbinic obligation, whether correct or incorrect, does not correspond to the distinction between subjective and objective; even if hair covering is a rabbinic obligation, R. Shulman contends, I have not proven it to be socially subjective.

R. Shulman's second objection is the easiest to address. He is correct that the distinction between a Torah obligation and a rabbinic obligation does not necessarily correspond to the objective-subjective distinction. There are areas of halakha relating to modesty where there clearly is a Torah obligation and yet it is subjective (such as the prohibition for a woman to wear a man's garment, or vice versa⁷), and there are rabbinic prohibitions that are clearly objective (such as the prohibition not to enter a brothel for any reason⁸). My original article notes this distinction quite directly in the name of some *Rishonim* and notes that there is a school of thought that rules that the obligation for married women to cover their hair is rabbinic but objective⁹ and I have no doubt that such a view can be well defended in the Talmudic tradition. However, the purpose of my article was to lay out a view in the *Tur* and *Shulhan Arukh* which shows that the obligation to cover hair was both rabbinic and subjective, a school of thought that I still think best describes the view adopted by a number of *Rishonim* as well as the *Tur*, *Shulhan Arukh* and *Levush*.

In my opinion, any authority who notes that the hair covering obligation is both rabbinic and a *dat yehudit* has functionally concluded that it is subjective, unless elsewhere in that author's work he makes it clear that this violation is objective. So, while R. Shulman is correct in saying that a woman eating pork might be neither violating a *dat moshe* nor a *dat yehudit*, but is still sinning, the reason it is prohibited is because elsewhere in the *Shulhan Arukh* (YD 79:1) that prohibition is recorded as objective. Hair covering could be an objective obligation as a matter of theory, and it certainly is that in the *Bet Shmuel*, *Bah* and *Gra*. Nevertheless it simply is not codified as such in the *Tur*, *Shulhan Arukh* or *Levush*, as the next section demonstrates.

⁷ See *Shulhan Arukh Yoreh De'ah* 182. There is no Jewish law list of male and female garments. All is dependent on the societal norm for this Torah rule.

⁸ *Shulhan Arukh*, EH 21:1.

⁹ See in my original article, pages 132-135.

III. EXPLAINING THE *TUR*, *SHULHAN ARUKH*
AND *LEVUSH*

The main thrust of my article was to demonstrate that the proper reading of the *Tur*, *Shulhan Arukh* and *Levush* is that a married woman's obligation to cover her hair is dependent on the subjective norm in the community these women reside in, which is determined by "local custom."¹⁰ Since R. Shulman has challenged even this point, I will outline the main contours of the argument.

The issue of hair covering comes up in three places in the *Tur*:

- A. The following are to be divorced without receiving their *ketubah*: a wife who violates *dat moshe* or *dat yehudit*.... And what is *dat yehudit*? Going out with her hair¹¹ undone; even if it is not entirely undone but only covered by her work-basket – since she was not covered with a head-scarf, she is to be divorced. Rambam wrote that even though a woman's hair is covered with a kerchief, since she is not wearing a full-covering like all women, she is to be divorced without receiving her *ketubah*. This is particularly if she goes out to a public thoroughfare, or a through-alley, or a courtyard which is crossed by the public. But [if she goes] to a regular alley or courtyard, she is not to be divorced. (*EH* 115)
- B. Jewish women should not go out to the market with their hair undone, whether single or married. (*EH* 21)
- C. If a handbreadth of a woman's flesh which she usually covers is exposed, it is forbidden to recite the *Shema* before her, even if she is one's wife. Likewise, if her calf is exposed, it is forbidden to recite [the *Shema*] before her. So too with the hair of a woman which it is her way to cover – it is forbidden to recite [the *Shema*] before it. However, for maidens¹² whose way it is to go with their hair undone, it is permitted. (*Orah Hayyim* 75, henceforth *OH*)

If one only had the two sources in *Tur*, *EH*, one would understand that all Jewish women, married or not, are forbidden to go out with their head uncovered, and that if a married woman were to do so, she should be divorced without payment of her *ketubah* due to her lewd behavior.

¹⁰ This is, of course, what was meant by the term, "subjective." But since R. Shulman so strenuously objects to this term, I will use "custom," which he prefers.

¹¹ Literally, "head."

¹² Literally, "virgins."

However, *OH* complicates matters, as it states rather clearly that single women need not cover their hair. How is one to explain this discrepancy?

It would seem that the simplest explanation is that the *Tur* believes that modest practice is defined by local custom: maidens may uncover their hair only in a place and time where the social norm is that they may, and only because the social custom is such. In *EH* 21 he follows Rambam's prescription of modest dress, which was the standard in Sephardic countries (including Spain, where he lived), i.e., that all women – married and single – covered their hair. In *OH* 75, he references the Ashkenazic practice of single women going with their hair uncovered, explaining that if that is their custom, then their hair would not be considered “exposed”, and it would not be a problem for the man reciting the *Shema*.¹³ It seems obvious from the *Tur*'s formulation that in a place where single women generally cover their hair (Sephardic countries), it would be forbidden to recite the *Shema* before them with their hair exposed.

With this formulation in mind, *EH* 115 is rather simple to explain as well. The woman loses her *ketubah* payment because she is behaving immodestly. The behavior is lewd not because it is unconditionally forbidden, but because proper women¹⁴ in that society do not go out with their hair uncovered. The *Tur* *EH* 21 states the socially normal rule: he does not know of any society where married women go with their hair uncovered, so the possibility is never mentioned. Nevertheless, it would seem that he would agree that in such a society a woman would not be in violation of *dat yehudit* if she went out this way, since the behavior is not lewd.¹⁵ Even R. Shulman concedes that this the correct read of *EH* 115.

It is possible to argue that the *Tur* *EH* 21 refers to an “objective” prohibition, one not driven by societal norms, and that *OH* 75 is relevant only to the recitation of the *Shema*. In this approach, the *Tur* would be claiming that all women, single or married, are required to cover their hair. However, in a country where single women do not do so, their uncovered hair would not be considered a “distraction” to the man reciting the *Shema*. However, this interpretation is difficult to accept since the *Tur*

¹³ The line is taken from Ra'avyah which is cited in the *Mordekhai* commenting on *Berakbot* 24a, note 80 and the *Bah* on *Tur* 21.

¹⁴ Married in Ashkenazic countries, all in Sephardic ones.

¹⁵ The author of the work *Tzeidah la-Derekh* (Rabbeinu Menachem b. Aaron, student of R. Yehudah, son of Rosh, and a contemporary of the *Tur*, in Ma'amar, Kelal 2, ch. 14) makes this point even more explicitly: “And what is *dat yehudit*? Going out to the marketplace or through an alley or courtyard which many people frequent in the manner of promiscuous women.” In this formulation, it is clear that the entire prohibition is dependent on the practice of modest women.

does not say a word about the supposed forbidden practice of single women uncovering their hair.¹⁶ Is R. Shulman, then, of the view that single women need to cover their hair as a matter of normative halakha according to the *Tur*, *Shulhan Arukh* and *Levush*?

On the other hand, it is very difficult to argue that in *EH* 21 when the *Tur* says *penuya* (unmarried women), he is referring only to single women who have been married in the past (as opposed to virgins) since in the very next line he says: “But it is permitted to gaze upon a single woman (*penuya*) - whether a virgin or previously married¹⁷ - in order to determine whether he finds her attractive, for the purpose of marriage.” It strains one’s credulity to claim that the *Tur* could mean two different things by the same word in the same sentence! Rather it seems clear that the *Tur* believes that it is the normative practice for all women, married or not, to cover their hair, but he is aware that in certain countries the practice is different for single women, and he is comfortable acknowledging that in a place where single women do not cover their hair in fact, there is no violation of Jewish law. Because of this, the formulation in *EH* 21 that, “A Jewish woman should not go bareheaded in the market whether she is single or married,” can no more be the source for the objective prohibition for married women to cover their hair than it is the source for the objective prohibition for single women to cover their hair. If such an objective prohibition is not found in *EH* 21, and not found in *EH* 115, it certainly is not found in *OH* 75. Hence one may conclude that it is not present in the *Tur* anywhere.

The above formulation is not unique to the *Tur*. The *Shulhan Arukh* offers substantially the same formulation, classifying uncovered hair as a *dat yebudit* in *Even ha-Ezer* 115:4, mandating that both married and single women cover their hair in *Even ha-Ezer* 21:2 and permitting the recitation of *Shema* in front of the uncovered hair of single women in *Orah Hayyim* 75:1-2.¹⁸

Following the lead of the *Tur*, and thus having removed hair covering from the category of *dat moshe* in *EH* 115, one cannot claim that the *Shulhan Arukh*, *EH* 115 is the source of the objective prohibition to cover

¹⁶ Let me add a more general observation, which is that a rabbinic codification of modesty rules seems intuitively to be more subjective than a Torah obligation; this is exactly the point made by the *Pit’bei Teshuvah* in *EH* 21:6 which is that all immodest conduct is measured against some social determination of modesty and that women may engage in conduct which is generally thought of as highly immodest if in the specific circumstance that it is engaged in, it is thought not to be immodest at all (such as going to an OB/GYN). See the original article on pages 162-163 for more on this.

¹⁷ Literally “a non-virgin”

¹⁸ See *EH* 21:2, *EH* 115:1-4, *OH* 75:1-2.

hair – even R. Shulman agrees to this. *EH* 21:2 cannot be the source for the objective prohibition of married women to cover their hair, just as it is not the source for the objective obligation of single women to cover their hair, since *OH* 75 makes it clear that single women do not have to cover their hair when modest single women do not.¹⁹ Finally, *OH* 75 cannot be the location of this prohibition either, as that source seems to make it clear that common practice is the determining factor – it only refers to the obligation to cover in reference to the social norm (*derekh*) to cover. *OH* 75 clearly states that in a place where any particular group of women does cover their hair, all women in that group must cover their hair, and when in a place where single women do not cover their hair as a matter of fact, they need not as a matter of halakha, either. Rema's glosses sharpen this point by linking the halakhic category of tufts of married women's hair (which need not be covered as a matter of halakha when it is not actually covered as a matter of social norm) to the halakhic category of single women's hair – the obligation to cover is driven by the social norm and nothing else.

Finally, the *Levush* substantively echoes this formulation as well, classifying uncovered hair as a *dat yehudit*, mandating that both married and single women cover their hair but yet permitting the recitation of *Shema* in front of the uncovered hair of single women.²⁰

To summarize: R. Shulman agrees that *EH* 115 and *OH* 75 are not the sources for the objective obligation for married women to cover their hair. He maintains that *EH* 21, which states, “Jewish women should not go out to the market with their hair undone, whether single or married,” is the source of the objective prohibition against a married woman's uncovering her hair, which he regards as “forbidden by force of law.” This must be incorrect because if this were true then the *Tur*, *Shulhan Arukh*,

¹⁹ One can only argue with this if one accepts that all single women ought to cover their hair according to the *Shulhan Arukh*. Nor can one argue that the word *penuya* does not mean single women in *Shulhan Arukh*, *EH* 21:2, as it is used in *EH* 21:3 to mean any single women, just like the *Tur*. Indeed, there are 22 times when the *Shulhan Arukh* uses the term *penuya* and not a single one of them can be reasonably understood solely as a reference to a single woman who has been already married. I am aware of the fact that many commentators on the *Shulhan Arukh* understand it just that way (see *Helkat Mehokek* 21:2; *Bet Shmuel* 21:5; *Taz* 21:2, and many others). However, as noted by *Magen Avraham*, *OH* 75:3, this explanation simply runs counter to the words of the *Shulhan Arukh*. It might well be that this dispute is actually quite central to how to understand the *Shulhan Arukh*. However, there is little doubt in my mind that given the formulation in *EH* 21:3 which explicitly uses the word *penuya* to denote even a virgin (he states after the word *penuya*, “whether she is a virgin or not”) that such is his intent here as well. The *Bet Shmuel*, *Taz* and *Helkat Mehokek* are all arguing with the *Shulhan Arukh*, and not explaining him.

²⁰ See *Levush*, *EH* 21:2, *EH* 115:1-4, *OH* 75:1-2.

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and *Levush* must hold that unmarried women are similarly required to cover their hair in public, which creates a contradiction with the *Tur* and *Shulhan Arukh*, *OH 75*. Rather, a better explanation is that *EH 21* creates no more of an objective obligation upon married women than on single women to cover their hair. Thus, while R. Shulman does assert there is an independent prohibition for married women to cover their hair, he has no source in the *Tur*, *Shulhan Arukh*, or *Levush* to support this assertion. If there is no other source for this prohibition, then at least according to the *Tur Shulhan Arukh*, and *Levush*, the only source for the prohibition can be the subjective one in *EH 21* or the *dat yehudit* violation of subjective customary law found in *EH 115*.

Therefore, it would seem that according to the *Tur*, *Shulhan Arukh*, and *Levush*, in a society where women, be they single or married, go out with their hair uncovered in fact, such conduct does not constitute a violation of Jewish law. R. Shulman has no coherent response to this and indeed does not even discuss the view of the *Shulhan Arukh* at all in his reply. That is a forceful silent concession.

Of course, one can respond to this issue in the manner that the *Bet Shmuel*, *Bah*, and *Gra* do: by arguing with the *Tur*, *Shulhan Arukh* and *Levush*. As I note in the original article:

Indeed, there is a fundamental disagreement between the *Tur* and *Mehaber* on the one hand and Rambam, the *Bah*, and *Bet Shmuel* on the other. According to the *Tur* and *Mehaber*, the prohibition for a woman to go with her head uncovered falls under the category of *dat yehudit*, “the modest practices which the daughters of Israel practice.” According to Rambam, the *Bah*, and *Bet Shmuel*, uncovering of the hair in its entirety is considered *dat moshe*, and the prohibition is not dependent upon the practices of the daughters of Israel but rather is unchanging.²¹

It is important to understand that the *Bah*, *Bet Shmuel*, and *Gra* argue with the *Tur*, *Shulhan Arukh*, and *Levush*: they insist that either hair covering is really a *dat moshe*, or that *EH 21* ought not refer to all unmarried women, or that *OH 75* and *EH 21* are irreconcilable, or that the *Shulhan Arukh* is mistaken.²² These answers are all plausible as a matter of normative

²¹ Original article, p. 107.

²² The *Bet Shmuel* explicitly classifies full uncovering as *dat moshe* in *EH 115:9*; the *Bah* is cited in detail in the original article of mine on page 106-107; and *Gra*, *EH 115:10* notes that the view of the *Tur* and *Shulhan Arukh* are difficult (see also the excellent notes of the *Birkat Eliyahu* on this).

halakha. But they assume that the approach of the *Tur*, *Shulhan Arukh* and *Levush* is wrong. My *limmud zekhut* is that women throughout the centuries followed the view of Jewish law found in the *Tur*, *Shulhan Arukh* and *Levush*.

IV. UNDERSTANDING THE VIEWS OF THE RISHONIM AND AHRONIM

When one steps farther back and looks at the *Rishonim* and *Ahronim* through a wider lens, one readily discerns three basic schools of thought. The first is the view of Rambam, that women, both single and married, are obligated to cover their hair as per R. Yishmael in *Ketubot* 72a. This view is simple to understand. R. Yishmael's school of thought mandates that since the *sotah* had her hair uncovered in her Temple ritual, one sees from this that all other women must cover their hair in public. Rambam makes no distinction between single and married women and need not necessarily even link the obligation to modesty, just like the recitation in *Ketubot* 72a makes no distinction between married and single women or to modesty. The fact that Rambam codifies this as *dat moshe* in the *Mishneh Torah* makes it clear that it is immutable according to Rambam.²³

The second school of thought reads the Talmudic source completely differently and limits the obligation of women to cover their hair to women who are “*sotah* eligible,” which, while not directly mentioned by the Talmud, is a reasonable inference from the flow of the gemara, which cites a biblical verse regarding the *sotah*. The discussion in *Ketubot* 15a that makes it clear that betrothed women do not cover their hair (even though they have the status of married women – *eshet ish* – as a matter of halakha) further inclines one toward this view. This school of thought posits that hair covering relates only to married women, and that if a woman is not married “enough” to be subject to the *sotah* ritual, then there is no obligation upon her to cover her hair. According to this school of thought, single women are not under an obligation to cover their hair precisely because they are not “*sotah* eligible.” Indeed, this school of thought argues that even women who are married but not “*sotah* eligible” need not cover their hair; hence a betrothed woman (*arusah*) does not have to cover her hair and even a woman who is a fully married

²³ Rambam, *Issurai Biah* 21:17, and *Ishtut* 24:11-12.

(*nesuah*) but has not yet been intimate with her husband need not cover her hair, since she too is not yet *sotah* eligible.²⁴

Both of these understandings of the obligation of women to cover their hair make perfect sense and are completely reasonable: Most *Abronim* adopt the second model and many *Rishonim* the first. But neither of these two schools of thought explains the ruling of the *Tur*, *Shulhan Arukh*, and *Levush*, which prohibit both married women and unmarried women from uncovering their hair, but yet note that in places where single women do not cover their hair, that is not a violation of Jewish law.

The thrust of my original article is exactly to explain this view in the *Shulhan Arukh*. Some *Rishonim*, including the *Tur*, *Shulhan Arukh*, and *Levush*, as well as some *Abronim* codify the obligation of married women to cover their hair no differently than they do the obligation of unmarried women to cover their hair, which is a subjective obligation, exactly as stated in *EH* 21 and *OH* 75. Just as in a social context in which Jewish law permits generally modest single and previously-married women to uncover their hair if that is the local custom, there is no indication in *EH* 21:2 that the same rule does not apply to married women.

I think that the *Tur* adopts this view because of his interpretation of Rashi, *Tosafot*, and the *Tosafot ha-Rosh* (as well as other *Rishonim*, such as the *Kol Bo*, *Ba'al ha-Itur*, *Smak*, and *Ritva*)²⁵ explained in my original

²⁴ I have in my possession a responsum from R. Moshe Feinstein, dated 15 Elul 5745, to R. Aharon Tendler, forthcoming for publication which states, in relevant part:

The obligation of a woman to cover her hair takes effect only after the first night since it is from that point on that she has the status of one who has been intimate with her husband. She does not have to cover her hair immediately after *huppah* and *yibud* since at that point she does not yet have the status of one who has been intimate with her husband. The reason is obvious, since as a matter of marriage law, there is no distinction between an *arusah* and a *nesuah*, rather the obligation to cover her hair is dependent on whether or not she has been intimate with her husband.

²⁵ R. Shulman is correct that my translation of *Ritva* is imprecise, but it was done (both times) to convey that R. Yohanan saw that which he should not have seen: He was standing at the gates, looking in, and not the other way around. This view is expressed by *Tosafot Bava Metsia*, 84a s.v. *yativ*; Rema, *Teshuvot* 19; *Yam Shel Shlomo* 6; and *Tosafot ha-Rosh Bava Metsia* 84a. In his footnote 21, R. Shulman objects that I misinterpret *Ritva*'s comments. Insofar as *Ritva* said that wearing a *kalta* in the marketplace is a violation of *dat yehudit*—and then said nothing further—I inferred from his silence that he holds *peri'at rosh* in the marketplace to similarly be a violation of *dat yehudit*. As I noted in my original article, *Ritva* makes no reference whatsoever to any violation of *dat moshe* in his explanation. R. Shulman evidently disagrees with me, but to defend my response, the reason I find omission in this case to be proof of intent is because *Ritva*'s explication in this passage is unbelievably detailed. He

article. I would like to add that the *Bet Yosef*, because of his uncommon view that Rambam's understanding of what is *erva* (nudity) is actually consistent with the famous view of Ra'avyah about the subjective nature of the laws of modesty, also adopts the subjective understanding of the obligation to cover hair. This is made clear by R. Joseph Karo in the *Kesef Mishneh* (Laws of Shema *Hilkhot Kriat Shema* 3:16). Here he explains Rambam's formulation, "if a handbreadth of her body is exposed" by stating: "this is specifically in a place where that is generally covered, for that is the precise meaning of the term 'exposed.'" R. Karo goes on to repeat this same assertion in the *Bet Yosef* on *OH* 75. By incorporating subjective criteria into Rambam's formulation of halakha's obligation to cover, R. Karo is suggesting a radical departure from the standard interpretation of Rambam.

Let me explain: the usual assumption of most halakhic authorities is that Rambam and Ra'avyah are diametrically opposed in their outlooks on the laws of modesty. Rambam claims that there are objective criteria codified by the Sages as to what needs to be covered, whereas Ra'avyah claims that the criteria are actually subjective and dependent on local practice. If one understands their respective iterations simply, one would argue that Rambam believes that all women in all times and all places are

enumerates a series of different scenarios that would entail different degrees of immodesty, explaining in which places and with which head coverings a whole range of prohibitions would be violated. It is for this reason that his failure to mention "the prohibition that would take effect without a *kalta* in the marketplace" leads me to believe that it is no doubt the same prohibition that would take effect *with* a *kalta* in the marketplace—if this were not so, he most certainly would have said otherwise. Let me add that R. Shulman seems to ultimately agree with me that Ritva understands even full uncovering as *dat yehudit*; he merely argues that even if something is *dat yehudit* that does not mean it is subjective. As I note in the substance of this reply, that argument is not fully persuasive, as once one moves the violation from *dat moshe* (as Rambam has it), one must find another source for the obligation to cover all the time. The same is true for his criticism of my reading of the *Tosafot ha-Rosh* and *Tosafot*. If R. Shulman means to explain that *Tosafot Ha-Rosh* and *Tosafot* really adopt the view that fully uncovered hair is a *dat moshe* (as Maharsha attempts to claim), then the basic thesis of R. Shulman's general reply to me starts to crumble, since, if fully uncovered hair is really *dat moshe*, then the fact that both the *Tur* and the *Shulhan Arukh* demur from that classification and call it *dat yehudit* is certainly significant. Rather, again, R. Shulman must concede that my reading of *Tosafot* and *Tosafot Ha-Rosh* is correct — uncovered hair is but a *dat yehudit* — but he must argue (as he does in the body of his reply) that uncovered hair is still an objective prohibition. R. Shulman's footnote 21 is part of the circular reasoning that undergirds his paper and, as noted in the first section of this article, he fails to explain the Talmud in *Kerubot* 72a-b at all. R. Shulman's footnote 22 is equally mistaken— for the same reason as his criticism in note 21 replied to above. R. Shulman actually agrees with me that exposed body parts are only *dat yehudit* and not *dat moshe*, which makes this note of his difficult to accept.

required to dress the way he describes in the *Mishneh Torah*. This would mean that even in modern day America, unmarried girls would be required to cover their hair. On the opposite extreme, one could argue that Ra'avyah believes that all modesty is socially determined, and that if all women in a certain society exposed their midriffs, for example, it would be permitted for observant Jewish women to do that as well, since in that society it would not be considered immodest.

However, R. Karo interprets both of these *Rishonim* differently, and assumes that these two authorities really are in agreement. He believes that Rambam only applies his “objective criteria” to a women’s torso, and that this is what he means by “any [exposure of] a woman’s body is nudity” (*kol guf ha-isha erva*) – understanding “body” as torso. All other parts of the body are considered “nudity” (*erva*) only in a society where they are generally covered. Similarly, R. Karo believes that when Ra’avyah states, “all the things referenced above about nudity only apply in a place where they are regularly covered,” he refers to parts of the body other than the torso. However, in R. Karo’s opinion, even Ra’avyah agrees that the exposure of a woman’s torso is considered nudity regardless of her society’s sartorial norms; he limits his subjective approach to hair, voice, hands, feet, face, etc. The only reason Rambam seems to be so much stricter, R. Karo believes, is because he is describing the practice in his own society, which was much stricter than the German practice reflected in Ra’avyah.²⁶

Given this conceptual framework, it is easier to understand how the *Tur*, *Shulhan Arukh*, and *Levush* feel comfortable codifying in accordance with Rambam in *EH* 21, and still rule with Ra’avyah in *OH* 75, since they both hold to the same principle, despite the differences in local practice that their respective articulations imply. This also explains why they moved the rule of hair covering from *dat moshe* to *dat yehudit* in *EH* 115, in direct contradiction to Rambam’s apparent formulation.

Of course, I recognize that this analysis runs contrary to the normative analysis found in the great *Abronim* of the last centuries and while my original article did put forth a smattering of *Abronim* who adopted this analysis, it is important to concede that normative Jewish law does not adopt this view, but instead follows the approach of the *Bet Shmuel*, *Bah* and *Gra*. For this reason, I repeatedly made note of the fact that the article that I was writing was a *limmud zekhut*, i.e., an explanation of a practice found in many diverse communities in the diaspora and it would be a mistake of both Jewish law and common sense to think that my

²⁶ Although this position is first articulated by R. Karo, one must assume that it accurately reflects the view of R. Jacob ben ha-Rosh latent in the *Tur* and the *Levush* too.

article was a call for married women who were covering their hair to cease.

Before we leave the *Rishonim*, let me respond directly to one line of questioning by R. Shulman. R. Shulman questions whether my reading of Rashi is correct, as Rashi classifies *yibud* as a *dat yehudit* even as it is an objective *issur*. R. Shulman is certainly correct that there can be violations of *dat yehudit* that are objective and even rabbinic. *Yibud* is a codified violation in the *Tur* and *Shulhan Arukh*, EH 22, and thus, of course, one can have an objective violation of a rabbinic prohibition and yet it is still a *dat yehudit*: the claim throughout my article is not that such a theoretical framework cannot exist, but merely that neither the *Tur* nor *Shulhan Arukh*, nor *Levush* in fact codify such an objective prohibition with regard to hair covering.²⁷

V. EXPLAINING THE TALMUDIC SOURCES

R. Shulman purports to identify deficiencies in my explanation of *Ketubot* 72a-b, the underlying Talmudic source for this discussion. I'll leave it to the reader to determine whether my analysis of the *sugya* is plausible, since I already spent nearly 20 pages on this issue.²⁸ It is also worth repeating my observation from the preface that his explanation of the Talmud suffers from the same weakness as mine. The mishna classifies fully uncovered hair as *dat yehudit*, a subjective violation of the rules of modesty. The Talmud asks:

What is [considered to be a violation of] *dat yehudit*? Going out with her head uncovered. [Is not going out with an] uncovered head a Biblical prohibition (Rashi: so why is it not considered *dat moshe*?)—as it is written, “And he shall uncover her head” (Num. 5:18), and the school of R. Yishmael taught that this is a warning to the daughters of Israel that they should not go out with uncovered head?

Both Rashi and Rambam explain the Talmud simply and completely: Fully uncovered hair is *dat moshe* and not *dat yehudit*, and there is little doubt

²⁷ Allow me to suggest a more complex answer to this question which also could be true. Many *Abronim* adopt the view that *yibud* is also somewhat subjective, and thus permit, for example, adoptive parents to be alone with adopted children, since when sexuality is subjectively socially impossible, *yibud* too is permitted. This would make the answer to R. Shulman's question simpler, but dependent on the views of only a group of *Abronim*; see *Teshuvot Tsits Eliezer* 6:40:21; *Teshuvot Asei Lekha Rav* 3:39; *Yalkut Yosef, Kitsur Shulhan Arukh*, p.975. This is also what is hinted at in *Terumat ha-Deshen* 242 when he compares hair covering to *yibud*.

²⁸ Pages 139-150, and 163-170 in the original article.

in my mind that this approach (adopted explicitly by the *Bet Shmuel* and many others) is a very logical reading of *Ketubot* 72a-b. Hair covering is then an objective obligation independent of all times and places. But (as even R. Shulman concedes) it is not the view adopted by the *Tur*, or *Shulhan Arukh*, or *Levush*. Indeed, as I noted before, inasmuch as he attacks my approach to the Talmudic discussion, he proposes a solution fraught with the same problem – how do the *Tur* and *Shulhan Arukh* explain the Talmudic sources since hair covering is a *dat yehudit*?

In the original article I outlined at least four basic approaches to the Talmudic text that explain the view of the *Tur* and *Shulhan Arukh* (as well as R. Shulman) with many slightly different permutations. They are:

1. The gemara in *Ketubot* is not normative (and is *shelo le-halakha*):
 - a. The approach of the Netsiv that negative obligations derived from positive commandments are generally no more than custom, and that the *Ketubot* 72a-b *sugya* is incompletely normative (*le-halakha*).²⁹

²⁹ R. Shulman raises a question regarding my interpretation of Netsiv. He says my interpretation is erroneous because Netsiv holds that according to Rosh, *peri'at rosh* is a violation of a biblical prohibition, not *dat yehudit* (as I set forth). He then further objects, saying that even if one momentarily assumes that Rosh does in fact hold that *peri'at rosh* is a violation of *dat yehudit*, there is no way to reconcile such a view with the text of *Ketubot* (72a-b). I answer here his first point, as the second is answered in the text above. Regarding my reading of the Netsiv, R. Shulman has missed the forest for the trees. He leaps directly to the final outcome of Netsiv's commentary, which is that both Rosh and Ra'avad see *peri'at rosh* as a biblical prohibition (the Rosh derives the biblical prohibition from Rashi's first explanation of the gemara, whereas Ra'avad derives the biblical prohibition from Rashi's second explanation). The crucial point in my presentation of Netsiv is that Rosh would *not be able* to derive a biblical prohibition based on the second but still 'main' explanation in Rashi. I brought this reading of the Netsiv to show the reader that based on the simpler, 'main' explanation in Rashi, Rosh would have concluded that *peri'at rosh* is not on the level of a biblical prohibition. This point is of great relevance because it explains why *Rishonim* throughout the ages who opted to understand R. Yishmael according to the second, 'main' explanation in Rashi ruled that there is no biblical basis for the prohibition of *peri'at rosh*. They viewed R. Yishmael in light of this second explanation in Rashi, and they viewed this second explanation in Rashi just as Rosh himself would have viewed it. Thus, through the eyes of Rosh, one begins to understand why those *Rishonim* who read the gemara according to this second, 'main' explanation in Rashi ultimately concluded that the prohibition of *peri'at rosh* was not of biblical origin, but merely *dat yehudit*. Let R. Shulman not forget that I place my presentation of Netsiv in Section IX of this paper, a section entitled, "The Talmudic Basis for Those Who Maintain that Uncovering of the Hair is Only a Violation of *Dat Yehudit*." I presented Netsiv in precisely this forest, not for the purpose of explicating the particular views of Rosh and Ra'avad, but to suggest a basis and a rationale for those *Rishonim* who see the gemara through the lens of Rashi's second 'main' explanation of R. Yishmael and conclude, like Rosh does, that this 'main' explanation is in fact no basis whatsoever on which to rule that the prohibition

- b. The approach of those who adopt the view that the phrase *de-oraita* in the gemara does not mean “a Torah obligation.”
 - c. My own insight that the formulation of *azhara lei* is generally rejected as a source for halakha by the *Rishonim*.
 - d. The tension between the objective codification in *Ketubot* 72a-b and the subjective codification of Ra’avyah in *Berakhot* 24a.³⁰
 - e. The tension between *Kiddushin* 81b-82a in the name of Shmuel, and *Ketubot* 72a.
2. The tension between the various *amora'im* in *Ketubot* 72a-b can be read to codify only the subjective obligation in *Ketubot* 72a-b.
 - a. The approach of the *Minhat Ani* that if hair covering in a courtyard is permitted then hair covering in the market is rabbinic (and perhaps subjective), and thus the *de-oraita* question in *Ketubot* 72a is not normative halakha.³¹
 3. The term *paru'ah* means disheveled and not uncovered.
 - a. The view that uncovering and disheveling are distinct prohibitions and only disheveling is prohibited objectively.
 4. The prohibition for women to cover their hair is a subjective biblical obligation.
 - a. The approach of R. Babad that all is subjective.
 - b. The approach of R. Mesas that this is a dispute between the first and second views of Rashi.

of *peri'at rosh* is of biblical origin. Please refer back to my original footnote 61 for a complete explanation as to why, based on Rashi's second 'main' explanation, Rosh holds that *peri'at rosh* is not a biblical prohibition. The analysis of whether customs relayed in the Bible take on the status of biblical obligations will not be repeated here.

³⁰ R. Shulman's final point, that there is a rigid separation between the discussion in *Berakhot* 24a and *Ketubot* 72a-b, is a reasonable one. R. Shulman maintains, as do many *Rishonim* that the *Berakhot* discussion is limited to the mode of dress of women in a place where men are engaged in prayer. By this analysis, *Ketubot* 72a-b discusses how women should dress generally, and *Berakhot* 24a is limited to prayer. However, what R. Shulman does not acknowledge is that many *Rishonim* do not accept this distinction and indeed posit that the prohibitions in *Berakhot* 24a are universal in nature: indeed the normative practice within our community exactly follows that view—we assume that neither voice, legs, nor hair may be revealed by women even outside the confines of prayer exactly because *Berakhot* 24a is understood to be a general rule and not a prayer rule. Based on this analysis, one can readily see that the view of Ra'avyah discussed above, which insists that *Berakhot* 24a is limited by the sociology of modesty in one's own time and place, provides a license to expand the subjective component of the rules of modesty found in *Berakhot* 24a, and are thus in tension with the rules found in *Ketubot* 72a-b (it is not surprising that both the *Tur* and the *Shulhan Arukh* adopt the view of Ra'avyah as normative as a matter of Jewish law). For more on this, see my original article, pp. 118-121.

³¹ R. Shulman's insistence that this point cannot be considered even as *pilpul* simply does not withstand a close reading of the *Minhat Ani's* view, as explained above.

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It is worth emphasizing that this last approach could readily accord with the final insight of the Talmudic source in *Ketubot* 72b (“if so, you have not permitted Jewish women to stay married to their husbands”) as the ultimate reference to the subjective practice of Jewish women rather than to an objective codification.

It is important to understand that once *Rishonim* concede that single women need not cover their hair when the prevailing social practice is not to do so, then one must further concede that hair is not intrinsically erotic and is not governed by the general prohibition to cover up all body parts that are erotic (*guf ha-isha erva*). This explains the development in Europe of the practice of wearing a wig. It is inconceivable to imagine that a woman can cover her breasts with a picture of breasts – breasts are erotic; that hair may be covered with fake hair is an acknowledgement that hair is not erotic at all. Indeed, the transition from a society in which hair is erotic to a society where hair is, in fact, not erotic, is the central historical event which motivated modest Jewish women observant of Jewish law to cease covering their hair: of course, in a society in which hair is erotic, all Jewish women must cover their hair. Consider, for example, the question posed to R. Moshe Feinstein in *Iggerot Moshe*, EH 1:54, concerning whether a poor widow may go with her hair uncovered to the office so she can remain employed. R. Feinstein permits it (because he is certain that a widow is not under any objective obligation to cover her hair),³² but we certainly cannot imagine that he would likewise permit the widow to expose her thigh or breast in order to keep her job.

VI. CONCLUSION

The consensus of the *Abranim* for the last few centuries has surely been that there is an objective Torah obligation upon married women to cover their hair. Nevertheless, contemporary halakhic authorities must also be aware that the *Tur*, *Shulhan Arukh*, and *Levush* are not part of that consensus, and that furthermore, the reason they do not join that consensus is because there are *Rishonim* who dissent. Indeed, a small number of *Aharonim* do not agree with the consensus either. This is ample justification (*limmud zekhut*) for the centuries of Orthodox

³² Let me be clear here. R. Feinstein does not agree with the *limmud zekhut* presented in this article because he thinks that the *sotah* theory is correct, as explained in note 24. Since a widow is not *sotah* eligible, he adopts the subjective rule for a widow's hair.

women who did not cover their hair: members of our community ought not look at the centuries of great women who do or did not cover their hair and think that their conduct is without justification as a matter of halakha.

R. Shulman ends his reply with a plea that we do nothing to encourage women who might otherwise be planning to cover their hair to think that they have no such obligation. I am not arguing with such a position – the consensus of the *Abronim* speaks volumes as to normative Jewish law, and I am hardly an authority to argue with them. But I too have a plea: that the Orthodox community ought do nothing to suggest that women who did or do not cover their hair should be considered outside of the Orthodox community. We need not list here the names of the wives of various great rabbis who went about with uncovered hair – suffice it to note that the list would name the wives of several great scholars. If they were not prophetesses, at least they were daughters of prophetesses, and presenting this *limmud zekhut* on their behalf should be part of the Torah of our mothers we are enjoined not to forget.

VII. POSTSCRIPT: WHAT IS A *LIMMUD ZEKHUT*?

Throughout my original article and this reply, I use the term “*limmud zekhut*” (meaning, plausible explanation as a matter of Jewish law) without a clear explanation of this important concept, which is nearly unique to Jewish law. I would like to clarify the term here.

There are two basic routes to defending a practice which does not represent the consensus of decisors: *hiddush* (novel insight) and *limmud zekhut*. A *hiddush* is an understanding of the Talmud which has not been advocated before, but which the decisor who discovered it is convinced is the correct understanding of the sources. When this occurs, the aforementioned decisor advocates following this position normatively. A *limmud zekhut*, however, is something else. One need not necessarily be convinced that the suggested defense is the correct reading of the classical sources – it is enough for one to be convinced that it is a *plausible* reading. This conviction can come from the individual’s own insight into the texts, from a single precedent (*da’at yabid*), or from a collection of precedents, none of which represents the consensus. My *limmud zekhut* regarding hair-covering is the latter. Although I am not convinced that the halakhic construct I propose is the proper reading of

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the Talmudic sources, I am convinced that it is the proper understanding of the *Tur*, *Shulhan Arukh* and *Levush*, as well as a smattering of *Rishonim* and *Abranim*. It is also, in my opinion, a *plausible* reading of the Talmudic sources.³³

³³ The process I used to come to this decision itself reflects the nature of a *limmud zekhut*. It was driven by the facts on the ground. I saw that many Orthodox women past and present – including wives of many prominent scholars (*gedolim*) of the previous generations – did not cover their hair. I felt that this phenomenon required an explication grounded in Jewish law and began to ponder the question. I then saw a number of *Abranim* - not the majority and not the leading figures, but serious scholars nonetheless - justifying the practice, and I wondered what the basis was. Then, I looked at the *Tur* and *Shulhan Arukh* and understood the basis. Finally, I tried to figure out how this school of thought understood the Talmud. The result of this process, a process which lasted many years, was my original article.

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