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CONTENTS

Pressures Faced by *Posekim*: A Personal Reflection[1]

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When someone poses a halakhic question, the authority offering an answer or issuing a decision—the *posek*, or decisor, and in plural, *posekim* or decisors—is faced with five important considerations (or pressures, if you prefer) that can incline them to answer the question in different ways. These considerations are as follows:

1. Is the Jewish law in this case clear or indeterminate? If indeterminate, what presses one to pick this option over another?

2. How will the person who asks the question respond to the answer? Is this something that the decisor needs to consider when resolving the issue at hand?

3. How will the community respond to the question and the answer? Is this a pressing matter for the community, one in which an answer will likely bring a swift and vocal communal response? Or, rather, is this of relative insignificance to the broader community?

4. Are there reasons to answer publicly so that others will see both the question and the answer?

5. Will people misunderstand the answer to permit something that the *posek* does not intend to permit, or prohibit what was not intended to prohibit?

Each of these considerations generates complexities worth exploring—and I am sure there are others that I am not considering here. My hope is that those who ask and answer questions of Jewish law will be girded and guided by this short essay. May both those who ask and those who answer remain virtuous and determined to stand for the authentic values one needs to stand for, resisting the social tides that can dilute our observance.

The Starting Point: Is Applied Jewish Law Clear or Indeterminate?

The first question is very basic, but also the most important because it asks: "What really is the halakha in this case?" There are two possible scenarios that the decisor might find themselves in. First, in some matters of halakha, Jewish law accepts the possible propriety of more than one answer. Thus, the job of the decisor in those cases is to decide not only what the ideal halakhic answer is in that particular case, but also which answer best fits the needs of person asking the question. This, of course, differs sharply from the second scenario, where only one answer is consistent with Jewish Law—and there are many cases where this is true. But, this essay focuses on cases where more than one answer is possible.

Importantly, halakha has deep doctrines of indeterminacy in ritual law. Broadly speaking, Jewish law considers minority opinions that are not proven wrong as possibly correct. Thus, they may be relied on in a time of need. In fact, even opinions of just one significant authority can be relied on in cases of urgent need.[2] This principle impacts the role of the decisor as follows: Sometimes one is asked a question regarding a matter for which one does not have a firm and clear view of the halakha, nor can one find a single correct answer that is supported by both custom and practice. I will give an example of such a case later in this article. Nevertheless, the decisor is called upon to figure out which approach is the correct one for the matter at hand.[3] Based on my conversations with others, this question—how many disputes are still open and how much discretion does an individual decisor have—is the single most important point of disparity among authorities who answer questions of halakha.[4]

Some claim that most legal disputes in Jewish law (maybe all, at least in theory) can be resolved internally and textually by reference to certain talmudic logical rules that are universally accepted within traditional Jewish jurisprudence. While this is not the case (this group of decisors concedes) for secondary matters of ritual custom or theology, it is for matters of functional Jewish law. Indeed, for this school of decisors, properly applied logic will resolve almost all the disputes of previous generations. Furthermore, many decisors have a deep trust of their own logic and comfortably consider disputes closed because they have thought about a matter in detail and have determined what they consider to be the correct answer.

A second, separate school of thought reaches essentially the same outcome—nearly all disputes can be conclusively resolved—but does so from a very different starting point. These decisors posit that almost no dispute can actually be resolved by reference to first tier rules of Jewish jurisprudence (unlike school one, above), since—at least among giants of Jewish law—it is exceedingly rare that one view is demonstrably incorrect. Instead, they resolve disputes by resorting to binding second tier rules which resolve disputes, rules such as "follow the current majority" or "be strict on matters of biblical law." Ashkenazim, for instance, follow Rabbi Moshe Isserless (Rama), and Orthodox Jews in America accept the authority of Rabbi Moshe Feinstein. All such rules are to be followed. Disputes are thus functionally closed by reference to the customs around us.

A third school of thought argues that the two approaches outlined above are functionally correct with respect to how people and communities ought to function on a regular basis. They give power to custom (*minhag*) both in ritual, commercial, and family law matters, since in the real world, law needs consistency of outcomes and certainty of results. These rules are thus binding because they are followed and not the other way around. This is the way (argues this school of thought) that Jewish legal theory has evolved over time, and it allows (if you will excuse me for saying this) Jewish law to be considered a legal system rather than merely a personal ethical system. Yet what this means practically is that if you live in a place with a well-established ritual practice, that practice is the halakha for all intents and purposes, even as one can agree in theory that it is no better than a different outcome and is no more correct in God's eyes.

The final school of thought rejects all of this, both as a matter of legal theory and also as a matter of actual practice, at least in a time of need, certainly for personal questions that impact no one else.[5] Instead they construct Jewish law as a spectrum of opinions from the ideal view to keep to one that is minimally acceptable in time of urgent need. This school of thought proposes three basic ideas. First, very few opinions are ever truly and completely rejected as definitively wrong.[6] Second, in a time of need, any opinion can be relied on unless it is one of those opinions that is distinctly considered wrong. Third, this matter is left to the judgment of individual Jewish law authorities who may decide for themselves and their followers what the rules ought to be, both as an ideal and in a time of need. There is no formal hierarchy at all. In this model, Jewish law is much more open, and the customs mentioned in school three above are social and not jurisprudential.[7]

As I have noted elsewhere,[8] I am inclined to think that the dominant model of Jewish ritual law follows the final school of thought because any halakhic authority who confronts a real-world problem of ritual law has many more choices and options than we might give them credit for at first glance.

Allow me to give you a simple illustrative example (which I will return to at the end of this paper). How many days of Yom Tov should a tourist from the Diaspora observe when in Israel? Is the answer one (as they do in Israel) or two (as they do in America)? This matter was the focal point of a dispute between Rabbi Yosef Karo and Rabbi Tzvi Ashkenazi many centuries ago. Rabbi Karo (d. 1575) adopts the view that a tourist in Israel keeps two days, as this is a matter of personal practice, and argues that, so long as one is a resident of the Diaspora, wherever one is—even in Israel—one keeps two days. Rabbi Ashkenazi (d. 1718) maintains the opposite, that one who is in Israel only observes one day of Yom Tov. To him, this is not a personal custom, but a geographical one—and everyone in Israel keeps one day only. Most classical Jewish law authorities adopt the view of Rabbi Karo, and only a minority adopt the view of Rabbi Ashkenazi. So, how do different decisors resolve this matter for their communities?

1. Some examine the talmudic and other sources and determine the correct answer on their own, using the logical and textual tools of rabbinics.

2. Some argue that this matter is settled by the rulings of the previous generations, and one should follow the majority view.

3. Some argue that this matter is in doubt, and one should follow the view of Rabbi Karo and be strict for Rabbi Ashkenazi, and some reverse this and adopt the view of Rabbi Ashkenazi while being strict for Rabbi Karo. Some treat this as a matter of full doubt and are strict for both views.

4. Some rule that this matter is in doubt, and one should follow the custom of the community they are in and the rabbi(s) who established those rules.[9]

Of course, one should not be surprised to discover that some think it is best to follow Rabbi Karo, but posit that, in a time of need, one can follow Rabbi Ashkenazi.[10]

This example offers an important takeaway: Jewish law is a somewhat flexible legal system vis-a-vis ritual matters. While there might be an ideal answer to a question, there are also less-than-ideal answers that are also viable. Practitioners of Jewish law know this, and that is why different communities of followers of halakha exist and one of the reasons decisors differ from each other. Anyone who has learned any substantive area of halakha knows that cases of urgent need are treated differently. The idea that in some ideal world all authorities of halakha would answer all questions identically for all people misses exactly that one person's circumstances are not the same as another's, and one community's situation is not identical to another's.

What this means is that in the "real world" of answering questions from people—rather than in writing a "Code of Jewish Law for all times and all places" like the Rambam's *Mishneh Torah*—one learns to listen closely to the person asking the question. Placing the question in context and in a situation is important, and recognizing the range of options that are present is crucial. On the other hand, there are questions that presuppose a value system that is outside the pale of Torah Judaism—one that reflects a set of values that are rejected by the overwhelming consensus of halakhic decisions of the centuries. Determining what is the range of viable halakhic opinions helps one understand both what is in and what is outside the range of Torah values.

The Next Step: Objectively Correct versus Subjectively Right

The next set of questions that a decisor always asks concerns a common set of problems dealing with responses to the decisor's decision. These questions are:

1. How will the person who asks the question respond to the answer? Is this another consequence that needs to be considered?
2. How will the community respond to the question and the answer?

Another equally important question—one unstated (and virtually undiscussed) in the halakhic literature—is, "What gives a decisor the *right* to consider people's (and community's) responses to the decisor's decisions—decisions based on the truth as the decisor sees it?"

I suspect that the ability of a decisor to ask these questions is also unique to halakha as a legal system.[11] Sometimes, decisors decline to answer questions and affirmatively refer questioners to someone who will provide them with the lenient answer that the questioner needed but that the original answerer was unwilling to provide. This "punting" is a way that a *posek* deals with pressure of "I need this answer" from a questioner, even where the decisor thinks that the answer they want is not the correct answer, but nevertheless recognizes the real need for the questioner. The *posek* therefore sends the question to another authoritative decisor who is prepared to rule as the questioner senses they need.

Consider, for example, the practice of the late great Jewish law authority, Rabbi Shlomo Zalman Auerbach, with regard to a subset of questions relating to aborting fetuses with certain types of defects.[12] He would refer such people to Rabbi Eliezer Waldenberg [*Tzitiz Eliezer*] who permitted those abortions, although Rabbi Auerbach himself thought that such abortions were prohibited and perhaps even tantamount to murder. Nevertheless, he recognized that the consequences of his answer would be difficult or bad for this individual person, and, since there was a legitimate view found among recognized halakhic decisors, he would send such questions to those recognized decisors.

His practice teaches a vital point about issuing decisions [*pesak*]: One decisor can (but need not) send a person to a decisor who can provide a person with the answer they need. But what right does one *posek* have to send the case to a different *posek*?

The justification is revealing about the role and practice of Jewish law decisors generally. First and most importantly, it demonstrates that these authorities are meant to safeguard the community; they consider the impact of their answers on the people around them. Second, it demonstrates that the decisor is aware that there are clearly cases where not seeking the objectively right answer is proper. Rather, the decisor may (and perhaps should) find the answer that fits the needs of the questioner and their community as a valid expression of Jewish law.[13]

There are at least six different approaches to "punting" that are worth noting, each of which points to a different aspect of the decisor's role. The first is derived from a talmudic story in *Hullin* 99b:

> When people would come before Rabbi Ami to ask about the halakha of a thigh that was cooked with the sciatic nerve inside, he would send them before Rabbi Yitzhak ben Halov, who would rule leniently about this issue and say that is was permitted, in the name of Rabbi Yehoshua ben Levi. Rabbi Ami himself did not hold accordingly, but he did not wish to rule stringently for others. And the halakha is that sciatic nerves do not impart flavor at all. (Translation from Sefaria.)

This story suggests the following guidance on "punting" (similar to what was discussed above): One decisor many decline to answer a question and send it to another of equal status and authority. This is permitted even when the first is sure that the second view is wrong. Now, *why* Rabbi Ami did this, and how he was justified in doing so, are good questions and not explained by the Talmud. Rashi implies that Rabbi Ami was justified in punting simply because the questioner was expecting a more liberal view. In other words, according to Rashi, decisors can generally punt matters where they do not want to impose their stricter standards on those seeking more liberal answers.

A second approach to punting can be construed as an example of "soft pluralism." In other words, Jewish law recognizes many questions has three (or more) answers: the right one, the wrong one, and the one (or ones) that one can accept in a time of need. The Talmud sometimes even acknowledges that in times of urgent need, one can accept *any* view as legitimate so long as it is plausible.[14] Halakhic authorities frequently concede that views other than their own (even as they think their view is most correct) are plausible, and in a time of need, these other views can

be accepted as correct. In this model, halakhic authorities decide what views besides their own are subjectively right even if they are not objectively correct.[15]

There is a corollary to this notion. A decisor may consider another's subjectively right decision as completely wrong, and yet still be comfortable in allowing the questioner to rely on that decision because it is based on the holdings of a scholar or rabbi who himself is reliable (*bar samcha*). I would go even further and say that although this second view is incomprehensibly wrong to the first decisor, he may direct people to that second view simply because the one who is articulating it is a respected authority of Jewish law.[16]

A third way of conceptualizing punting, and of understanding the talmudic source above, is to maintain that the only time an authority may refer a questioner to another authority is when the first truly believes the second authority's view of Jewish law is correct. This issue, rather, is merely that his own view is stricter than the minimal legal standard. That is a possible reading of the above passage, particularly if one understands that the normative Jewish law codified in the last line of the page rejects the view of Rabbi Ami.[17]

A fourth view—taken from the talmudic recounting in *Hullin* 48a—seems to be that that one can "punt" a questioner to another decisor only when he is uncertain as to what the correct legal ruling ought to be. That Talmudic source states:

> The Gemara relates that **Rabbi Yitzhak bar Yosef was walking after** Rabbi **Yirmeya in the butchers' market. He saw these** lungs **that were** full of **cysts,** and he wished to determine the halakha with regard to them. **He said to** Rabbi Yirmeya: **Doesn't** the **Master desire a piece of meat?** If so, meat from those animals is for sale. Rabbi Yirmeya, not wanting to issue a ruling with regard to the meat, **said to him: I have no money.** Rabbi Yitzhak bar Yosef **said to him: I will** buy them for you on **credit.** Rabbi Yirmeya realized that he could not avoid issuing a ruling, so **he said to him: What can** I do **for you? As when** people **came before Rabbi Yohanan** with such lungs, **he** would **send them before Rabbi Yehuda, son of Rabbi Shimon, who** would **instruct** them **in** such cases **in the name of Rabbi Elazar, son of** Rabbi **Shimon, to permit** the meat for consumption. **But** Rabbi Yohanan **himself does not hold accordingly and** does not permit the meat. I practice stringency in accordance with his opinion. (Translation from Sefaria.)

The narrative here seems to limit referrals to cases of uncertainty.[18]

A fifth view involves hierarchical authority. The work *Vealayhu Lo Yuval*, which is about questions asked to the great Rabbi Shlomo Zalman Auerbach, recounts the following incident:[19]

> **Sending the Questioner to the Chief Rabbis:** Rabbi Ephraim Greenfeld told me that a relative of his suffered a brain hemorrhage. The doctors were certain that he had no chance of survival and asked the family's permission to donate his organs to other patients. Rabbi Ephraim spoke with his relatives and knew that whatever ruling the Rabbi [Shlomo Zalman Auerbach] would give on this matter would be accepted by them, so he approached with a religious doctor from the hospital during the late-night hours to ask Rabbi Auerbach what to do. Rabbi Auerbach told them: In my opinion, it is forbidden to take organs from him to save other patients, but I am aware that the Chief Rabbis of Israel [Rabbi Avraham Elkana Kahana Shapira and the Rishon LeZion Rabbi Mordechai Eliyahu] permit in such a situation to take organs to save other patients—you should go and ask them!

It is possible to read this story as permitting only referrals to the "chief rabbis" or maybe only to decisors viewed by oneself as superior, and even so only on communal questions.[20]

A final view on punting, this anecdote notwithstanding, a close read of the article "*Mah Enosh*: Reflections on the Relation between Judaism and Humanism" by Rabbi Aharon Lichtenstein inclines one to think that maybe this phenomenon is simply another example of Jewish law's desire to accommodate the humanity of people, without a deep specific unique jurisprudential basis. In other words, "punting" reflects the desire of Jewish law to allow people to function in a time of need, with a variety of tools, not each of which is fully individually jurisprudentially based, but more reflective of human necessity and the desire of halakha to function than any other idea.[21]

Whatever the reason is, there is no doubt that sometimes decisors refer questions to other authorities, and that this is part of the job. It is consistent with how authorities of Jewish law help people find the right answer for a person without personally saying things that the decisor thinks are mistaken. In this process, the decisor considers how the questioner would respond to their answer, as well as how the community will understand and respond.[22]

A Final Consideration and a Caveat: Will the Decision Be Properly Understood?

There are two final, but no less important, factors that a decisor must consider before offering their legal decision:

1. Are there reasons to answer this question publicly to bring this discussion to broader attention?
2. Will people misunderstand the answer to permit something that the decisor does not intend to permit, or else prohibit something that the decisor does not intend to prohibit?

Both questions are more sociological than legal. Consider, for instance, the following illustrative example: Over the last decade, decisors have seen increasingly more questions on what role a person who is in a same-sex relationship (SSR) can play in an Orthodox community. At some point, these questions need to be addressed not on an ad-hoc basis, but in a more systemic way. This is true for three reasons. First, reasoned written material allows people to understand the logic of the decision-maker and thereby the Jewish legal process. Second, written material creates communal and general expectations so that people are not put in a situation in which they are unaware of what is expected of them as a matter of Jewish law (whether they follow the law or not) and thereby made to be unexpectedly embarrassed. Third, written discussion allows many authorities to see what others are doing and modify their public (and private) expectations considering the norms of other communities.

Yet, in writing decisions down, there is always the concern of misunderstanding. Every authority worries that rulings will be misunderstood beyond their proper parameters and will be taken to permit something that the writer did not intend to permit or to prohibit something that they did not intend to prohibit. This fear of misunderstanding—or sometimes understanding all too well what is on the authority's mind, but what they are (in fact) unwilling to permit—is critically important in understanding when one chooses to write an answer (*teshuva*) or an article, or, why a decisor might issue a resolution with no firm reason that clearly addresses the situation, thus leaving the explanation of "why" somewhat unresolved. A desire to contain, or better still, avoid misunderstandings will often dictate much of what one writes and in what language one writes

and even in what style one chooses to speak. Writing about SSRs is an excellent example of that. Sometimes one wants to convey a complex idea, namely, that while this conduct is a violation of Jewish law, one does not want to see these violators treated any differently than any other violators of comparable matters of Jewish law.[23]

Let me add an important caveat: We are discussing in this article the pressures on the decisor who is answering question, and not on the questioner, a topic certainly worthy of another article. Jewish law has a clear rule prohibiting a petitioner from asking the same question to more than one authority; once a person directly asks a question to an authority and the question is answered, the questioner is bound by the answer. The authority can punt, but the questioner cannot. The ability to choose which opinion is the correct one is left to the person who answers the question and not to the person who asks it. The questioner has one—and only one—enormous decision: to whom should they ask the question. Indeed, to a great extent, this is the most fundamental question all Jews have—one that shapes the Jewish law as they actually practice it: What community should they join, and to whom should they direct questions of Jewish law and ethics?[24]

Six Examples that Highlight the Complexities Faced by Authorities

Let us move away from the abstract toward six concrete examples that provide insight into the complexities decisors regularly face.[25]

1. End of Shabbat

The first example deals with an oft-asked question: When is the earliest time one can end Shabbat? I was recently asked by a congregational rabbi, on behalf of a congregant in a dire financial-legal situation, when was the earliest time they could sign a document on a Saturday night to avoid a significant financial problem. Sunset in New York City is at 4:28 pm on December 9, and, for reasons that are beyond the scope of this paragraph, the congregant needed to personally sign a document in front of a judge before 5:00 pm on Saturday. The person worshipped in a Chabad synagogue, which ends Shabbat at 5:15, 45 minutes after sunset. Jewish law here is far from clear, with opinions permitting Shabbat violations 13.5 minutes (relative) a *mil* after sunset, as early as 4:46 pm (Gra), and some

being even more strict, arguing that Shabbat ends at 5:57 (Rabbenu Tam).[26] Yet, it is also clear that the normative custom in America does not follow either the minimalist understanding of the Gra, or the maximalist understand of Rabbenu Tam. Nearly all synagogues end Shabbat no earlier than 35 minutes after sunset and no later than 50 or 72 minutes after sunset. Chabad synagogues uniformly ended Shabbat 45 minutes after sunset, as is their custom.[27] This person needed to be in a judge's chambers to sign no later than 32 minute before sunset and also needed some time to prepare to do so. Given the indeterminacy of the law, the fact that most American communities adopt the view of the Gra, treating additional waiting as fulfilling the special mitzvah of adding additional time for Shabbat, and that this question could be answered without setting any general policy, I told the rabbi to tell his congregant that he could walk to the location in question with his identification in hand (in a place where there was an *eruv*) and sign the form any time after 4:51 pm.[28]

2. SSM Kohen Performing the Priestly Blessing

Over the past few years, I have been occasionally asked about whether a man who is in a same-sex marriage (SSM) and is a *kohen* can engage in the priestly blessing (*duchen*). Although at first glance one might intuit that this is prohibited, actually the law is reasonable clear that—anomalously and unusually for sexual sins by *kohanim*—same-sex relations are not the type of sexual sin that prevent a *kohen* from blessing the people. This is in accordance with the *Mishnah Berurah, Arukh haShulhan, Kaf haHaim*, and *Yalkut Yosef*, and is unlike many other serious sexual sins. The exact reason for this is set out in the note below.[29] Yet, as Rabbi Feinstein notes in his answer on whether a *kohen* who violates Shabbat can engage in the priestly blessing (where there is some basis, although far from controlling, to prohibit such), there is an argument that a synagogue rabbi can ask *kohanim* to leave the sanctuary and not engage in the blessing to protect other values.[30] For a long time, I answered similarly. However, after engaging different questions over time, I set out a few months ago to lay out my views in an article, so that (1) leniently permitting a *kohen* in a SSM to engage in the priestly blessing should not be misunderstood as lenient in other areas related to SSRs or other sexual sins by *kohanim*; (2) these types of questions are relatively recent and community-wide guidance is needed; and (3) I thought it was good to combat the sense that halakha was

always unduly strict in this area which was preventing people from doing a mitzvah.

3. *Second Day Yom Tov in Israel*

A regular question asked of almost all American rabbis—including me—involves what to do as a tourist in Israel during a holy day. Should one observe one day of the holy day, two days, or some combination? Many views abound. I personally try very hard to follow the view of Rabbi Aharon Lichtenstein and observe the second day as a stricture (*lehumra*); I do not observe the second day of Yom Tov prayer and ritual when in Israel, though I abstain from work in general and from what would be biblically prohibited work on the first day.[31] Even my own family thinks my view is difficult to implement and hard to understand. Yet, after due consideration, it is my view that correctly balances the views of the Rabbis Karo and Ashkenazi. Nonetheless, when people who are not uniquely my students ask me this question, I tend to send them to one of my many friends who are Chabad rabbis—some of whom even were my students—who tell them to observe only one day, since that is the common custom in fact in our community. I recognize that what I think the best legal decision might be is viewed by many as burdensome, complex, and intellectually indeterminant. Sometimes, one does not have to share one's view, and one can send people to decisors that provide them with answers that resonate with their expectations and allow them to function.

4. *Error in the Creation of Marriage*

Many years ago, I wrote an article on the rare situation in which a woman can leave her marriage without a divorce (and yet where her husband is still alive) entitled "Error in the Creation of Jewish Marriages: Under what Circumstances Can Error in the Creation of a Marriage Void the Marriage without Requiring a *Get* according to halakha."[32] The piece explains Rabbi Moshe Feinstein's views on this matter. For many years, I was privileged to have assisted Rabbi Gedalia Dov Schwartz *zt"l* on some matters in which a woman was permitted to remarry without a religious divorce decree (*get*) based on an error in the creation of the marriage, and I have been involved in other such matters since his passing. Such cases are rare and complex, and one easily worries that they will be subject to abuse by some in our community who are sincerely seeking to solve very sad

agunah cases (cases where one spouse has left but the other cannot remarry with a religious divorce), yet lack the firm legal foundation to validly argue for a marriage to be void in its creation.[33] In addition, determinations of this type are very public and are subject to review by many great authorities. While my view is that cases like these are worthy of ending without a religious divorce decree, others do not agree, and the child that results might be labeled a *mamzer*—born of a forbidden union—by their community. Based on all these factors, I only issue decision letters when they are endorsed by great Jewish law authorities, and I abstain from merely voicing my personal opinions unsupported by a leading scholar. I do work exceedingly hard to find giants of Jewish law to agree in cases as needed. In some areas of legal decision-making, consensus is needed, and idiosyncratic views are unwise for a community.

5. *Tripartite Prenuptial Agreement*

The same can be said for the tripartite prenuptial agreement I authored many years ago. Solutions to the *agunah* problems abound. However, we all recognize that "solutions" that are not accepted by the Orthodox community are functionally ineffective, since the woman will think she is free of her Jewish marriage, but the community will not. This is a bad place to be in; thinking oneself as single and yet being married is unwise, and so too is thinking of oneself as single when most Jewish law authorities deny it. Even if some rabbis think an individual is single, it might be just as bad a status. Thus, in terms of my decision-making, I am swayed by the force of the question, "How will the person asking the question respond to the answer? Is there another consequence that one must consider?" This drives me to conclude that until a critical mass of significant legal authorities endorses this tripartite prenuptial agreement, it ought to remain something I think is correct, but not something I instruct people to use. Even so, I am aware of the fact that many, many couples in Israel and America actually are using this document,[34] and that it has many advantages in cases of spousal death (especially *halitza* procedures), men in a permanent vegetative state,[35] and in terms of its independence from secular law. So, I share the document with the community, uncertain of the legal consequences and without instructing people to use it or not.

6. Hair Covering

Our final example is, at some level, the one that is most complex. Many years ago, I wrote an article in *Tradition* explaining the legal basis for married women to not cover their hair, and it provided what I considered then (and my sense that this is correct has only increased) an excellent justification for conduct, without endorsing it as a legal determination (*limud zekhut*).[36] My abstract view is that Jewish law here is indeterminate—there are numerous pre-modern decisors who rule that in a society where modest women do not cover their hair, Jewish law does not require it—and thus a person who comes from a family where married women do not cover their hair need not start. I am also aware that none of the great legal decisors with whom I regularly consult actually agrees with my view, and the same is true for nearly all authorities of the last century. Furthermore, many women view this matter as a critical one; some do not want to be part of a community in which women think they need to cover their hair, and others have the exact opposite view. Furthermore, I worry that people will understand any permissive ruling with regard to hair to apply to many other situations of modesty, a uniquely problematic issue in an immodest society. Based on these factors, I wrote the article only as a thought exercise.

Nevertheless, I regularly get asked questions from women about hair covering. I have three basic approaches to these questions. First, I try my hardest to avoid directly answering them. I say things like, "In the article I explain the basis for not covering," or "Read the article," or "The Ben Ish Hai permits women not to cover their hair when modest women generally do not," or "There certainly are Jewish law authorities who think married women need not cover their hair when modest women do not," and other such comments that do not directly speak in my own name. Second, I appreciate the public complexity associated with these questions—being liberal on issues of modesty in immodest times is hard. Third, I do not answer these questions in writing having already written once.

But, truth be told, sometimes rules are meant to be broken—I was recently called by a great Jewish law authority in Brooklyn who told me "Mrs. X will be calling you shortly to speak with you about hair covering, and you should tell her that she does not have to cover her hair." So, I asked this great Jewish law authority, "If that is the right answer to this question,

why don't you tell, after all, you are a Torah giant!" He responded, "I am Rabbi Ami and you are Rabbi Yitzhak ben Halov in this question." [See *Hullin* 99b, cited above at page 13.] So, I did as I was told and directed this woman that she need not continue to cover her hair.

Conclusions

The process of answering Jewish legal questions starts with knowing the answer, but it does not end there. It moves from there to knowing what other answers are possible and who provides those other answers. It then moves on to formulating answers in a way that works for the community that one is serving, including sending questions to others. Nuance, complexity, and sensitivity to the community are part of the tools used by those who answer questions of Jewish law.

NOTES

1. Thank you to Rabbi Hayyim Angel, editor of *Conversations*, for inviting me to prepare this article. His posing of the thoughtful question to me of "I thought it would be a very valuable contribution for you to reflect on what it is like to be a *posek* [one who answers questions of Jewish Law], the pressures you face to conform, other communal issues that you think the public should be aware of, etc. Given your expertise and integrity to stand up for your own principles, I think it would be a very worthwhile perspective to bring to the public" framed this article. I attempt to answer the questions he poses, aware of my limitations. Thank you as well to Rabbi Reuven Travis for his editorial help.

   In this article, I do not discuss the pressures—actually very different—as a *dayan* in commercial matters where one is adjudicating between two parties or pressures faced by *dayanim* generally in many matters. The pressures in those situations are different, and much more governed by technical halakha, as found in *Shulhan Arukh Hoshen Mishpat* 9, 10, 12 25 and other places.
2. See, for example, *Encyclopedia Talmudit*, *Hefsed Merubeh* 10:36 around notes 44–50.
3. I am aware of Rav Aharon Lichtenstein's insightful presentation of the difference between a rule [*pesak*] and a ruling [*pseika*], as explained in "The Human and Social Factor in Halakha" (*Tradition* 36:1 1–25 (2002). If Rav Aharon (truly one of the greatest minds our community has ever produced)

is arguing that *pesak* [in the sense of writing a rule] is the idealized form of Jewish law, and *pseika* is the practical application of these idealized rules to the reality that we live in, then I think almost all halakhic authorities are engaging in *pseika* when they answer questions, and this distinction is not valuable, even as it is true. On the other hand, if Rav Aharon means that halakha in less-than-ideal situations is *pseika* and halakha in a perfect word is *pesak*, then I think this distinction is over-stated in the real world. Even the real world of talmudic, medieval, and early pre-modern authorities, these sages considered the hard and complex nature of reality in which they lived when they wrote rules. Therefore, all is just *pseika*, other than just a few works of idealized Jewish law, like the *Mishneh Torah*. For example, is instructing someone to use a *heter iska* [pro-forma document than permits charging interest] an act of *pesak* or *pseika*? Is instructing a woman that birth control is proper in any particular situation *pesak* or *pseika*? Is permitting carrying a gun on Shabbat *pesak* or *pseika*? Sadly enough, we live in a less than ideal world—where it does not rain gold coins, raising children is complex, and antisemitism abounds—so many challenges are present. Let me add that there is palpable tension between the above article and another article of Rav Aharon on halakhic process entitled "*Mah Enosh*," to be discussed later.

4. To be clear, there are times when one might have a clear view of the halakha or can answer the question based on both custom and practice but declines to do so. Later in this article, I will discuss "punting"—the Jewish law phenomenon in which a halakhic authority is certain what the answer is, and yet will decline to answer the question because it provides the questioner an answer that they do not want in a case that is important to them. Needless to say, this phenomenon requires that there be an authentic *posek* who is comfortable providing the answer the party is seeking.
5. This is in contrast to question where even though this is actually a personal ritual matter as a matter of fact, it is a communal matter since the community actually adjudicates by its conduct whether the result is accepted. For example, whether a woman needs a Jewish divorce or not is a personal ritual question only she may ask about herself—but a determination by a rabbi that she does not is, in fact, second guessed by anyone who she wishes to marry.
6. When I say "wrong" in this context, I mean that the view cannot be relied on in any circumstances, even though of course the view is well within the umbrella of Torah, and one fulfills the mitzvah of Torah study by studying them. The views of Beit Shammai in the Mishnah are one such as example, as the talmudic rabbis themselves note.
7. The contrast between Jewish law and American law here is complete: Minority opinions in American law are just for study, but are of no legal value at all, whereas in Jewish law, most minority opinions are validly used in situations of need.
8. I do not discuss this issue here at great length, but I have a few books that do discuss this issue in various forms. See *Setting the Table: An Introduction to the*

Jurisprudence of Rabbi Yechiel Mikhel Epstein's Arukh haShulhan, Academic Studies Press (2021) (co-author: Shlomo Pill) and *The Codification of Jewish Law and an Introduction to the Jurisprudence of the Mishna Berura*, Brighton, Mass.: Academic Studies Press (2013). (co-author: Ira Bedzow) and *Innovation in Jewish Law: A Case Study of Chiddush in Havineinu Jerusalem*, Urim Publications (2010). The reality of legal indeterminacy helps explain why works of Jewish Jurisprudence are of less common in Jewish law, since if legal indeterminacy governs, jurisprudence is less significant.

9. See Rabbi Joseph Karo, *Avkot Rochel* 26 and Rabbi Tzvi Ashkenazi, *Chachmat Tzvi* 167. For more on this, see the excellent discussion by my friend and former co-author Rabbi Howard Jachter, in Gray Matter I at 217–224 at https://www.sefaria.org.il/Gray_Matter_I%2C_Laws_of_Holidays%2C_The Second_Day_of_Yom_Tov_for_Visitors_to_Israel.10?lang=he and Rabbi Dr. David Horowitz, "Visitors in Israel and Yom Tov Sheni," JHCS 6:79–92 (1983) at https://www.yutorah.org/lectures/735671/ . Of course, within the views that compromise between the two views there is much nuance on issues.
10. See for example Rabbi Hershel Schachter, "Regarding the Second Day Yom Tov for Visitors in Eretz Yisroel" on Torahweb.org.
11. American law and the common law from which it descends certainly does not allow this question to be asked. See Code of Conduct for United States Judges, Canon 3.
12. See for example "Abortion in halakha" https://www.yutorah.org/lectures/lecture.cfm/1021843/rabbi-hershel-schachter/abortion-in-halakha/ at minute 22:30 to 23:10 for Rabbi Hershel Schachter recounting such. If you listen closely, you see that Rabbi Auerbach recognized that the consequences of his answer for this person was bad for this person, and since there was a different legitimate view found among recognized *posekim*, he would send such questions to that recognized halakhic authority. I was told that Rabbi Aharon Lichtenstein also had this approach to abortion as I note in "What Does Jewish Law Think American Abortion Law Ought to Be?" at note 16. I was told that it was the practice of the Lubavitcher Rebbe with regard to some questions related to Jewish law and adoption to instruct people to ask Rabbi Soloveitchik; See R. Tzvi Schachter, *Penina HaRav*, page 268, which notes one such story.
13. It is clear that there are some halakhic authorities who did not think this correct. For example, the great Rabbi Moshe Feinstein in *Iggrot Moshe* OC 5:20:16 prohibits declining to answer questions when both the facts and the law are clear to the person who is being asked. He states, "But, when one is asked on a clearly defined set of facts what he thinks the Jewish law is, it is obvious that he must respond as is proper for this person and it is prohibited to decline to answer and send them to other experts . . .". Furthermore, this idea is found rather directly and unmistakably in the penultimate paragraph of his introduction to volume 1 of the same work as well. There are two possible ways to explain Rav Moshe: One is that if he felt that if a lenien-

cy was needed, he would find it and give it himself, and the second that a Jewish law authority when asked is called upon to answer and not punt even if this authority is stricter than others. Furthermore, it seems clear that Rabbi Feinstein felt this was the rule even if others around one was more eminent authorities. See *Iggrot Moshe* YD 1:101. Let me add as support to this view, and maybe as an explanation of what this dispute is about, that the core question might be whether the formulation found in *Shulhan Arukh* YD 242:14, which notes that "Any scholar who is eligible to rule and does not rule, is depriving people of Torah and putting a stumbling block in front of the masses" is rule of law, or a rule of reason, or simply ethical advice, or limited to the situations where the scholar solves the problem. Rabbi Feinstein understands this as a rule of law, and others as a practical application to help people.

14. In the words of the Talmud "It is proper to accept the rule of Rabbi X in a time of need."
15. See, for example, *Ktav Sofer* YD 77, who in parts of the teshuva formulates the rule this way.
16. In the above *Ktav Sofer*, other parts of the same teshuva can be read this way.
17. This seems to be the view of Rama. See YD 228:21 in the name of some say and Rama OC 472:7 and Responsa of Rashba 3:304 and others. This is part of the discussion of why—in cases of urgent economic need—we are lenient in ritual matters. See also Pri Megadim, *Formulation of the Question* (first order).
18. That seems to be the view supported by the above *Iggrot Moshe* in OC 5:20:16, which denies the right to send a question to another who will provide a different answer when the initial person asked is sure of the answer.
19. See Nachum Stepansky, *Ve'alayhu Lo Yuval*: The Insights and Practices of Rabbi Shlomo Zalman Auerbach, YD 58 at page 91. A thoughtful reader of this article suggested that in cases in which the person will do the sin anyway, it is better to find them some authority who will permit this action, since it is better pastorally that a person not view themselves as a sinner, and this is a rationale for punting, as well.
20. The next story (59) in this work involves a similar referral, but on a communal matter to the Chief Rabbi. It seems to this writer unlikely that Rabbi Auerbach viewed himself as intellectually subordinate to either of the Chief Rabbis mentioned although one never knows for certain. At some level, the question posed is whether this is a punt or a lateral, or a forward pass, to continue the football metaphor.
21. See Rabbi Aharon Lichtenstein "*Mah Enosh*: Reflections on the Relation between Judaism and Humanism" The *Torah Umaddah Journal* 14:1–61 (2006/7) also at https://www.etzion.org.il/sites/default/files/2021-01/RAL-Mah%20Enosh-%20Judaism%20and%20Humanism.pdf particularly in section VI, from pages 29 to 42 as well as crucial paragraphs on the bottom of page 43 and the top of page 44.

By contrast,mkehat@gmail.com the principle to be explored presently—that

normative standards may be compromised in straitened circumstances—does concern the clash of human and halakhic factors. It suggests that, within limits, extraneous factors may validly intrude upon halakhic judgments; that, for the *posek* or his respondent, non-normative considerations may properly enter into normative decision. Clearly, however—as regards the respondent, certainly—the consideration of such factors must be, at best, a matter of license. If one may, as a concession to his condition, take certain liberties, these can hardly be elevated into duties. And even if one argues correctly that it is the halakha itself, which has sanctioned these liberties—so that they be rightfully regarded as grounded in principle rather than convenience—it has sanctioned them only as such, as an option of which one may avail himself rather than as an imperative duty. Hence, the humanistic moment implicit in such permissiveness must be regarded as more significant than that reflected in *pikuach. nefesh* or *kevod haBeriyyot*. Whereas they constitute particular halakhic concepts relevant to specific areas of halakha, this principle represents a broad flexibility within the halakhic process generally; and whereas they remain genuinely internal elements, it can, in a very real sense, be construed as an extraneous factor.

Translating this into the idea of one *posek* looking for another *posek* who permits this conduct is not so hard.

22. Not explicitly addressed here, and certainly worthy of more analysis is when should a *posek* decide to provide a simple verbal answer, a simple written answer or write a clear explanation. There is no doubt that the same factors that are considered when deciding to send the question to another are at play in these decisions as well. Of course, the temperament of the *posek* is also important, with some extremely hesitant to write, and other more comfortable.
23. See the examples section for more.
24. Forum shopping, prior to asking a question, is abstractly permitted; indeed, many people make very important religious choices by examining diverse religious communities, considering their views on important matter, and deciding to join one of them, and then asking the rabbi or rabbis of that community their questions, tempered by the important idea found in *Eruvin* 6b that a person who forum shops for both the leniencies of the Shammai school and the leniencies of the Hillel School is called evil. Of course, people can switch communities when they decide that such is proper and change who they ask questions to. What they cannot do, however, is ask a question to a rabbi, be given an answer, decide that this answer does not fit what they want and ask another rabbi the same question, hoping for a better answer. This article does not explain the unique role and responsibility of a *posek* who is the *rebbe muvhak*—a teacher who one has personally committed to following lockstep—since I think such relationships are exceedingly rare among readers of this journal, even if it is more common, perhaps, among Belzer Chassidim. For more on these issues, see *Shulhan Arukh* YD 242 and the elaborate discussion there among the commentators there as well as the comments of Shach on SA CM 25:5.

25. I have slightly changed the facts of each of the cases relevant to preserve the anonymity of the questioners. The details of the questioners hardly matters for the examples.
26. See https://www.myzmanim.com/day.aspx?vars=68949485/12-9-2023/elab ////////////3b6def for a recitation of the various possible halakhic times. For an excellent new book on the various view, see Rabbi Ahron Notis, *The Great Z'manim Debate* (2022). It is worth noting that the above link gives 11 different answers to when Shabbat ends, from 4:45 to 5:56 and notes on the top of the page that Shabbat ends at 5:14 and others wait until 5:41.
27. See https://www.chabad.org/calendar/candlelighting_cdo/aid/6226/locationid/370/locationtype/1/save/1/tdate/12-09-2023/jewish/Shabbat-Candle-Lighting-Times.htm which notes that on December 9, 2023, shabbat ends at 5:13, 45 minutes after sunset in New York.
28. Let me contrast this approach with one that I think is rejected by modern *posekim* nearly universally. Ra'avya (cited by the Ohr Zarua, *Shabbat* 76) limiting the torah prohibition of writing to Hebrew and Greek [neither the language of use in this case]. Although Rama cites this view in SA OC 306:11 as thus only prohibiting writing in the vernacular rabbinically, there is a distinct sense among the *posekim* (as noted by *Mishna Berurah* 306:47 and *Arukh haShulhan* OC 306:21) that this view of the Rama is either wrong or a typo and not to be followed as the view of the Ra'avya is incorrect or alone. If that view were correct, one could have addressed this issue—which would then be a rabbinic prohibition—in many other different ways. Indeed, I have no doubt that if the Ra'avya were alive today and still held to his view, it is possible that I would have sent this questioner to the Ra'avya to have him answer this question. But, in the current generation, I am unaware of any halakhic authority who thinks the Ra'avya is correct.
29. A prepublication version of the article can be found at https://www.broyde-blog.net/uploads/8/0/4/0/80408218/allowing_a_kohein_in_a_same_sex_marriage_to_duchen_for_publication_review_with_ai_appendix_includeded_near_final_for_sharing.pdf and in essence this article highlights that a kohen in a SSR or SSM is not in a prohibited relationship with anyone uniquely prohibited to marry a kohen which is the central test for whether a kohen should be prohibited from the priestly blessing (*duchaning*). Please read the article if you wish.
30. See *Iggrot Moshe* OC 1:33 and this discussion in the above article on pages 13–14.
31. See above for more information. For more background see Rabbi David Brofsky, Yom Tov Sheni. who notes "This position has been adopted by numerous *Posekim*, although they differ as to the extent to which one should observe *Yom Tov Sheni*. While some suggest that one should merely refrain from *melakhot* [work], others recommend that one should fulfill the positive commandments, such as the *mitzvot* of the second *seder*, hearing the *berakhot* [blessings] from another person. R. Soloveitchik and R. Aharon Lichtenstein also rule that one visiting *Eretz Yisrael*, including students who come to study

but intend to return, should refrain from performing *melakhot* [work] on the second day of Yom Tov."

32. https://www.jlaw.com/Articles/KidusheiTaut.html
33. See for example, https://www.torahmusings.com/wp-content/uploads/2005/08/4_2_Broyde.pdf
34. See https://jewishprenup.org/ and see "Tripartite Agreement is Jewish Law" *Techumin* 37:228–240 (2017). For an excellent criticism of this agreement, see the thoughtful recording by Rabbi Yona Reiss at https://www.yutorah.org/sidebar/lecturedata/867961/Response-to-Tripartite-Solution-for-Agunos and his article in Techumin 37:240-247 (2017) entitled "Veim Shlosh Ayla Lo Ye'aseh La." For a more sympathetic review, see Rabbi Mordechai Torczyner, "The Tripartite Agreement: A Prenup Like No Other" at https://www.yutorah.org/sidebar/lecturedata/918245/The-Tripartite-Agreement:-A-Prenup-Like-No-Other.
35. See my article "Plonit v. Ploni: The *Get* from the Man in a Permanent Vegetative State," *Hakirah: The Flatbush Journal of Jewish Law and Thought* 18 (2014), 59–90.
36. See Hair Covering and Jewish Law: Biblical and Objective (Dat Moshe) or Rabbinic and Subjective (Dat Yehudit)? Published in: *Tradition: A Journal of Jewish Thought* 42:3 (Fall 2009), 95–179.