On How to Lean toward Leniency: Halakhic Methodology for the Posek

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One of the very serious questions that faces every posek is what degree of flexibility does he have in determining his decisions, whether in the direction of stringency or that of leniency. Is he inexorably bound by the rulings of the Shulhan Arukh, for example? Or may he take a position which is more stringent than that of the Mehaber ? (It is generally agreed that he may add stringencies to his own private practices.) Conversely, can he take a position of leniency, which would seem to contradict the standard rulings?

We know that there are certain well-defined areas of halakha where the posek is given considerable leeway and personal freedom, and may even be encouraged in the direction of koah de-heteira adif (favoring the position of leniency). For example, the Talmud declared that mi-shum igun akilu Rabbanan, i.e., in the case of agunot one should lean toward a permissive path. So too, bi-khdei hayyav, mi-pnei kevod ha-beriyot, hefsed merubbeh, shaat ha-dehak, mi-shum tzaara, etc. On the other hand, in certain cases one may rule more stringently, in accordance with the principle of lifnim mi-shurat ha-din.

This is obviously a very broad subject, on which there is a very considerable literature, and clearly we cannot even begin to cover it systematically within the framework of this study. However, what we shall attempt to do here, is to limit ourselves to a discussion of some of the halakhic methodologies available to the

posek, who, when he feels the circumstances demand or merit it, wishes to achieve a position of leniency. Indeed this was the main thrust of my two books, Darkah shel Halakha, Jerusalem 2007, and Netivot Pesikah, Jerusalem 2008.

One of the methodologies that may be employed, when there are issues such as severe loss of income, welfare of the community, tragic situations, etc., is to have resort to minority opinions, despite the general normative principle that we follow the majority opinion. This methodology is well-founded in our early sources. Thus the Mishnayot in Eduyot 1:5–6 teach us the following:

5. And why do they [the Masters of the Mishna] record the opinion of the individual against that of the majority, whereas the halakha [ruling] may only be according to the opinion of the majority? That, if a court approves the opinion of the individual, it may rely upon him…
6. R. Yehudah said: If so, why do they record the opinion of the individual against that of the majority when it does not prevail? That, if one shall say [i.e., at a later date], "I have received such a tradition," another may answer, "You did not hear it [except] as the opinion of such a one."

To this we should add the text found in the Tosefta (Eduyot 1:4), where we read:

The halakha is always in accordance with the opinion (divrei) of the majority; the opinion of the individual as opposed to that of the majority is only cited to be rejected. R. Yehudah says: The opinion of the individual as opposed to that of the majority is cited lest there be an hour of need, and they can rely upon it. The Rabbis said: The opinion of the individual as opposed to that of the majority is cited so that when one says "it is pure" and the other says "it is impure," this says "it is impure in accordance with the view of R. Eliezer," they reply to him, "the ruling is in accordance with the tradition of R. Eliezer."

The Mishnah rules that the minority view can be used by a more senior beit din, while the Tosefta says that it can be used to make changes in the law when there is an hour of need.

The Mishna text has been the source of considerable discussion in recent times. See, e.g., Y. Blidstein, Samhut u-Meri be-Hilkhot ha-Rambam: Perush Nirhav le-Hilkhot Mamrim (chapter 1–4), Tel-Aviv 2002, pp. 83–84; K. Albeck, Mavo la-Mishnah, Jerusalem 1999, Nezikin pp. 475–476; Y.M. Epstein, Arukh ha-Shulhan be-Atid, Jerusalem 1969. Hilkhot Mmmrim 5:5; M. Fisch, "Parshanut Dehukah ve-Textim Mehaivim: Ha-Okimta ha-Amorait ve-ha-Filosofiah shel ha-Talmud," and Iyyunim Hadashim be-Filosofiah shel ha-Halakhah, eds. A. Ravitzky, A. Rosenak,

Jerusalem 2008, p. 265; M. Rorth, Orthodoxiah Humanit: Mahshevet ha-Halakhah Shel ha-Rav Professor Eliezer Berkovitz, Tel-Aviv 2013, pp. 41–54, referring to Berkovitz's Ha-Halakha Kohah ve-Tafkidah, Jerusalem 1981 pass., and other of his writings.

However, let us go back to the classical commentators to the Mishnah, such as R. Yisrael Lifschitz, who in his Tiferet Yisrael ad loc., explains:

It should seem to me that he wishes to say that one can rely on the individual opinion at times of need, as it is stated, "R. Shimon is worthy to be relied upon in times of need." (B. Gittin 19a, B. Berakhot 9a, B. Shabbat 45a, B. Nidah 6a, 9b)

Similarly, R. Shelomoh ha-Adani, in his Melekhet Shelomoh ad loc., writes:

For were it not for the opinion of the individual it would be impossible to annul the opinion of the majority, even in times of need…. But if there was a difference of opinion on a certain issue, then a different court, even of lesser status, can rely on the minority view….

He adds further proof for this assertion from a statement by R. Saadiah Gaon to B. Ketubot 93a, (cited in Otzar ha-Geonim, by B. M. Lewin, Jerusalem 1939, p. 310 no.721). There is a difference of opinion as to whether this methodology applies also to biblical laws or merely to rulings of rabbinic status, the Siftei Cohen, Shah, (Shabbetai ben Meir ha-Cohen, 1621–1661) (to Yoreh Deah 242 ad fin.) taking the former position, and the Turei Zahav by R. David ha-Levi (1586–1667) (Yoreh Deah 293) the latter.

R. Menasheh of Ilya (Lithuania 1767–1831) clarified the Eduyot statement as follows:

We thus learn that a court may rely on an individual and, at its discretion, change a law from the one that had bound their ancestors…. (Alfei Menasheh vol.1, Jerusalem 1979, p. 44)

This, too, is the view of the Raavad (as against that of the Rambam), and also of Tosafot to Megilah 5b, as explicated by R. Mosheh Tzvi Neriah, in his article "Yahid ve-Rabim," Or Hamizrah VIII, 1961, (3/33), pp. 9–11.

Indeed, it could well be that both dissenting views are actually correct. So we read in B. Eruvin 13b and B. Gittin 6b that:

R. Abba stated in the name of Samuel: For three years there was a dispute between Beit Shamai and Beit Hillel, with these claiming "the halakha is as we

say." Then a heavenly voice declared, "These and these are the words of the living God, but the halakha follows the rulings of Beit Hillel."

And see Ritba to Eruvin ibid. ed. M. Goldstein Jerusalem 1974, p. 107, who writes as follows:

They asked the Rabbis of France, of blessed memory: How is it possible that both [opinions] be the words of the Living God, when they forbid and they permit? And they replied, When Moses went up to the heavens to receive the Torah, they [the angels] showed him for every single detail 49 facets to forbid and 49 facets to permit. And he questioned the Holy One blessed be He concerning this. And He said that it would be given to the Sages of Israel in each generation [to make a determination], and that determination would be according to their ruling. And this is correct according to the homily, but in truth there is a secret [explanation], (i.e., an esoteric one).

(See Moshe Halbertal's analysis in People of the Book: Canon, Meaning, and Authority, Cambridge Mass. London 1997, pp. 63–72, on what he calls "The Constitutive View").

Compare this to Midrash Psalms 12:4, ed. Buber, pp. 107–108:

Said R. Yannai: The Torah was not given "cut and dried" (hatikhin), but for each word that God gave to Moses He gave 49 facets for [declaring] purity and 49 for impurity. Said Moses before Him, "Master of the Universe, how then will we be able to clarify the issues?" He replied to Him, "We follow the majority; if the majority declare impurity, it is impure, if purity, it is pure."

(This text is derived from Y. Sanhedrin 4:2, 22a.) See further B. Eruvin 6b. See further, R. Hayyim Vital, Shaar ha-Kavanot: Inyanei Tefilin, Derush 6, 11a, ed. Yeshivat-ha-Mekubalim, Jerusalem n.d. but c. 2005, vol.1, p. 199.)

Similarly, we read in B. Hagigah 3b:

"The masters of the assemblies" (Ecclesiastes 12:11)—these are the scholars who gather together in assemblies and study Torah, some ruling pure and others ruling impure, some prohibiting and others permitting, some rejecting and others accepting. Were one to say, "How, then, can I learn Torah from now on?" The Scripture says, "They are given from our Shepherd" (Ecclesiastes 12:11). One God gave them, and One Leader attended them." [1]

R. Menahem Recanati, in his commentary on the verse "And God spoke all these words saying," (Exodus 20:1), writes as follows:

The Rabbis said in B. Hagigah 3b: "[The words of the wise are as goads and as rails fastened] by the masters of the assemblies..." (Ecclesiastes 12:11)—these are the learned Sages; "assemblies," they who are studying Torah; these declare pure and these declare impure, these declare kosher and these declare not kosher, these permit and these forbid. Should a person say: How can I now learn [i.e., what is correct]? For this we learn, "And God spoke all these words saying" (Exodus ibid.):—they all have one father, all were given by one Master, they were spoken by the Lord of all acts. And they said: R. Meir had one pupil who could prove the insect to be pure in 49 ways (B. Eruvin 13b). [And, of course, insects, vermin, are impure.] And all this is because the words spoken [by God] were [in] "a great voice which did not end" (Deuteronomy 5:19)—[a voice] which had all the facets which change and turn over from impure to pure, to forbidding and permitting, to not kosher and to kosher. Because we cannot possibly believe that that voice lacked anything. Therefore in the greatness of the voice were things that could turn in all directions. And each of the Sages received his own ["voice"], for not only the prophets received from Mount Sinai, but all Sages in every generation, each of them receives his own [message]. And this is what the verse (ibid.) tells us, "these words the Lord spoke unto all your assembly [in the mount out of the midst of the fire, of the cloud, and of the thick darkness." [My emphasis] And in relation to this it is stated that "Both these and these are the words of the living God." For if one of them was mistaken, they would not have made this statement. And these are the 70 facets that the Torah has, which turn to all sides, for that "voice" split up into seventy branches, as we have explained in our commentary to Psalms. Our Sages, of blessed memory taught that God gives to a great host of exponents the "word" which splits up into seven times seven voices, i.e., seventy tongues. And R. Yehoshua ha Levi explained it, like a man who strikes the anvil and numerous sparks fly out in all directions. So too the great host of exponents. The hammer is but one single thing, and it splits up a stone [which it smites] into many fragments. So too is "the voice" in which the Torah was given. And if you think about it, this clears up all the uncertainties.

R. Shelomoh Luria, Maharshal, in his introduction to his Yam Shel Shelomoh, formulates this notion as follows:

Everything that is found in the words of the Sages of the Torah, from the time of Moses up to the present day, these are the Sages concerning whom is it said, "The words of the wise are as goads" (Ecclesiastes 12:11)—they were all given by

one shepherd (B. Hagigah 3b). And be not surprised by the various differences of opinion, which are so very distant one from the other, if these opinions are directed to heaven…. But all are the words of the living God, as though each one of them received [his tradition] from God and from Moses, even though what came out of Moses' mouth could never be two opposite statements on one single issue. And the kabbalists explained that all souls were present at Sinai and received [the words] through 49 channels (tzinorot), seven times seven purified (cf. Psalms 12:7). And these are the voices (or sounds) which they heard and saw. [cf. Exodus 20:18, "And all the people saw the thunderings (kolot, voices) and the lightning…." These are the opinions that were transferred through the channels (or conduits), each one seeing through his channel in according with his own understanding. So each one receives in accordance with the strength of his soul… such that one reaches one conclusion, declaring impure, and the other another one, declaring pure…and all are true. And you may understand this. And for this reason the Torah was given to the Sages of each and every generation, each according to the source of his understanding… and in accordance with that which is shown to them from the heavens. [My emphasis]

This seems to express the view of continued revelation, and this indeed is the view of R. Mosheh Alsheich in his commentary to Proverbs 21:17. There, he has an extended discussion on what clearly for him was a very vexing provocative question, as to how two conflicting views can both be correct. His solution is also based on his Kabbalistic views. (See below. See also Abraham J. Heschel, Prophetic Inspiration of the Prophets: Maimonides and other Mediaeval Authorities, Hoboken, NJ, 1996.)

Similarly, R. Mosheh Feinstein, in his Igrot Mosheh, Yoreh Deah 3:92, writes:

Our Sages describe the opposing views of halakhic debate as both being "the words of the living God." This means that Torah study of the diverse views of Sages inherently does not contain something which is not true. Thus the opposing views of Beit Shammai and Beit Hillel are both true. This rule applies also to the disputes of R. Eliezer and all the Tannaim and Amoraim. All of them were given from One Shepherd. Thus it was not untrue when the Heavenly Bat Kol announced that the halakha was in accord with R. Eliezer. His words were inherently true—even though in this world we decide practical halakha on the basis of majority decision. Because of the inherent truth of all views of our sages, we say the blessing "Who gave to us the Torah of truth" even if we are only learning the views that have been rejected from practical halakha such as those of Beit Shammai or minority opinions.

And in Igrot Mosheh, introduction to Orah Hayyim, we read:

It is correct and obligatory for the sages of the latter generations to decide halakha—even if they are not qualified according to the standards of the sages of the Gemara. Therefore there is definitely a concern that their halakhic determinations are not in accord with the view of Heaven. However, in truth, we are guided by the principle that Torah is not in Heaven. Rather it is determined according to what appears correct to the rabbi after proper study of the issue to clarify the halakha according to the Talmud, and the writings of posekim. He is to use his full abilities to seriously deliberate with fear of Heaven—in order to determine what appears to be the correct halakha. Such a pesak is viewed as true and he is obligated to issue his conclusion. This obligation exists even if in fact his ruling is contrary to the halakha in Heaven. His ruling is also considered the "word of the living God" as long as he is convinced he is correct and it is internally consistent. He will receive reward for his rulings even if the truth is not in accord with his position. Proof for this is found in B. Shabbat 130a: A certain city in Israel that followed the halakha according to R. Eliezer—even though this was not the accepted halakha—received great reward in terms of long life… Thus, the ruling which a rabbi is obligated to teach and receive reward for it, is that which he decides after studying the issue with his full ability. This obligation and the receiving of reward exists even if the ruling is not in accord with the truth. This is the nature of all disputes of the Rishonim and Aharonim concerning what is permitted and what is prohibited. As long as a universal ruling has not been determined—each rabbi can make decisions for his followers according to that which he thinks is correct—even though the objective halakha is only in accordance with one of them. Both will also receive reward for their rulings. Because of this we find much dispute also in the most severe prohibitions—with variations between places that rule like the Rambam and Beit Yosef and those that rule like Tosafot and the Rema. Both of the opposing views are "the words of the living God even though the actual truth as understood by Heaven is only like one of them.

This almost mystical view is echoed in a statement by the Shlah ha-Kadosh, (Toledot ha-Adam: Beit Hokhmah sect. 8):

How do we understand the concept that all the words of our sages are the words of the living God? We read in Eruvin 13b: For three and a half years Beit Shammai and Beit Hillel argued concerning whose views were actually halakha. A Bat Kol announced from Heaven that both views were the words of the living God, but the halakha was in accord with Beit Hillel. The Ritba writes in the name of the rabbis

of France that the halakha was given in 49 different ways of prohibition and 49 different ways of permission—it was left up to the rabbis of each generation to determine what was the correct halakha for their generation. There is a problem with this explanation. Only when both sides can be right is it reasonable to say, "Both are the words of the living God." For example, in B. Gittin 6b, concerning the concubine of Givah, the views are not mutually exclusive and both could be correct. However in a dispute where one side says it is prohibited and the other side says it is permitted—then surely both cannot be correct! Therefore, if we choose one side, how can we say about the rejected view that it is "the word of the living God"? The rational mind is simply not satisfied with the words of the French rabbis. In fact, the resolution of this problem is dependent—as the Ritba alluded—upon kabbalistic reasoning and secrets… The explanation of this issue, in my humble opinion, is found in B. Bava Metzia 59b concerning the dispute between R. Eliezer and R. Yehoshua whether Heaven can decide the halakha. I already have explained that every single mitzvah has a source in Heaven. According to one's attachment in Heaven, that is how the mitzvah manifests itself in the physical world. The carrying out of the actual mitzvah is directly related to the nature of the attachment. However not everyone has the same level of attachment. Therefore, each rabbi will decide the halakha based upon his personal attachment and consequently they will not necessarily agree. The final halakha is decided by the majority which indicates the most representative means of attachment to Heaven… This is so even though a particular individual might have a much higher type of attachment in Heaven. The halakha is determined by what is the most appropriate way that the mitzvah performed physically for the majority. Thus, we can see why two mutually opposing views can both be the "words of the living God." For example, in the dispute concerning tefilin between Rashi and Rabbeinu Tam, each holds that the tefilin of the other is invalid. Would you think that one side never fulfilled the mitzvah of tefilin during his entire life?! The answer is that each side had a unique attachment to Heaven which determined their ruling about tefilin. However, the final halakha is determined by the majority…

Indeed, throughout the generations scholars struggled with the concept of multiple truths—"eilu ve-eilu…," seeking kabbalistic explanations, or finally admitting that such is beyond human comprehension. Thus R. Tzadok ha-Cohen of Lublin, in his Dover Tzedek, Pietrokov 1911, p. 4, writes:

The expression eilu ve-eilu refers to the fact that… all the aspects and parts are in fact a unity, and they all are the words of the living God. However, this concept is truly beyond rational comprehension. How is it possible that complete opposites

are both true? We know that it is impossible that truth is anything other than one. How can diverse and conflicting things all be a unity? … Therefore, this concept of eilu ve-eilu is beyond the material intellect of man. That is also, why there is no absolutely clear halakha in the Oral Law that is beyond dispute—except for halakha le-Moshe, which is not disputed, as the Rambam states…

And similarly in R. Abdallah Somech's Zivhei Tzedek, Bagdad (1813–1829), Yoreh Deah sect. 26:

Question: How could the conflicting opinions of our sages—where one asserts that something is prohibited and another claims that it is permitted—all be given to Moshe on Mount Sinai? Answer: The answer to this question is extremely deep, and we are not able to answer it properly. Even the Rishonim did not have a full response to it.…

He then quotes the Ritba (cited above), the Shlah, the Hida, etc. finally admitting that:

Even the Ritba indicated that the genuine answer is from the mysteries of Kabbalah. Therefore, the bottom line is that this question is beyond our ability to understand. We see the many answers that were to give a little comfort—especially to the masses. Thus, they will have to suffice because the real answer is found in Kabbalah, which is not appropriate for either of us.

Each of these authorities seeks to explain how two contradictory views can, in a sense, both be correct. And we for our part can hardly know which is the "more correct.” For us, then, we are left with a situation of continued uncertainty—safek.

And moving into modern times R. Yitzhak Hutner, in his Pahad Yitzhak: Quntras Ve-Zot Hanukah, Brooklyn 5624 (=1964), p. 18, wrote as follows:

Our perception of the power of Torah she-be'al Peh as revealed through disagreements is greater than when there is agreement. For within the principle that "these and those are the Word of the Living God" is included the essential principle that even the shittah that is rejected as practical halakha is nevertheless a Torah view, when it is expressed according to the norms of the discourse of Torah she-be'al Peh. This is because the Torah was given by the da'at of the Sages of the Torah (as enunciated by the Ramban). And if they then vote and decide according to the rejected view, the halakha then changes in a true sense (aliba' de-emet)… The result is that in disagreement the power of Torah she-be'al Peh is revealed to a greater extent than by [the Sages'] agreement. The "war of Torah" (milhamtah shel Torah—Torah debate is thus not merely one mode of

divrei Torah among others, but rather "the war of Torah" is a positive creation of new Torah values, whose like is not to be found in ordinary words of Torah [where there is no disagreement].

And indeed this is the opinion of R. Yaakov Hagiz (1620–1674) in his Halakhot Ketanot, Jerusalem 1974, part 1, no.146 (p. 18), where he was asked if a controversy between the decisors is regarded as a safek (uncertainty), and he replies in the affirmative, (or in his formulation, "so it seems most likely").

Furthermore, it is a generally accepted view that even though we have accepted the rulings of Maran, R. Yosef Karo, this is not because we are certain that his views are correct (ain zeh mi-torat vadai), but only as a pragmatic means to get out of the area of uncertainty (mi-torat safek). So we learn from Shut Nediv Lev, by R. Hayyim David Hazan, Saloniki-Jerusalem (1862–1866), vol. 2 sect. 63. Likewise in Rav Poalim, by R. Yosef Hayyim, Jerusalem (1901–1913), vol. 4, Yoreh Deah sect. 4 ad fin.; Penei Yitzhak, by R. Yitzhak Abulafia, Aram Tzovah, Livorno, Izmir (1871–1888), vol. 1 Yoreh Deah sect. 9, 13; vol. 2, 28c, vol. 5, 162d, etc. See R. Ovadiah Yosef, Halikhot Olam vol.7, Jerusalem 2002, p. 32, who cited additional sources.

And again, ibid. p. 259, R. Yosef writes:

But it seems… that in a difference of opinions among the posekim, the [ruling] never leaves the area of uncertainty (safek),even though the Torah ruled to follow the majority, this is only in certain cases—here he lists them—but this is not the case in a mahloket posekim, which always remains within the area of uncertainty….

R. Yosef brings numerous sources, early and late, to prove his contention. R. Asher Weiss, in his Minhat Asher vol. 2, Jerusalem 2014, p. 171 expresses much the same opinion, namely that to follow the majority is not clearly a biblical injunction (referring to B. Eruvin 46a).

We find a similar sevarah (reasoning) much earlier in the Shitah Mekubetzet to Baba Metzia 6b, in the name of Rosh that even the view of a majority remains a safek, but that the Torah ruled that we should follow such an opinion; (cited by R. Shlomoh Kluger, in his U-Baharta ba-Hayyim, Budapest 1934, sect. 12, and discussed by R. Ovadia Yosef in Yabia Omer vol. 10, no. 60:3, p. 198; likewise by my sainted grandfather, R. David Sperber, in his Afrakasta de-Anya, vol. 1, Brooklyn N.Y. 2002, no. 91, pp. 237–239). However, see Peri Megadim to Yoreh Deah 100, sect. 37, who calls this principle into doubt. And see, in brief, Mosheh

Avigdor Haikin, Kelalei ha-Posekim, London 1923, p. 70:10. (Indeed, the whole notion of "the majority," rov, is by no means clear and is exceeding by complex. See Hazon Ish to Kilaim 1:1.)

The great early-twentieth-century authority, R. Avraham Yitzhak ha-Cohen Kook (1865–1935), in his Shabbat ha-Aretz, Jerusalem 1985, p. 42, writes as follows:

We find, that even when a number of mishnayot rule stringently and this was the practice for many generations, nonetheless, when [some Rabbis] relied upon an individual view to rule leniently, [other] Rabbis did not object.... Even when they had always ruled stringently in accordance with the view of the majority, when later, in times of need and necessity for the sake of the community, they ruled on a rejected view, the Rabbis leveled no objections.

Indeed, there are times and situations when it is incumbent upon us to resort to minority opinions. When the gravity of the situation demands it, great authorities made lenient decisions based on such minority positions. This is especially the situation in the case of the "enchained woman"—agunah, a woman whose husband has vanished and is not known to be dead, so that she cannot be divorced, but neither can she remarry. This was well summed up in a passage by the great sixteenth-century rabbi, Avraham ha-Levi, who lived in Egypt, in his response Ginat Veradim, Even ha-Ezer Part 3, sect. 20 (Jerusalem 1951), (cited above note 53):

If we were to examine the opinions of the sages of ancient times—in order to fulfill what they obligate us to do and as we do in all other areas of law—and follow the majority rule so that there would never be any challenges to our decisions, then there would never be freedom for the agunah from any rabbinic teacher. And it is our fault that there are terrible situations which result in the daughters of our father Abraham remaining as widows with living husbands. And there is none to be gracious or kind to them, and they are left starving and thirsty and destitute. And we shall also be concerned lest they follow paths of immorality: Great poverty can lead one to such a path. Moreover, these women are young and active (and will not be able to wait with restraint.) Yet, if we want to follow the lenient decisions, the seriousness of the issue holds us back. Therefore, we have no alternative but to follow the path that was firmly established by our earliest rabbis—to follow the path of straight thinking even if it is against the consensus of the gedolim from whose waters we drink, as it is written in the Talmud, "It is sufficient to rely on (the minority opinion) of Rabbi X, even though it is not the accepted halakha. And it has already been stated at the end of B. Yevamot 122a, "We allow a woman to marry on the authority of an

echo," i.e., that they were lenient with her because of her iggun, [enchainment].

Admittedly, this is a somewhat special halakhic category; but we may learn from it that in cases of what may be regarded as a form of necessity, we do have recourse to minority opinions. Indeed, there are numerous examples in rabbinic literature of recourse to the use of minority opinions, such, for example, R. Mosheh Feinstein, Igrot Mosheh, Orah Hayyim 4, sect. 66, idem, Orah Hayyim 2, sect. 18.

In view of the above it becomes clear that one is permitted to take a minority position in pesak. This is evident in the writings of the great Baghdadi posek, R. Yosef Hayyim (author of the famous Ben Ish Hai) in his introduction to his major responsa Shut Rav Poalim, vol. 1, Jerusalem 2001. For there, when analyzing the different kinds of responders (meshivim), he writes:

There is one who is nimble and effective in knocking on the doors of the books of all the responders, early and late ones, and even the latest, minor and major up to our times, even of authors who are still alive, and his intention is to search in order to see and understand the opinion of each and every scholar who was involved in the specific issue, and this is certainly an admirable approach. For one thing, because, if he finds an author who examined the issue in depth, and he agrees with his conclusion, then his ruling to the question posed before him and for which he has to give a practical solution, will not be his alone, but also on the basis of this other opinion, and he will not be a "lone judge," (referring to the first Mishna in Sanhedrin, and cf. B. Sanhedrin 5a).

Clearly then, the posek who has examined numerous sources may legitimately rule in accordance with his own conclusions (see below Appendix 3 and see Shut ha-Rashba, vol. 1, no. 253, Jerusalem 1997, p. 108), but it is preferable that he couples his adjudication with yet another opinion, even if this be a minority position.

In my extensive study of this issue, in Darkah Shel Halakhah, I brought a variety of additional sources to support this contention.[2] Furthermore, in my Netivot Pesikah, Jerusalem 2008, pp. 32–35,[3] I discussed the status of sources discovered more recently that may have the effect of changing accepted halakhic practice, and the degree of legitimacy to making use of them in order to bring about such change. [4]

To the above we should now add the following related issue, namely that the fact that the majority hold a given opinion does not necessarily means that that

opinion is truly the correct one, as is evident from the Mishna in Eduyot cited above. [5]

Thus some commentators ad loc. explain that the rejected opinion could become the correct halakhic approach. We already noted that this is the opinion of R. Menashe of Ilya, cited above.

Indeed, it could well be that both dissenting views are actually correct, as we have already pointed out above, and so we learn from B. Eruvin 13b and B. Gittin 6b that the views of Beit Shamai and Beit Hilllel actually were both correct. And there are kabbalistic statements that in the time of the Messiah the halakha will be according to Beit Shamai, and also that its dominant view on the form of the tefilin will be that of Rabbeinu Tam.

To the above we may add the remarks of R. Yisrael Zeev Gustman, in his Kuntresei Shiyurim to Kiddushin, Brooklyn 1970, 24/2, that only when there is an absolutely certain ruling is this binding, but where there is a difference of opinion between the authorities this is not an absolute ruling, and hence in a safek de-Rabbanan, in a point of uncertainty in an issue of rabbinic status, we rule leniently.[6]

We quote the very beautifully formulated statement of Isidore Twersky, in his Introduction to the Code of Maimonides (Mishneh Torah), New Haven and London 1980, in a section entitled "The Impossibility of Absolute Finality" (p. 139):

Many of these categories converge upon one overriding fact: Maimonides' realization that law has immanent uncertainties, that the legist regularly and unavoidably faces unimagined contingencies and new hesitations. Absolute finality is a utopian construct. Like the historical process or personal experience, law can never be purified of its mutations and individuality. A code is a rational construction which captures and freezes as much as possible of a fluid, unpredictable, sometimes recalcitrant reality, but there is always a fluctuating residuum which must be confronted openly and freshly. Maimonides was well aware of this and indicated it in various ways.

And on p. 142 he adds:

…. All his desires for finality, objectivity, and universality notwithstanding, Maimonides was sophisticated and realistic, sensitized by the very Rabbinic tradition which he was codifying. He knew that despite his major contribution to condensation and consolidation the vitality and effervescence of halakha could not be fully contained or compressed. The logic of law and the contingencies of

life have always to be aligned. Halakha and reality are both multifaceted realities.

To the above we may add the view that even the rulings of R. Yosef Karo in his Shulhan Arukh, which are so widely accepted, at least in the Sephardic communities, are not accepted because they are "certainly correct," but out of a level of uncertainty, or as formulated by R. Yaakov Hayyim Sofer, in his article "Hakhraot u-Piskei ha-Gaon Erech ha-Shulhan," which appeared in Zekhor le-Avraham, ed. A. Berger, 1993, p. 233: "That we accepted the rulings of Maran [Yosef Karo] was not from certainty [that he is always correct] but only from doubt."

This is also the position of R. Yosef Hayyim, in his Rav Poalim vol. 4, Yoreh Deah sect. 5 ad fin.; R. Ben Tziyyon Aba Shaul, Or Tziyyon, vol. 2, introduction sect. 1:2; R. Mosheh ha-Levi, Yosef Daat sect. 12:3; R. Hayyim David Kazan, Nediv Lev, vol. 2, Hoshen Mishpat sect. 63; R. Raphael Yosef Hazan, Hikrei Lev, vol. 1, Yoreh Deah sect. 127; R. Meir ..... , in his introduction to the Ben Ish Hai p. 12; perhaps also R. Ovadiah Yosef Yabia Omer vol. 9 no. 17:21, p..... , and no. 105, p. 225 sect. 3 ad fin., and many additional sources cited by R. Yaakov Hayyim Sofer, etc.

Admittedly, this view is not universally accepted, and is the subject of considerable controversy, such that other authorities claim the Shulhan Arukh's rulings are absolute, containing no uncertainty. To refute the above authors, see, e.g., R. Neriah Gafni, Magen Yosef, vol. 1, Jerusalem 2011, pp. 117–132, and R. Yitzhak Yosef, Ein Yitzhak vol. 3, Jerusalem 2009, pp. 95–99, for extensive polemic discussions upon the interpretation of a passage in his introduction to his Beit Yosef. Nonetheless the views of these great authorities cannot be summarily discarded.

Thus, in addition to all that has been stated above, there is an innate element of uncertainty in all aspects of halakha, and this element does not weaken it, but rather strengthens it by admitting of greater flexibility and resilience.[7]

Samuel Morell, in his Studies in the Judicial Methodology of Rabbi David Ibn Abi Zimra, New York, 2004, pp. 177–209, discusses ben Zimra's unique way of ruling according to the "Middle Way," and he summarizes his findings (ibid. p. 208) that:

The message of the "middle way" is that there is no substantive preference for one opinion over another.

Is this not what R. Yitzhak Colon (d. 1480) wrote in his Sheelot u-Teshuvot Maharik, Warsaw 1884, no. 163, p. 176:

In my humble opinion it would appear that wherever the Talmud notes that so and so, the ruling is like this, the talmudic authorities did not plumb the depths of each and every controversy, deciding that the halakha should be in accordance with him whom they stated to be the authoritative one, because it was not possible for the talmudic Sages to examine in depth every single difference of opinion of the Tannaim and Amoraim and to determine according to whom is the halakha in detail. Rather they followed the majority view, [especially] when they saw that a certain Tanna was sharper or more accepted than his fellow Sages. And so too with the Amoraim. And they relied on this approach to determine that the halakha be in accordance with this opinion, except in certain exceptional cases where they knew that the halakha is in accordance with the dissenting view. And the Sages of the Talmud had the authority to determine the halakha as they saw fit, and [saw their ruling] as beyond doubt. And this was the case until the period of Rav Ashi and Ravina, who end the period of horaah—decision-making. And in this way they determined the laws. And I have many proofs that this is the case, but I have no time at the present to elaborate on this…

So these rulings in accordance with the majority were for the most part pragmatic rather than minutely reasoned decisions.

On the other hand there may be a considerable danger in consistently taking the stringent path, as we have already indicated above. See, for example, the very harsh statement of the Radbaz, R. David ben Zimra, in his Responsa, part 4, no. 1368:

…But in any case if he wishes to take upon himself stringencies [he may do so], and he should close himself off in his own house, [but he should not do so for others], for [in so doing] he leads to conflicts, and to vain hatred, and the desecration of the Name, God forfend, and may the Good Lord pardon him, Amen.

Indeed, the superior status of leniency is a guiding principle in many of his rulings. So writes Israel M. Goldman, in his The Life and Times of Rabbi David Ibn Abi ben Zimra, New York, 1970, p. 23:

To those scholars who would pile on stringency upon stringency, he expressed himself in terms such as follows: "Leave our people Israel alone! It is enough for them if they are careful about that which the Torah has forbidden, and about that which the Rabbis have forbidden, and still you come along and add doubt upon doubt.” [Responsa of RDBZ vol.2, Venice 1749, no. 637]. Again, "I do not deem it necessary to add such stringencies for Israel which the earlier authorities have not instituted. Would that Israel would observe that which has already been

placed upon them, for if you grasp for too much you may grasp nothing, with the result that nothing is left in the hand” [ibid. vol.1, no.163]. And in an impatient tone to one writer: "You come to create new forbidden foods out of your own head!” [ibid. no.145].

Goldman (ibid. pp. 23–24) continues to give some concrete examples of the Radbaz' approach. He writes:

To illustrate: A Jew was sick and it was deemed necessary to violate the Sabbath in his behalf. But because of his piety he refused to allow them to violate the Sabbath on his account. R. David, maintaining the traditionally humane Jewish views in such matters, calls this man "a pious fool who will have to give account for his life to God. The Torah taught 'You shall live by them' and not die by them [ibid. vol. 4, Livorno 1652, 67]. Even in a case where the doctor does not think it necessary to make a medicine which would cause a violation of the Sabbath but the patient feels that such a medicine will help him, R. David decides that the principle, "a man's own heart feels the bitterness of his soul the most," applies in such a case and the medicine should be procured, [ibid. 66]. Further, the great authorities differ on the point whether it is permitted to do anything for a sick person which would cause Sabbath violation if those things are not absolutely necessary. R. David clearly takes his stand with the words: "There is a difference of opinion on this among the legal authorities, but I am among the lenient interpreters" [ibid. 130]. In the same spirit, when a man was sick during the Passover week and he needed barley water as a medicine, R. David gives careful instructions how it can be prepared with the least possibility of leaven cereal being spread and adds: "I see fit to permit this for a sick man even if he is not in danger." Should a Jew who is in prison on the Sabbath and who has no food, be allowed to tell the jailer to buy and bring him food on the Sabbath? Or, shall he fast till the next day, since the prison is locked at night? R. David decides that it is permitted to send the jailer on the Sabbath day [ibid. vol.3, Fürth 1781, 576].

A more detailed analysis of Ben Zimra's halakhic approach and his tendency to leniency, (most especially in the case of Agunot, but not solely), may be found in Samuel Morell's Studies in the Judicial Methodology of Rabbi David Ibn Abi Zimra, New York, 2004, pp. 58–75, 87–90, 170–171.

Even harsher and more forceful against those "who put stringency upon stringency" are the words of R. Yaakov Emden (1697–1776) in his Sheilot Yaavetz vol. 2, Lemberg 1884, no.150 (fol. 48); where he rails against the Ashkenazic humrot, which he says are observed even more than biblical laws (gufei Torah), and which he claims leads to very serious errors in clearly prohibited laws, stating

that he who prohibits the permitted in the end will permit the prohibited. He accuses them of blindness and having lost any sort of wisdom, making the insignificant essential, leading to great loss.

One could greatly multiply such statements, (see e.g., Maharatz Chajes to B. Niddah 34a, or responsa of the Mabit R. Mosheh Mi-Trani, vol. 3, sect. 68, Brooklyn 1961, 13ab, who wrote: "Do not be very pious (hassidim harbei) [for] it is sufficient for you [to accept] that which the Torah prohibited," (cf. Y. Nedarim 9:1), i.e., you need not add new prohibitions), but the above should suffice to underscore the dangers of excessive stringencies. (And cf. above note 42.)

And here I would like to recall a wonderful story (that I cited in my On the Relationship of Mitzvot between Man and His Neighbor and Man and His Maker, Jerusalem, 2014, pp. 40–43) that R. Yehudah Leib Maimon records in his Toledot ha-Gra (Jerusalem: 1970, 7), concerning the rabbi of Frankfurt, R. Avraham-Abush, a contemporary of the Gaon of Vilna:

They relate that once the shohahtim (slaughterers) of Frankfurt came before him with a query concerning [the kashrut of] a lung, a matter on which the Rema and the rest of the Polish authorities ruled most stringently. The incident took place on the eve of a festival, and the matter was one which potentially involved a very considerable monetary loss for the impoverished slaughterer. The members of the Beit Din wished to rule stringently and declare the meat not kosher (in accordance with the view of the Rema), but R. Avraham-Abush began to search for ways of finding it kosher. The judges of the Beit Din insisted on their position that it is impossible to rule leniently against the view of the Rema and his colleagues, but R. Avraham-Abush argued with them, discussing the halakhic issues involved, and finally ruled that the meat was kosher. The members of the Beit Din were astonished, asking him: How could one possibly rule leniently declaring it kosher against the ruling of the Rema and the great authorities of Poland who held the same opinion?!

R. Avraham-Abush replied to them as follows: I prefer at the end of my days when I come [before the Heavenly Court] to argue my case with the Rema and his colleagues, rather than with this poor slaughterer. The slaughterer is a simple man, and it will be very difficult for me to argue my case with him before the Heavenly Court, if he brings me to court claiming that I declared his animal tareif, and that in doing so I caused him great monetary loss,[8] and that I damaged his business on the eve of the festival. But I am sure that when I lay out my arguments before the Rema and his colleagues, we will reach an agreement…

The logic in R. Avraham Abush's position is clarified in a similar tale told by Yaakov Rimon and Yosef Zundel Wasserman in the book, Shemuel be-Doro: R. Shemuel Salant z"l, Rabbah shel Yerushalayim 1841–1909, Hayyav u-Poalav, Tel-Aviv: 1961, 122–126:

Once upon a time some learned rabbis were arguing with him (R. Shemuel Salanter) on a case where he had ruled "kosher," and needless to say he refuted their counter-arguments. One of them turned to him and said to him: "You have refuted our arguments, but what will happen when you come before the Heavenly Court and have to argue with the Beit Yosef and the Rema?" He replied as follows: "Surely you will agree with me that it will be better for me to argue my case with them, since I believe that I understood in depth their opinion, rather than having a claim against me on the part of the ox [i.e., on the part of the owner of the ox] that I incorrectly declared tareif... [9]

Both these tales have a common denominator: namely that if the rabbi ruled incorrectly, declaring tareif meat kosher, he has sinned against God, and Yom ha-Kippur will atone for this sin. But should he have ruled kosher meat as tareif, he will have caused damage, hurt and monetary loss to the slaughterer, and this is a sin against his fellow-man for which Yom ha-Kippur does not automatically atone; and hence he preferred to err on the side of leniency rather than risk erring on the side of stringency.[10]

Indeed, much the same concept is to be found in a responsum of R. Eliezer Fleckles, Teshuvah me-Ahavah vol. 1, Prague 1806, no. 181. There we read:

He was wont to say to his disciples, "Go and see who is more severely punished: he who is overly stringent (she-lo ke-din) or he who is overly lenient. And you will understand that he who is overly stringent is more severely punished. For he who is overly lenient sins a sin between man and his Maker, and he will be repentant and be forgiven. But he who is overly stringent must appease his neighbour. And this is hinted at in the statement , 'Your donkey (hamorkha) is gone, Tarfon' (B. Sanhedrin 33a)—a double word-play on hamor- donkey, and humra-stringency,[11] for that is a hint at one who rules with excessive stringency and declares everything as forbidden [i.e., to be eaten]. See Rashi and Tosafot to tractate Beitzah 2b, (de-heteira) on the (koah de-heteira adif).

Let us further take note of the very explicit instructions formulated by the Shlah ha-Kadosh (R. Yishaya Horowitz, author of Shnei Luhot ha-Berit, Amsterdam 1698), and aimed at rabbinic decisors. He writes (ibid. 184b, in Masekhet Shevuot, ed. M. Katz, vol. 2, Haifa 2002, p. 266 nos. 89–91):

89: The goal of study is to study and to teach, to keep [the law] and carry it out. You, my children, may the Lord guard over you, if you are asked to give a ruling, and have the privilege to be decisors, take great care in your decisions, that you stumble not, God forfend… And before you give your judgment, make sure that the law is as clear as daylight in your heart, without any hint of uncertainty… And if there is any uncertainty, be not ashamed to discuss this with other students. Who was greater than Rav Huna, who when he had to rule in matters of tereifot (non-kosher foods), would gather others [to join in the decisions], so that 'each would carry a chip off the beam' (i.e., share the responsibility), (B. Sanhedrin 7b). [Cf. the Shlah's son, R. Sheftel's instruction in Hanhagot ha-Tzadikim, vol. 1, Jerusalem 1988, p. 109, no. 22.] And may the fear of God be in your hearts.

90: In any case, do not say, if that is the case, let us be stringent in most cases. For this is not called a (decision of a) decisor, to rule stringently for others not in accordance with the law, though he may do so for himself, should he so wish. And in Masekhet Berakhot in the first chapter (4a), it talks of the generation of King David, when their hands were soiled with foetus and placenta… in order to declare a wife pure to her husband. It does not say whether they wished to purify or declare impure; only that they toiled so much not to declare the pure to be completely certain impure, thus keeping them from the mitzvah of procreation. So the decisor is cautioned not to cause others to err, God forfend, but we should learn of the power of leniency. And this is the law in all rulings, even one for himself (i.e., when the decisor decides for himself), that the measure of piety is that he be stringent for himself, if there is place for stringency; but if there is not, but he merely wishes to take upon himself a stringent position because of his lack of knowledge, had he studied and gone more deeply into clarifying the issue, he would see that there is no place for stringency, and if he nonetheless rules stringently, he is a pious fool (hassid shoteh).

91: … But greater is he who toils [in his learning of] Torah, and studies until it is clear to him that it is permitted… Then, praise be he in this world… and it will be good for him in the world to come that he steeped himself in Torah….

I would like to add a further consideration: For there is a well-established rule in Jewish law, that we find formulated by the Shakh [Sifrei Cohen, by Shabtai Cohen, 1621–1663, he being a major commentator to a part of the Shulhan Arukh], in his Kitzur Hanhagot Issur ve-Heter 9, Yoreh Deah 245, thus, “Just as it is forbidden to permit that which is forbidden, so it is forbidden to forbid that which is permitted.”

This principle is already found reflected in the prayer of R. Nehuniah ben ha-Kanah (flor. Erets Yisrael c.80–110 CE), found in the Talmud (B. Berakhot 28b), where he expresses the hope that he will not err in his judgments: “That I do not declare the impure pure, neither the pure impure…”

See the parallel in Y. Terumot 5 ad fin., a statement of the 3 cent. C.E. R. [E]liezer; Y. Hagigah 1:8; Y. Sotah 8:2, cited in medieval sources such as, Semag Asin 111, Hagahot Maimoniyot, Mamrim 1:5. And see also Teshuvot Maimoniyot to Maakhalot Asurot 15, in the name of the Yerushalmi.

Cf. B. Berakhot 28b, and Rokeah sect.28 who wrote, "The sin of permitting things that are prohibited is just as the sin of prohibiting things that are permitted." And see further R. Ovadiah mi-Bertinoro to Avot 5:8, and Yitzhak Yosef, Shulhan ha-Maarekhet, vol.2, Jerusalem 2010, pp. 409–411. We may further recall the words of R. Dimi in the name of R. Yitzhak in Y. Nedarim 9:1, that the judges exhort him who took upon himself a prohibitive oath, saying, "Is it not sufficient for you that which the Torah prohibited, but that you wish to prohibit other things!" (See Barukh ha Levi Epstein, Barukh she-Amar to Avot, second ed, Tel Aviv 1905, pp. 72–73.) Of course, this principle also has its parameters, and the Rabbis frequently imposed prohibitions to distance and prevent people from sinning, le-afrishei me-Issura. However, this subject is beyond the scope of our present study.

This clearly places a great degree of responsibility upon the decisor, requiring him to examine most intensively any issue before declaring it prohibited. For it is always easier to say "No, it is forbidden,” than to say "Yes, it is permitted.” But the easy way is not the way of halakha, but rather one must attempt to reach a clarification of the truth. (See my Netivot Pesikah, Jerusalem 2009, pp. 173–176.)

There may be an exception to this rule in the case of a repentant who has to take upon himself additional stringencies in order to counteract his natural tendency to give in to his evil inclinations. For him, writes R. Yona Girondi, in his commentary to Avot 3, 16, that the "baalei teshuvah" should distance themselves from that which is permissible in the area in which he sinned….But this is a special situation. (See also his Shaarei Teshuvah 1:2, N. Rakover, Takanat ha-Shavim, Jerusalem 2007, p. 676.)

This principle is discussed in numerous rabbinic sources, and is the subject of an extensive responsum on the part of R. Menashe Klein, in his Mishne Halakhot vol. 5, Tel-Aviv 1973 no.104, pp. 150–153, and cf. idem, vol. 4, Brooklyn 1977, no. 105 p. 172, etc., and the many additional references collected by Lior Silber, in his

Milei de-Hassiduta 2nd edition (n.d., but c. 2014) pass.

Furthermore, the Pithei Teshuva to Yoreh Deah 116:10, ad fin., cited the Solet le-Minhah (that is the Solet le-Minhah ve-Shemen le-Minhah, which is the second ed. Of R. Yaakov Reischer's Minhat Yaakov, Dessau 1696) , Kelal 76, Din 8, that "one who is stringent in those laws where there was no stringency mentioned among the Amoraim (such as 'annulment in sixty', (bitul be-Shishim) or a "secondary vessel," (keli sheni) is, as it were, practicing epikorsut, heresy, and there is no benefit in his action only loss...."

We may add the observation of Zvi Zohar, in his Heiru Penei ha-Mizrah: Halakha ve-Hagut etzel Hakhmei Yisrael ba-Mizrah ha-Tikhon,Tel-Aviv 2001, p. 343, that R. Ovadia Yosef stresses the preference for leniency in pesak, wherever it is possible. And (ibid. pp. 79–80 note 79) he notes that this principle is explicitly spelled out in R. Yosef's article "Mishnato shel Yisa Berakhah," Shevet Ve-Am, second series 1/6, 1971, pp. 95–103. He further points out that in R. Yosef's volumes of responsa, Yabia Omer and Yehaveh Daat, the phrase Koha de-heteira appears 118 times (!), giving a sampling of references.

The great burden of responsibility upon the decisor, that we mentioned above, is very revealingly reflected in a passage by Rav Avraham Yitzhak ha-Cohen Kook, which with singular clarity expresses his personal concern as to when to rule stringently and when leniently, and what are the implications of the two alternatives:

…For I know clearly the nature of the people of our generation, that it is just when they see that we permit all that is permissible according to the depth of the law, they will understand that whatever we do not permit is because this is the true law of the Torah. Consequently the masses will follow the rulings of halakhic decisors—which is not the case if it becomes evident that there are things which, from the point of view of the halakha, are permitted, and the Rabbis, neglecting to taking note of the troubles and distresses of Israel, leave the situation as prohibited. For then, the result, God forbid, will be to bring about a great desecration of God's name, (Orah Mishpat, Jaffa 1985, sect. 112, fol. 126b), and cf. Mishpat Cohen no.76). [12]

It is precisely this kind of concern that demands the careful pursuit of halakhic clarification and determination. [13]

[1] See on this whole subject the comprehensive and penetrating analytical study of Avi Sagi, in his The Open Canon: On the Meaning of Halakhic Discourse, New

York 2007, pass.; Eliezer Berkovitz, Not in Heaven: The Nature and Function of Halakha, New York 1983, pp. 50–53. See further Yitzhak Yosef, Maarekhet ha-Shulhan vol. 2, Jerusalem 2010, on the rationale for ruling according to a minority opinion where there is great loss—hefsed merubeh, or in special circumstances—shaat ha-dehak, and ibid. p. 642, as to whether the rulings in the Shulhan Arukh are final and certain or remain in the area of uncertainty—mi-koah safek, (citing as examples, Hayyim David Hazan, Responsa Nediv Lev, Salonica-Jerusalem 1862–1866, Hoshen Mishpat sect.50, and his father Rephael Yosef Hazan, in his Hikrei Lev vol. 3, Salonica 1787, Yoreh Deah sect.127, and others). See further Hanina Ben Menahem, Judicial Deviation in Talmudic Law: Governed by Men, not by Rules, London Paris etc. 1991, pp. 158–165, on using minority views, and pp. 173–182, on horaat shah.

[2] And see also ibid. pp. 104–109. See also above note 109. And here we may add the following references: R. Ovadiah Yosef, Yabia Omer vol. 10, Jerusalem 2004, Yoreh Deah sect. 43; R. Meir Sigron, Or Torah 44/2 (532). 2012, pp. 153–156; Meiri to Sanhedrin 32b, p. 144, that one should always try to find compromise and rule mercifully, i.e., leniently; Y. Porat, in Or ha-Mizrach 12/1, 540 1963, pp. 6, 8, on R. Naftali Tzvi Berlin's (Netziv) position on relying on alternative positions which are more lenient, etc.
[3] And see also my discussion in my Legitimacy and Necessity: Scientific Disciplines and the Learning of Talmud, Jerusalem 2006, pp. 23–25, and also pp. 60–63. On the Rema's use of minority opinions, see Asher Ziv, Rabbenu Mosheh Isserles (Rema), New York 1972, pp. 109–110.
[4] Here I may add that the standard rule is that when there is a difference of opinion between an earlier and a later authority, we usually follow the later one, for even though he may be a lesser scholar, he is, as it were, a dwarf on the shoulders of a giant, who has a broader horizon. (On this phrase, see Shmuel Ashkenazi, Alfa Beta Kadmaita de-Shmuel Zeira, Jerusalem 2000, pp. 322–327.) The Meiri was intimately acquainted with the Rambam's writings, but still took an independent position. (See on this principle of Halakha ke-Batrai, in my Darkah shel Halakha, Jerusalem 2007, p. 9, and most recently the remarks of R. Yaakov Hayyim Sofer, in Or Israel 17/1 (63), 2011, pp. 240–242, where he also brings a variety of sources proving that one follows the later authority, even when he is single opinion against many. He also draws the parameters within which this rule may be applied.) See above note 67.

On the very important issue of how we act or react when discovering new sources (or readings) that were unknown to earlier posekim and might change the halakha, I wrote extensively in my Legitimacy and Necessity: Scientific Disciplines

and the Learning of Talmud, Jerusalem 2006, pp. 22–25, 58–63, and again in my Netivot Pesikah, Jerusalem 2008, pp. 31–41. We showed there that the Hazon Ish believed that "new data" cannot change established halakha. (See S. Leiman, Tradition 19, 1981, pp. 301–310, for a full discussion of the Hazon Ish's view see further S.Z. Havlin, Ha-Maayan 8:2, 1968, pp. 35–37; M. Bleich, Tradition 27, 1993, pp. 22–55; Y. Tzvi Halevi Lehrer, Tzefunot 16, 1992, pp. 68–73; S. Spiegel, Amudim be-Toledot ha-Sefer ha-Ivri: Hagahot u-Megihim , Ramat-Gan 1993, pp. 495, 508–513, and finally, Benjamin Brown, Ha-Hazon Ish, Jerusalem 2001, pp. 392–395.)

In his opinion information that was not known to the Beit-Yosef, for instance, such as that found in the Meiri, was hidden from him by divine providence, so that the halakha be crystallized as is was. The later discovery of the Meiri cannot change that crystallized halakha of the Beit-Yosef.
A similar view is voiced by R. Aharon David Deitsch (cited in the introduction to Y.N. Stern's edition of Hiddushei ha-Hatam Sofer al Sugyot ve-Perek Shevuat ha-Edut, 1929) in the name of the Hatam Sofer as follows:
I heard from our good teacher the author of the Hatam Sofer z"l, who said of himself that when a question comes before him, he reads the question before he examines it in depth, for he has to concentrate his thought so that he only wishes to respond to his questioner, [reading] the truth before Him that gives the Torah, be He blessed. And afterwards, that which occurs to him to reply, he regards as the truth. [And] even if later the questioner raises a difficulty from a gemara or the posekim, one that had he remembered at the time of writing [his response], he would have changed his ruling, and would not have bothered to justify his [earlier] opinion and ruling; even so, since the Holy One blessed be He in the first instance hid this [data] from him, and he was certain of himself that he had searched for the truth, he would put his mind to justifying his first opinion and legitimate it through a deep analysis. [My emphasis]

See Maoz Kahana's M.A. thesis, Hebrew University Jerusalem 2004, p. 107, where he brings further evidence that this indeed was the Hatam Sofer's position, referring us to his responsum, Evan ha-Ezer vol. 2, no.102, from 1809, (which in turn refers to R. Yonatan Eibeschutz' Urim ve-Tumim, Jerusalem 1977, sect.125).

However, we showed that the Rema to Hoshen Mishpat 25:2, wrote:
But if at times there is a responsum of a Gaon which was not mentioned in the books, and we find them (later on) differing from him, we do not have to follow the later authorities, because it is possible that they did not know the view of the Gaon, and had they known it they would have withdrawn their view (Maharik,

sect.94).

So too he writes in his responsum no.19 (ed. A. Ziv, Jerusalem 1971, p. 128) concerning minhagim (customs):
But in a place where something was innovated and this was unknown to the earlier authorities… it is certainly the case that it is permitted to enact new enactments… for we can presume that the early authorities would not have make their enactment in such a situation.

And, indeed, this is the majority view, see Kenesset ha-Gedolah to Yoreh Deah 37, Beit Yosef, no.50, 149. See further on this matter, R. Yaakov Hayyim Sofer, Beit Ya'akov (Jerusalem, 1985), p. 19, n.5, 52–53; and his Tiferet Yitzhak (Jerusalem, 1981), pp. 46, 115, and his copious references in his Hadar Yaakov, vol. 6, Jerusalem 2006, pp. 195–197, etc. Hence, discoveries of new early texts of Geonim and Rishonim should certainly be taken into account. A case in point is the Meiri, who was only recently fully discovered, and in whose writings we find numerous pesakim of relevance to our day. (See Beit Ya'akov, p. 52, n.17.) See eg. R. Ovadiah Yosef, Yabia Omer, vol. 4, Orah Hayyim 24:11, who writes that "had the Aharonim, who ruled stringently [on a certain issue] known the words of Meiri (to Rosh ha-Shanah 28b), who plainly holds the opposite view, they would certainly have abandoned their own conclusions in favor of his" (p. 103). And so too in vol. 4, Orah Hayyim 5:1, he writes, "and had the aforementioned Aharonim seen the responsum of R. Abraham son of the Rambam, they would surely not have differed from him" (p. 48). See further his introduction to his volume 5.
A further aspect of this issue may perhaps be seen in the frequently found argument that one does not have to follow a specific early authority because he did not yet know the Zohar, which was only revealed after his time. See, for example, Lewy, Minhag Yisrael Torah,pp.107, 132, etc. See also, other outstanding halakhic sources, such as the response of the Maharam (Rabbi Meir b. Barukh) of Rothenberg, (see, for example, R. Josef Katz, She'erit Yosef, ed. Ziv,(New York, 1984), sec.62, p. 149, etc). The argument is, of course, that had they had known the Zohar, they would have ruled in accordance with it. And the same argument is applied to the rulings of the Ari. Thus, for example, R. Yitzhak Barda (Responsa Yitzhak Yeranen, vol. 3, sec.13) writes, "had the Poskim known what the Ari knew, they would have reversed their opinions." So too, the Hida writes (Birkei Yosef, Orah Hayyim, 421: 1, etc.), "We follow him (the Ari) often even when he rules contrary to Maran (=R. Yosef Karo). For the rabbis maintained (kim le-hu Rabanan), that had Maran heard the words of the Ari, he would have chaged his mind." (See M. Hallamish, Kabbalah in Liturgy, Halakha and Customs [Ramat-Gan, 2000], chapter 5, p. 117–145 [Hebrew].)

We could add many additional sources to bear out our contention, but let us suffice with just one more example, a responsum of the Avnei Nezer, of R. Avraham Bornstein of Sochotchov, Orah Hayyim 362:
And it is known that the second part of the letter was published in our time [Lvov 1860], and in the time of R. Meir of Lublin (16 cent.) and the Magen Avraham (17 cent.), it was not published, and (hence) his words gain no mention. And it is possible that had they known of it they would have changed their opinion, since in an issue of rabbinic status (mi-derabanan) it is advisable to take the lenient position.
Furthermore, see R. Ovadiah Yosef, Halikhot Olam vo.6, Jerusalem 2001, p. 226, where he argues that in a case where the Beit Yosef for some reason was unaware of a Yerushalmi text and a whole range of Rishonim ruled in accordance with that text, had the Beit Yosef been aware of all this material, he surely would have ruled differently. He brings a number of authorities who hold this position (the Hida in his Shut Hayyim Shaal vol. 1, sect.56; idem, Yosef Ometz sect. 80 ad fin.; R. Yehudah Ayash, Shut Benei Yehudah, vol. 2, sect.124, fol. 202.b, etc.). I have been somewhat terse here, and even so have been overly extensive. For this subject requires a full examination in its own right.
[5] See Yitzhak Namni and Tzvi Idles, Samhuyot ha-Rov be-Halakha, Kiryat Arba 2002, p. 16, following on a statement by R. Shimon Shkop, Shaarei Yosher, Shaar 3, chapter 1. In fact, in many cases the Talmud does not adopt the majority view. See Paul Heger, The Pluralistic Halakkah: Legal Innovations in the Late Second Temple and Rabbinic Periods, New York 2003, pp. 187–200, in a section entitled " Preference for Individual Opinion."
[6] See most recently R. Elhanan Wasserman, Kuntres Divrei Sofrim, ed. Daat Sofrim, 2014, p. 78 note 85.
[7] Compare R. Menasheh of Ilya's notion of "relativism in the Talmud" and "The Supressed Minority," on which see Yitzhak Barzilay, Manasseh of Ilya: Precursor of Modernity Among the Jews of Eastern Europe, Jerusalem 1999, pp. 98–113.
[8] On this halakhic concept, see what I wrote in Darkah shel Halakha (Jerusalem: 2007, 117–118, 140–141, 175–177); Minhagei Yisrael, vol. 3 (Jerusalem: 1994, 53–54); idem vol. 8 (Jerusalem: 2007, 263); Encyclopedia Talmudit, vol. 10 (Jerusalem: 1961, 32–41).

Bension Cohen of New York (in an internet communication from Sept. 15, 2010) would wish that there be here an amplified explanation of R. Avraham-Abush's ruling so that it be more clearly understood. He would interpret it as follows:
….. both the slaughterer and the Rabbi were caring for the poor, they were concerned about Mitzvot she-Bein Adam le-Havero as well as the Mitzvot Bein Adam la-Makom. The lung is one of the least desirable organs for a butcher,

generally sold to the poor. The strict rendition of treifa, the slaughterer argued, would make all the poor who rely on this meat not to have the ability to celebrate the holiday with a little meat, causing the poor unnecessary anguish, before Yom Tov. Therefore, … the Rabbi who recognized the potential anguish, of the poor not having cheap meat for Yom Tov as well as the greater monetary loss required of them to purchase clearer portions of the meat, rendered a lenient pesak predicated on the shitah…. Presented in this… (chapter). There is a double consideration of Kevod ha-Kelal and the recognition of the Tzaar. The explanation presented… while very lofty presents an argument made by a true Gadol.

My thanks to Mr. Cohen for this insightful amplification, which is certainly much clearer and more forceful than a mere reference to the concept of hefsed merubeh, which might lead one to the erroneously simplistic conclusion that when it comes to money the Rabbis are ready to be lenient, (as Cohen writes, warning us against such an understanding). This is, indeed, partially true, but requires a detailed understanding of the concept of hefsed merubeh, for which reason I gave some basic references.

Here we may add that there is a general misconception that it is easier to rule stringently—le-humra, thus avoiding the dangers of permitting the forbidden. However, the Rosh, in his response, Klal Bet, sect.17 ad fin., writes, "and he who rules forbidding something must bring clear and strong evidence, for the Torah was concerned for the property of Israel. Further details may be found in R. Yitzhak Yosef's Ein Yitzhak, vol. 3 (Jerusalem: 2009, 298–306, 596).
A different approach to a similar situation is told of R. Yosef Dov Soloveitchik. It was his way to be extremely stringent in cases of kashrut for himself. But when it came to others, he feared to mistakenly declare something not kosher, thus causing damage and as it were stealing other people's property. On one occasion, he felt he had no alternative but to declare some meat non-kosher, "even though according to the Shach it is kosher, I may not cause you monetary loss and be considered a thief according to the view of the Shach." There and then, on the spot he took from his purse the value of the animal and gave it to the butcher, (A. Tobolsky, Hizaharu be-Mamon Haverchem [Bnei Brak: 1981], 249).
[9] On the Relationship between man and his Maker etc., ibid.
[10] See my discussion in Darkah Shel Torah, 140–141. Here we may add the following story brought by Meir Tamari in his Al Chet: Sins in the Marketplace (Northvale, N.J. and London: 1996, 24):
A shohet, "ritual slaughterer," once came to the Chafetz Chaim fo advice, saying, "The laws of shehitah are so many and difficult I am afraid that I may sin and cause others to sin through an infringement of them. I think I will go into

business." The Chafetz Chaim's reply was simple and direct: "If your major concern is the safety of your soul, you should remain a shohet. The laws of the marketplace and of money are far more numerous and onerous, while God, your partner, is an ever-present witness and judge to any deviations."

We find much the same idea reflected in the Netziv (R. Naftali Zvi Yehudah Berlin), in his Haamek Davar to Genesis 20:7, "[Now therefore restore the man his wife; for he is a prophet], and he shall pray for thee, and thou shalt live":

According to what we have explained… that the sin was that [Avimelech] caused grief to our forefather Abraham, surely he only needed to appease him, and there was no need for prayer. However, from here we may learn that one who sins against his neighbor also sins against God, and it is not sufficient to appease one's neighbor alone. One must also beg forgiveness from God. And for this reason he needed Abraham's prayer, in order to be completely expiated.

[11] To understand this "hint," we must see it in its fuller context as recorded in B. Sanhedrin ibid. There we are told that:
…Once a cow whose uterus was missing [was brought before] R. Tarfon who fed it to dogs, (because he regarded it as not kosher). And the case was brought before the Sages at Yavneh and they declared it Kosher… Said R. Tarfon, "Your donkey has gone, Tarfon." Rashi explains: Namely, I must sell my donkey in order to repay the loss of the cow to its owners.

There may also be a word-play on Tarfon-Tareif.
See continuation of the text, where R. Akiva confronts him that he does not have to pay for the "damage" he did.
[12] On which B. Gelman, in his article in Milin Havivin 3, 2007, p. 90, comments:

Rabbi Kook realized that permissive rulings, when appropriate, increase the public's trust in rabbinic leadership, and with increased trust will come increased levels of observance from a trusting public. Conversely, needless, stringent rulings can lead to distrust, less observance, and a breakdown in rabbinic authority. While Rabbi Kook issued these warnings regarding Passover stringencies, his words can easily and appropriately be applied to other areas of halakha as well.

[13] Finally, we should also take account of the statement in Y. Berakhot 2 ad fin., and Y. Shabbat 1:1, that one who is exempt from something and nonetheless does it is an ignorant person (hediot). I discussed this principle at length in my On the Relationship of Mitzvot Between Man and His Neighbor and Man and His Maker, Jerusalem New York 2014, chapter 10, pp. 69–78, which needs no

repetition here. I would only add a reference to R. Yosef Zechariah Stern, Zekher Yehosef vol. 1, Jerusalem 2014, sect.67, pp. 318–320, who, in his usual fashion, gives plentiful pertinent references to the discussion.