May women have their hair cut on chol hamoed? On a technical halakhic level, I argue in the companion shiur to this dvar Torah that the answer is yes. What I want to do here is discuss four metahalakhic questions relative to this specific issue.

The first – and this is perhaps the safest topic we can choose to discuss this generally explosive question – is what sort of attitude we should have toward gender distinctions in Halakhah. Here I must acknowledge that this framing – which assumes that gender distinctions constitute a discrete category, toward which a consistent attitude is appropriate – is borrowed from American constitutional law's notion that various distinctions can be subjected to loose, intermediate, or strict scrutiny. But I think it offers a valuable tool to poskim, and I specifically favor subjecting potential Jew-Gentile distinctions in interpersonal halakhot to strict scrutiny.

This cannot, however, be the case with regard to gender in Halakhah – there are simply too many areas in which the distinction is deeply ingrained, and others in which such distinctions flow inexorably from physical differences. But there is nonetheless room for some form of scrutiny, especially when potential rulings seem to assume psychological or intellectual differences between men and women.

The second question is whether we ought to evaluate potential gender distinctions primarily in terms of their outcomes or rather in terms of their reasoning. What are we to do if the best way to reach the solution we see as most compatible with gender equity is to utilize a legal rationale that seems sexist or even misogynist?

For example: The exegetical basis for the exclusion of women from the obligation to procreate can easily be criticized as sexist: "It is the way of men to conquer, but not the way of women". A posek accepting this critique might seek to play up the positions that see women as rabbinically obligated. But the effect of the exemption is to prevent women from being halakhically coerced into procreative sex, and generally to give them halakahic control of their sexuality.

The third question is the extent to which we are willing to concede that past halakhot simply cannot be extended to current circumstances – the changes have just been too great. This issue presents differently with regard to de'oraita law, where we are committed in principle to the position that the Torah's Author foresaw all future circumstances and legislated accordingly, and derabbanan law, where we have no such theological commitment. Thus, for example, Rav Moshe Feinstein takes the position that doing otherwise prohibited labor via preset electric timers often falls into a category of "appropriate to forbid but not actually forbidden", on the ground that the Talmudic Rabbis were unaware of electricity and therefore could not have legislated regarding it.

The fourth question is the extent to which we are willing to undo past authoritative rulings, especially those of Rav Yosef Karo, on the basis of our considerably larger library of the works of the rishonim and of variant manuscripts of all rabbinic texts. The potentially destructive effects of allowing such overturning can be seen in halakhic civil law, where plaintiffs can succeed only if the defendant has no plausible defense. A primary task of halakhic civil jurisprudence, therefore, is to eliminate positions from the discussion, and this the Shulkhan Arukh accomplished admirably; the standard rule is that positions not mentioned in the Shulkhan Arukh are halakhically irrelevant in civil matters. And yet, it is hard to allow rulings that no longer accord with the weight of tradition to stand, especially when they seem to us to have deleterious consequences.

Let me give very brief answers to these questions, in reverse order, in the expectation that there will be many occasions to discuss them in more detail and depth in the future.

4) We should resist the temptation to establish a bright line in this area and argue that the Halakhah must be determined either by pure historical/interpretational truth, as we understand it, or else by pure halakhic process establishing irreversible precedent. Rather, we should take the nuanced position that precedent generates significant but not infinite inertia, varying with its antiquity and the weight of the authorities who establish it, which can be overcome by some compelling combinations of contrary evidence, practical need, and moral intuition.

In the case of women's haircuts on chol hamoed, the weight of precedent seemed to me extremely weak and the contrary evidence quite strong. I did not see a real issue of morality involved, and practical need would be a function of specific cases only.

3) I think there are actually three positions possible here:
    a) Laws should be seen as inevitably extending to whatever new circumstances seem to present the same issues.
    b) Laws can only extend to circumstances that could plausibly be seen as having been conceived of when the law was made
    c) Laws may or may not be extended to cover new circumstances at the discretion of contemporary decisors, subject to the willingness of the community to follow them when they exercise that discretion. In such cases, it should be evident, what are formally judicial decisions are in practice legislative acts.

I favor the last approach. In the case of women's haircutting, the question then became whether we should extend the decree made regarding men to women. It seemed to me that this was probably extending the wrong rabbinic ray, that we should instead extend the exceptions for cosmetic bodyshaving and tweezing etc. to this case

2) Here again we should avoid bright-line answers. There are times, circumstances, and issues in which it is appropriate to focus on symbols; I cannot think of any non-extreme case, for example, in which I would pasken based on the sometime principle that "women's wisdom is only with the shuttle" – maybe to be matir an agunah. But as a general rule it is wiser to focus on results, although one must always recognize that the results of a halakhic ruling are not just the immediate case, but also all cases for which that case will become precedent.

In our case, it is not clear to me that the presumption that women's happiness often depends on their sense of their own appearance is sexist, although taking the extreme formulation of Arukh haShulkhan that "their entire happiness is in their adornments" literally rather than hyperbolically might be sexist. But I take it hyperbolically, and therefore am comfortable using Arukh haShulkhan's consequent ruling as precedent.

1) I suggest that the standard should be that the proposed distinction has a purpose plausibly defensible in non-sexist terms and the proposed distinction should be plausibly related to genuine differences in the religious, political, social or other experience of men and women. In this case, the desire to make women's yom tov

experience happier is certainly defensible in non-sexist terms, and I suggest that it relates plausibly to the different norms and expectations governing male and female hair grooming and growth in our society.

Accordingly, I see no barrier to ruling permissively on this question.

Shabbat shalom and chag kasher v'sameiach