How Not to Make Halakhic Rulings

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How Not to Make Halakhic Rulings *

Daniel Sperber

Introduction

In a series of articles and publications I discussed the question of how halakhic decisors (poskim) should act in our day and age, arguing that they should seek to bring people closer to a love of Judaism and halakha, to be inclusive rather than exclusive, and to practice what I called "friendly decision making" (pesikah yedidutit). I am wont to quote a passage from R. Aryeh Leib Friedman's Tzidkat ha-Tzadik (undated, but after 1953), p.115:

How much responsibility and caution one requires in interpreting halakha when it comes to real life. How serious and terrifying is the thought of permitting the prohibited.... But clearly it is no less serious and aweful to prohibit the permitted; as we say in the Vidui ha-Gadol, "That which you declared guilty we declared innocent, and that which you declared innocent we declared guilty." And so it is stated in Yerushalmi Terumot 4.3: "R. Eleazar said: Just as it is forbidden to purify the impure, so too it is forbidden to declare the pure impure."

Thus, one must always take into account the implications of one's ruling, how much pain and anguish it may cause, weigh the relevant aspects involved in the

issue, and seek out a way to find a suitable solution which will bring spiritual satisfaction to the questioners. Of course, we will not always be able to satisfy our "clients" with a "happy reply." But at least we should always try our hardest to do so.

In the following article, I shall give three examples, of how not to rule. They come from different fields of halakha, but they all reflect, in my opinion, the dangers and flaws involved in the tendency toward stringency, and the fear of leniency.

I. A Pesak attributed to R. Moshe Feinstein

R. Michal Zalman Shurkin, in his book Harerei Kedem vol.1 (Jerusalem 1980), which is a collection of hiddushei Torah which he heard from Rabbi J.D. Soloveitchik, has a sort of appendix "in order not to leave the folio empty", which has "facts, practices and advice (which he heard) from gedolei olam (pp.343-346), and in sect.II (pp.347) he relates the following tale:

I was present when the Gaon R. Moshe Feinstein z"l was asked the following question, and I am translating it in its original form, with its response. [And this is not le-halakha, and for the practical halakha the questioner should refer to his son R.David Shlita].

A young man (avrekh) came before R. Moshe z"l greatly perturbed by the complaints of his wife, who had already bore him several children one after another. And she sought permission from R. Moshe [to stop giving birth]. R. Moshe heard the question and replied, "There is no heter".
The young man continued and argued before R. Moshe that: "My wife is sickly, and perhaps the case of one who is sickly is different?" Upon which R. Moshe asked him, "What sort of sickness does she have?" The reply was, "She suffers, apparently, from weak nerves - i.e. nervousness." R. Moshe then asked the young man, "Does she hit the baby? "The young man replied in great surprise, "The baby is just seven months old." R. Moshe then said, "If she doesn't hit the baby, that means she is completely healthy." But the young man continued, "But how should I respond to my wife's complaints?" R. Moshe answered forcefully (be-takifut), "Learn with her musar." [See carefully in Iggrot Moshe vol.4 sect. 39, and in other responsa ibid., and I bring that which I myself saw and heard.]

I found this whole tale somewhat unbelievable, especially when we recall other rulings of R. Moshe. Thus, in Even ha-Ezer vol.4, sect.68, pp.137-138, we read as follows:

With reference to a couple that wish to use moch, (a form of birth-control), since, as a result of their weakness resulting from the [burden of upbringing], they hit them (i.e. the children).....
To the young man: Behold, because of your children, may they live long, your wife, and you yourself, have great distress from [the burden of] their upbringing, so much so that you beat them, even though it is clear to all that there can be no benefit in beating them. And, on the contrary, it will just add to the effort in educating them. Therefore this is an act of stupidity resulting from the disease of nervousness, for which we cannot exercise restraint (i.e. forgive) the pain they cause... and the cruelty to their small children..., even knowing that every strike is prohibited, and this is no form of education... and it may even lead to danger.... Therefore, there is good reason to permit the diaphragm.... And this ruling is for two years after she gives birth.... And this is also because of the danger to the mother, since it is clear that she is sickly with nerves (nerven) resulting from the great pressures and distress in bringing up her children, this too constitutes a danger both for the children and for her life too....

Although there seems to be a similarity between the two cases, though the former is much terser and more abrupt and even brutal in style, these rulings seem to contradict what he wrote elsewhere. For in Iggrot Moshe ibid. sect. 69 p.138, he wrote:

With regard what he wrote concerning the state of his wife, that she was forbidden to become pregnant because of the fear of danger to her, in view of her great weakness, which in itself is dangerous, and her depression which is also a danger, therefore it is simple that she be permitted to practice birth-control, as I have clarified in a responsum in vol.1 of Even ha-Ezer sect.63, that in place of danger she be permitted to use moch...

In R. Shurkin's case, the woman had given birth to several children, apparently close to one another in time, and she was constantly complaining that she did not want again to become pregnant, at least for a while. Undoubtedly, she had post-partum depression, if not a more serious type of depression. In such cases R. Moshe ruled clearly that this was sufficient reason for a temporary pause, an intermission, and hence to permit some form of birth-control.

Furthermore, R. Moshe himself, in that same volume, sect.74, p.142, subsect.3, wrote as follows:

As to the issue of a woman's taking birth-control pills to prevent pregnancy - even though it is forbidden to uselessly spill semen (zera le-batalah) , this is not the

case [when one takes pills] because the sperm enters the woman's womb. But without great need one should not take them nor seek such advice. And even though in order to keep her good health, a woman is not obligated to bring upon herself distress greater than she has power to bear, nonetheless, this is against the will of God. However, if she is physically weak, and even more so if she has great fear which we call nerves (nerven), which is just like illness, there is room for permissibility.

And see also ibid. sect.71, and Even ha-Ezer vol.3 sect.24, where he permitted the use of pills for a limited period for a woman whose weakness was greater than is normal, even though the husband had not yet fully carried out the mitzvah of procreation, and if he had, he was permitted to carry out birth-control even up to three years.

Is this really the case which R. Shurkin cited? Could R. Moshe not have questioned the young man more thoroughly and more systematically? What really was his wife's state of mind and health? What were the symptoms of her depression? Was the request for temporary respite or permanent? Had the husband fully carried out the obligation of procreation? Could it be that he only asked him: "Does she hit the baby?" And could his ruling really have been: "Learn musar with her." R. Moshe was a great posek, with a great deal of experience, human understanding and sensitivity. In one case he even permitted a baal teshuvah, who married a gentile woman, and who discovered that he was a cohen, to continue to live with his wife after she had converted! (See ibid. sect. 39. p.83.)

Indeed, there are numerous discussions concerning the halakhic status of depression, and when it is considered health-threatening and even life-threatening. (See, Iggrot Moshe Even ha-Ezer vol.1, sect. 65, p.165.) A clear exposition on this subject may be found in Avraham Sofer Avraham's book, Mishnat Adam vol.3, Even ha-Ezer, Jerusalem 1988, p.65, where he writes, inter alia:

On the other hand, if she does not want to become pregnant out of fear of an attack of depression etc., even despite psychiatric treatment (mentioned above) it would appear that she is permitted to use one of the methods of birth-control (according to the ruling of a rabbi), and the husband cannot force her to [carry out] that mitzvah. And R. Shlomo Zalman Auerbach shlita, and R. Yehoshua Neuwirth agreed with me on this point.

Furthermore, in that same volume, p. 59 he discussed a woman's weakness as follows:

The Birkei Yosef (sect.1, subsect. 2) wrote: If he has already carried out the obligation of procreation and his wife permitted him to desist from intercourse, he may do so, as we have written below sect.76, on the basis of Rambam chapter 15 of Hilkhot Ishut.

From this, and the Birkei Yosef's conclusion, we may deduce that he is of the opinion that even without serious medical reasons, but merely for reasons of convenience, finances etc., a husband is permitted to desist (albeit not completely) from intercourse with his wife, provided, of course, he does not practice auto-eroticism.

R. Mordechai Breisch, in his responsa Helkat Yaakov, Tel Aviv 1976, vol.3, sect. 62, rules that in a case when the Rabbi sees that there might develop a situation of danger, or possible danger (safek sakanah), this may be regarded as an hour of danger (shaat ha-dehak) in which one may have a ruling of permissibility. Indeed, in a series of responsa R. Breisch permitted birth-control (vol.2, sect. 11-13) for a woman who had children "and now wants under no circumstances to become pregnant, and this issue is affecting her nerves in a most serious manner", (p.35). The doctors also agree that she may fall into a state of mental derangement; nonetheless, his ruling was only for one year.

I shall not go into all the intricacies of the halakhic discussions in the numerous sources that discuss this issue. But surely this suffices to show how careful one must be in making such decisions. There are so many elements to be taken into account: halakhic, psychological, medical etc. I therefore find it difficult to believe that R. Shurkin's testimony is indeed accurate. For I do not believe that a great decisor could rule on such flimsy evidence, examined so superficially, and giving a ruling so abruptly. I believe this to be a lesson in what not to do.

2. The Sheitel Memorandum

Some few years ago a new issue erupted primarily in the hareidi community: Women were wearing sheitels (wigs) made from human hair coming from India. Some, perhaps even much, of this hair came from a place called Tirupati, in South India, where there is a Hindu temple. Pilgrims coming to this temple, before entering it, shave their hair and place it outside the temple entrante. . Millions of Hindus come annually to Tirupati - perhaps as many as twenty thousand a day! -, and vast amounts of hair pile up. The temple authorities, apparently realizing that this hair could constitute an additional source of income, began, many years ago, to sell it to wig-making companies.

When this suddently became known to a number of Rabbis in England, Israel and the U.S.A. - it had already been known to others and halakhically discussed many years earlier - they declared it "tikrovet avodah zarah", idolatrous offering, something directly related to idolatrous practice, and hence "assur be-hana'ah", such that it was absolutely forbidden to derive any benefit therefrom. The resultant publicity of this ruling led to mass burnings of those very expensive sheitels by the thousands.

Those devout women, who upon hearing that their sheitels were "idolatrous" immediately burned them, are to be lauded and applauded for their great piety. However, I imagine they were plagued with pangs of anguish, not only because they had to destroy what for them was a very costly and personal part of their apparel, but even more in that for many years they had been covering their heads with "idolatrous wigs", trespassing - albeit unwittingly - one of the most serious prohibitions in Jewish law.

Numerous erudite responsa were written discussing all sorts of halakhic aspects of this subject, the vast majority of them concluding that the sheitels were to be destroyed. Some more lenient ones counseled that they be exchanged - not necessarily such a practical suggestion. Only the barest minimum ruled that it was permitted to go on wearing them.

Virtually none of those learned sages had any real knowledge of India, Indian religión or languages, and I suspect that the majority had never even been in India, and certainly not in Tirupati. It is true that a small mission was sent for a few days to examine the temple, but none of the members had the competence, the linguistic abilities etc., as they themselves admitted, to make a real evaluation of the pilgrims' hair-shaving activities. More surprisingly, or maybe not so surprisingly, none of the experts in the field of Indian studies were consulted, neither, for example, Prof. David Schulman of the Hebrew University, an internationally acclaimed Indologist, nor Rabbi Alan Unterman of Manchester University, who did his doctorate in India on Indian religion, nor Prof. P.V. Wiswanath, a devout Jew of South Indian origin, now living in New Jersey, nor even the local Indian rabbis and authorities living in Mumbai and Delhi.

One of the few rabbinic authorities to examine the issue systematically from all points of view, was the renowned posek R. Menashe Klein (ha-Katan), whose numerous volumes of responsa are very widely acclaimed and largely accepted also by the hareidi communities. Incidentally, he surmises that around a million women wear such sheitels, whose cost is upward of a thousand dollars each so that the total destruction of the wigs may amount to as much as a billion dollars

(!) - hefsed merubeh, enormous monetary loss, an important consideration to be taken into account by halakhist. And even if his assessment be seen as somewhat exaggerated, the halakhic point he made is certainly pertinent. His conclusion was that the sheitels were not prohibited, but he counselled against wearing them for other reasons.

Now without even making an unequivocable statement as to whether the Tirupati hair constitutes "tikrovet avodah zara" or not, my point is that the halakhic procedure whereby the rulings were concluded, was highly flawed and therefore totally unsatisfactory. The decisior (posek) bears a great burden of responsibility before making a ruling that may incur the loss of thousands of dollars to thousands of individual women, and perhaps cause them deep anguish on learning that they had been trespassing so serious a prohibition.

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On the fifth and sixth of February this year, I participated in the first "Hindu-Jewish Leadership Summit" at Delhi, India. This summit was attended by a delegation of the Chief Rabbinate of Israel and some prominent European rabbis, and religious leaders of the Hindu Dharma. I was asked to participate, perhaps because I had served briefly as a rabbi in India many years ago, and was therefore thought to have some understanding of Indian culture and religion.

Many leading Achariahs and Swamis from all over India were present, and a very lively and probing dialogue took place. In our discussions we asked them whether Hinduism is a polytheistic and idolatrous religion, and they all unanimously and most vigorously denied such an assertion, explaining the apparent outward manifestations of idolatry in a completely different fashion.

At the end of the conference, a "Declaration of Mutual Understanding and Cooperation" was co-signed by all participants. Perhaps the most significant clause in the whole document in this context is the opening one:

The participants affirmed that:

1) Their respective traditions teach Faith in One Supreme Being who is the Ultimate Reality, who has created this world in its blessed divinity and who has communicated Divine ways of action for humanity for different peoples in different times and places.

I wonder whether the learned rabbis who prohibited the use of Tiraputi-based sheitels would have ruled differently had they had this document before them. Perhaps not. Perhaps the way in which Indian religious authorities understand their own religion is irrelevant to them. They know better, even if it causes the loss of millions of dollars and many heartbreaks....

3. The Lookstein Affair

The Facts: Rabbi Haskel Lookstein was invited by President Obama to participate in an interfaith thanksgiving event that was to take place in the Episcopal National Cathedral on the morning after his historic inauguration as the 44th President of the United States of America. Representatives of the various religions were invited, such as the different streams of Christianity, Islam, Buddhism etc. For the first time in such an event, the three major streams in Judaism, Reform, Conservative and Orthodox, were asked to participate, and Rabbi Lookstein was chosen to represent American Orthodox Jewry. And indeed he accepted, and participated in this memorable event.

The Reactions: The Rabbinical Council of America (RCA) took Rabbi Lookstein to task, issuing a press release saying that he broke the rules by entering a Christian church, rebuking him and claiming he had violated an unnamed rabbinic rule by entering a church and reciting a prayer there in honor of the President's inauguration.

The Questions: The issue is indeed complex, since it touches upon the very nature and parameters of permissability in our relations to our gentile-Christian neighbours. The basic questions are: Is Christianity idolatrous? Are Christians idolators? Are all forms of Christianity identical? If Christianity is idolatrous, may we, or, more correctly, how can we conduct trade relations with Christinas and/or Christians institutions. For according to the Mishnah (Avodah Zarah 1:1,2) in the land of Israel it is forbidden to do business with idolators three days before their holy days and three days after, and in the Diaspora according to Shemuel on that day itself (Bavli Avodah Zara 7b, 11b; and see, Encyclopedia Talmudit, vol.1, s.v. Eideihem). If Sunday is a Christian holy day, then in Israel one can never do business with a Christian! Similarly it is forbidden to derive any benefit from idolatry or to provide it with any benefit. Can one drink Benedictine liquor, which finances the Benedictine monastaries? And what about Quaker Oats, is that also forbidden? And partnership with idolators is also forbidden. But if a shareholder is halakhically considered a partner, how can one even buy shares? Are we certain

that the United Methodist pension fund has not invested in those shares, or the Anglican Church? ...etc.

A further question that must be asked is: are there circumstances under which one may override these possible prohibitions, such as shelom malkhut- in order to keep peace and good relations with the authorities, or mi-shum eivah- in order not to engender hatred and tension with our gentile neighbors?

Analysis: These questions-problems already troubled medieval halakhic authorities, for restrictions such as indicated above would have created insurpassable difficullties in the economic life of the Jews living in a Christian environment. Maimonides regarded Christianity as idolatrous, because of the belief in the Trinity, incarnation and the presence of images in their churches. For him, living in a Moslem context, and Islam being regarded as monotheistic, he was less affected practically by this halakhic position. However, European Jews in practice simply paid no regard to the prohibitions prescribed by Tractate Avodah Zarah. They traded with Christians before and after their holy days, sold objects used for ritual worship, and so forth.

The Solution: Three possible solutions were offered by the major medieval authorities: Rabbenu Gershon Meor ha-Golah in the eleventh century, basing himself on a statement of Rabbi Yohanan, namely that "Gentiles outside the Land of Israel are not idolatrous, but they are merely following the customs of their ancestors" (B. Hullin 13b), permitted trade with Christians even on their holy days (Teshuvot R. Gershon Meor ha-Golah, ed. S. Eidelberg, New York 1957, 21 pp. 75-77). So Christianity may be idolatrous, but outside the Land of Israel Christians are not necessarily idolators.

R. Tam, the Great Tosafist, claimed that the prohibition of trade applies only to what might be used as an idolatrous sacrifice and not to any other sort of business, (Tosafot, to B Avodah Zara 2ª, "Assur").

The third approach sees a change in the actual status of Christianity. The fourteenth century Provençal authority, R. Menachem Meiri, creates a new distinction between nations that are law abiding and those that are not, i.e. that have positive ethical values, and a legal system to enforce them, and those that do not. He describes the idolatrous nations to which he believes the Talmud is referring as follows (Beit ha-Behirah, Avodah Zarah, ed. A. Sofer, Jerusalem 1944, p.48, of pp. 3.28, 33, 46, 53):

They are polluted in their practices and disgusting in their moral traits... But the other nations which are law-abiding, and which are free of these disgusting moral traits and, moreover, punish people with these traits - there is no doubt that these laws do not apply to them at all.

Thus, while for Maimonides, for example, it is the object of worship, the theology, that defines worship as idolatrous, for Meiri it is the life style that is the deciding factor (see M. Halbertal and Avishai Margalit, Idolatry, Cambridge Mass., 1992, pp.212-213;Y. Katz, Zion 1953. pp.15-30 etc.). Hence, according to the Meiri there should be no prohibition to entering into a church, and certainly not an Episcopalian one which is virtually bereft of images.

Furthermore, there are differences of opinion among the early authorities as to whether trinitarianism is forbidden to gentiles. Clearly Jews are not permitted to believe in any form of "partnership" (shituf) between God and other divine entities. Our God is a single unitary God. But are gentiles permitted to believe that alongside God there are other (subservient ? related?) divinities? Maimonides clearly is of the opinion that this is absolutely forbidden for gentiles too, since this is real idolatry, (Hilkhot Avodah Zarah chapters 1, 2).

However, the Rema (Orah Hayyim 156) rules that shituf is permitted for non-Jews, and in greater detail in his Darkei Moshe ibid., basing himself on Rabbenu Yeruham, Toledot Adam 159c, and Tosafot to Behorot 2b, s.v. Shema. The ruling of the Rema was interpreted in a variety of ways. But the Shakh ad loc, and so too the Pithei Teshuvah to Yoreh Deah 147 clearly understood the Rema as meaning that shituf was not prohibited to gentiles.

Hence, if we take into account the view of the Meiri, on the one hand, and that of the Rema, on the other, it would well appear that Christianity is not, as such, idolatrous, and it should not be prohibited to enter a church, and certainly one that is virtually bereft of images.

Thus, we see that there are differences of opinion as to the halakhic status of Christianity, and this in itself creates a degree of uncertainty, a safek, as to the status of Christianity. The Taz, in Yoreh Deah 141, writes as follows:

It would seem that even though "uncertain idolatry" (safek avodah zarah) should be regarded with stringency (le-humra), nonetheless in any case where there is a rationale (sevara) either to permit or to forbid, one should deal leniently (raui le-hakel). For it is a principle that in all cases we do not create prohibitions in areas of uncertainty (lo mahzikinan issura misafek), and we do not deal stringently in

cases of uncertainty, except where the prohibition is clearly established.

The RCA's Rebuke. It is true that the position of both R. Moshe Feinstein and R. J.D. Soloveitchik was to discourage interfaith meetings, and presumably, this was the basis of the RCA's ruling and consequently the reaction to Rabbi Lookstein's participation in this interfaith event. However, they were referring to interfaith dialogues, when different religious parties attempt to persuade one another of their theological legitimacy. This interfaith gathering on the other hand, involved no sort of dialogue. Clearly, the Christian church was not legitimizing Islam or Buddhism in this event. It was merely one of national solidarity to the President, encompassing representatives of all faiths.

How would it have looked, if the representative of Orthodoxy had refused the President's invitation while the Conservative and Reform agreed to be present? What would have been the perception of the general public had they learned that an Orthodox Rabbi could not attend because he regarded Christianity as idolatrous? In our days of increased antisemitism, is this the sort of publicity we need? Would this have endeared us to the new President and the Christian public?

In my opinion, Rabbi Lookstein's participation constituted a kiddush ha-Shem, whereas the RCA's press release was not only totally irresponsible, but may also be regarded as a hillul ha-Shem.

Those distinguished Rabbis should have taken into account the questionable nature of Christianity's status, and following the Taz, regarded the issue leniently. They should have taken into account the issue of shelom malkhut, and perhaps even more mi-shum eiva and mi-pnei darkei shalom. They should have been aware of the ruling in Shulhan Arukh Yoreh Deah 178:3 that "a Jew may join government service and wear gentile clothes every day - thus violating a Torah prohibition - so that when the day comes he will be in place to serve the good cause of the Jewish people." Rabbi Lookstein, did not hide his Jewishness, or his Orthodoxy, but proudly stepped into a church publicly to show the American nation that Orthodox Jews also wish to express their thanks (hakarat ha-Tovah) and solidarity together with the rest of the American people.

* I requested Rabbi Shabtai ha-Cohen Rappaport, Head of The Beit Midrash of the Machon Gavoah LeTorah at Bar-Ilan University, to comment on what I have written here. And as a result, I have been privileged to receive his observations, which I am including here in order to give a counter-balancing point of view to much of my aggressive criticism. (His remarks are in square brackets followed by the initial S.R.)

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See "Paralysis in Contemporary Halachah," Tradition 36/3, 2002, pp.1-13: Kevod ha-Tzibbur u-Kevod ha-Beriyyot", Deot 16, 2003, pp.17-20, 44; "Congregational Dignity and Human Dignity: Women and Public Torah Reading", The Edah Journal 3/2, 2002, pp.1-14; "A Plea for the Chained Daughters of Israel", The Edah Journal 5/1, 2005, pp.1-4; "Revisiting the Agunah Problem", JOFA Journal VI/1, 2006, p.20; "Ol Mitzvot Noam Mitzvot", Akdamot 15, 2005.pp.129-139. "Friendly Halakhah and the Friendly Posek," The Edah Journal 5/2, 2006. pp.1-36; "The Human Element in the Commandments: The Effect of Changing Community Norms on Halakhic Decisions". JOFA Journal VI/4, 2007,pp.7-9; Darkah Shel Torah, Jerusalem 2007, pp.128 et seq.; Netivot Pesikah, Jerusalem 2008, pp.130 et seq.

[1]

[On this passage R. Shabtai Rappaport comments as follows:

> This passage is in my opinion strange. Obviously one may not prohibit the permitted, just as one may

not permit the prohibited. In Hoshen Mishpat 25, one who prohibits the permitted is obligated to pay [damages], as in the story concerning R. Tarfon.
However, from where do we learn that the ruling must tend to leniency? It has
to be truthful. Furthermore, even if the truth leads to pain and anguish, the
truth remains the truth. In addition, I do not understand why the source directs that the decisors may grant the questioner spiritual satisfaction. At
all events, we are assured that "Whoso keepeth the commandment shall suffer no evil thing" (Eccles 8:5).
S.R.]

To which I would respond that the Tzidkat
ha-Tzadik is keenly aware of the fact that there is not always a single absolutely truthful response to every question. The "truth" that is to be sought is often a subjective one, rather than a "mathematical" one. In such cases the decisor has to take into account all the implications of his ruling, including the possible negative effects upon the questioner. See, in greater detail, in my *Darkah Shel ha-Halakhah*, Jerusalem 2007, pp.51 et seq., and my *Netivot Pesikah*, Jerusalem 2008, pp.130 et seq.

To which R. Shabtai comments:

[It is true that there may not be a single
correct response to a halakhic question, and hence, the arguments (mahlokot) throughout our history. However,
from this one should not conclude that a rabbinic response must always be such that it satisfies the applicant. Concerning this Rav Yosef, in Pesahim 52b cited the verse in Hosea 4:1b, "My people ask counsel at their stocks, and their staff (*maklo)* declareth unto them" – all who rule leniently (*meikeil)* declareth unto them. The response has to be constructed upon the inner truth of the responder. See also Dibrot Mosheh to Shabbat sect.10, that the ruling has to be completely consonant with the responder's understanding of the Talmudic source and the relevant halakhah, related to it even tangentially. This consonance with his understanding [of the sources] assures that his ruling will not be influenced by his personal inclination, but only result out of his deep understanding of the Talmudic sources through an examination with no specific

relevance to the issue at hand.

It is true that in many cases one has to adapt
the ruling to the specific circumstances of the questioner, and there are many precedents for this; but this does not mean that the ruling has to please the questioner. Indeed, at times one has to distance the questioner from a transgression or from causing harm to others.
S.R.]

To which I would reply, that in principle I
agree with the above, though I am doubtful as to the degree to which a true decisor can distance himself from his personal inclination. On the contrary, I believe one can demonstrate that the "personal inclination" often
forms an integral part in a great decisor's process of decision making.

But more basically I would state that what I
wish to stress is that humane understanding and empathy are integral and legitimate components in halakhic thinking.

Here I would like to add a quotation from the
great jurist, Judge Mosheh Silberg, in his *Kach Darko shel Talmud*,
Jerusalem 1962, p.134. (my translation):

> Every legal norm,
> even the most equitable one, is likely, under certain circumstances, to lead to
> a perversion of the law. For the law is something generic, a standardized
> garment prepared in advance, and approximately suitable for the average person.
> But it is not accurately suited to the specific requirements of an individual,
> to the actual form of his limbs etc. Hence, the universal cry for an adjusted
> equity, for that special adaptable "spice", made to overcome the unavoidable obstacles posed by the law.

I shall not enlarge on this theme ……, but refer
the reader to the two seminal volumes by Prof. Aaron Kirschenbaum, *Equity in Jewish Law: Halakhic Perspectives in Law: Formalism and Flexibility in Jewish Civil Law*, and *Equity in Jewish Law: Beyond Equity: Halakhic Aspirationism in Jewish Civil Law*, Hoboken New Jersey and New
York,
1991.

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This follows on my article in Conversations 3,
2009. pp.1-11, "Modern Orthodoxy: A Crisis in Leadership."

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He brings no source for this length of time,
but compare what he writes in his responsum in Even ha-Ezer vol.3, sect.12, p.435:

> It would seem that
> when a woman fears to give birth, since she is greatly distressed… and this
> distress will continue for many years, and possibly for all her life, she may
> use *moch*… For in the case of such distress she is not duty bound to her husband's [wish for] sexual intercourse which will cause her to be pregnant.
> And I would advise the use of spermicidal cream… for three years, and hopefully
> she will get better and have healthy children, and she will not fear for a longer time than this…

[1]

[I was privileged to be acquainted with R. Moshe Feinstein' s positions in depth. I frequently discussed these matters with him in the years 1971 and 1974. In his Iggrot, Even ha-Ezer part 4 sect.72, he wrote:

> As to the matter of a woman's taking birth-control tablets (pills), even though there is no issue of wasting sperm, since the sperm goes into the woman's womb, nonetheless, without great need, one should not do this too, as one should not seek such clever devices, even though…. one may not obligate a woman to suffer beyond her abilities, but still this is an attempt cleverly to act against the will of God.

This passage summarizes his views with absolute simplicity. A normal healthy person who does not have the sort of illness that permit him to transgress various prohibitions of rabbinic and even of biblical status, lest his disease becomes more serious and even life-threatening, is obligated to keep the Torah commandment, and not to pamper himself, making himself out as weak. A Jew must use all his forces to strengthen himself to keep the Torah and its commandments. This includes having children in a normal fashion, in accordance with God's will, without the use of methods of birth-control. All this, not merely because of the formal prohibitions, but also because of the duty to "be perfect with the Lord thy God" (Deut. 18:13), which the Sifre explains thus: "Do not seek to know the future, but go after Him *be-temimut,* with innocent integrity, and so you will be with Him and in his ways." This I heard from him many times.

An exception to this rule is the sick person, who is permitted to seek out medication for his sickness, and not to act in "innocent integrity", since such behaviour would be blind irresponsibility.

See what he wrote in a different case (Iggrot part 4 sect. 10):

> And it seems to me
> that even though a small minority are born this way, and one might apply the
> verse "be perfect with the Lord thy God"… nonetheless, since now it easily possible to examine [the outcome], we may regard his lack of examination
> as blinding one's eyes to what may be seen.

Hence, when R. Moshe suspected that a woman was
pampering herself, he would state to her husband that he should not practice birth control, but trust in God. This, indeed, seems to be the point in the story related by Rav Shurkin. It is true that the description is short and brutal, but this is perhaps a result of a lack of literary ability rather than perversion of the truth. The question is when is a woman, who claims weakness, to be regarded as a sick person who is free of the obligation of "*temimut*". There is no doubt that psychiatric depression that requires medication can be viewed as sickness. Indeed, Rabbi Moshe was even more lenient in this matter, and ruled that every time that emotional pressure led to irrational behavior (or more precisely, to behavior unfitting the normal psychological behavior of a mother to her children), the woman may be regarded as sick. This question goes much further than that of Dr. Sofer in his book, except that he is far more lenient in permitting birth control and abortion following the views of Rabbi Waldenberg, a position which was totally rejected by Rabbi Moshe.

At all events, concerning the style reflected
in his response, I have not met a person more adamant in holding to his views, and, on the other hand, more gentle and considerate at the same time, than Rabbi Moshe Feinstein. He was most adamant when he understood the truth to be on his side, but the formulation was gentle and considerate beyond imagination.

Further concerning the *baal teshuvah* ,
who believed himself to be a Cohen and married a convert, in all due fairness one has to explain R. Mosheh's reasoning for permitting him to continue to live with her. R. Mosheh ruled that one should not regard a person to be a Cohen on the basis of the testimony of persons not qualified to give testimony, and in that particular case the knowledge that he was a Cohen came from his father who by Jewish law was in no way qualified to give any sort of testimony. It is possible that the father's lack of qualification was not merely because he was likely to lie, but also because he was not aware of the significance of *kehunah*, (namely that one requires a father who is a Cohen, and a mother who is eligible

to be married to a Cohen). Without elucidating the reason for R. Mosheh's ruling, one might think that he ruled leniently in order not to cause pain. S.R.] This, I believe to be a fine example of how R. Mosheh used his brilliant halakhic thinking to reach a compassionate solution, even if compassion was not the motivation for his ruling.

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See further Getzel Ellinson's article in Jewish Social Studies 46/1, 1984, pp.51-60, entitled "Natural Family Planning as Reflected in Contemporary Jewish Responsa.

[1]

Rambam ibid.15:1, writes: A woman who permitted her husband after their marriage to desist from intercourse, this is permitted. Under which circumstances? When they have children and have carried out the mitzvah of procreation. But if not, he is obligated every time until they have children.... See also Ellinson ibid. pp.38-40. And see further his booklet, "Procreation in the Light of the Halacha: Family Planning and Birth Control", Jerusalem 1977. pp.20-27 and further in David Feldman, Birth Control in Jewish Law: Marital Relations, Contraceptions and Abortion as set forth in the classic texts of Jewish Law, London 1968.

[1]

See also his responsa in vol.2, sect. 11-13, where he permits the use of birth-control to a woman who has given birth to sons and daughters, "and now does not under any circumstances want any more, and her nerves are badly and seriously affected" (ibid. p.35), and the doctors agree that there is a danger that "she will reach a stage of insanity." He has a long and conflicted discussion, but finally gives his permisstion for one year hoping that she will be cured during this period (p.42). He concludes that, even though R. Shemuel Engel (Responsa Maharash

vol.7, London 1954, sect.85-86) tended to stringency, he finally permitted the use of a diaphragm. See further, Responsa Tevuot Shemesh, by R. Shalom Messas,
Even ha-Ezer, Jerusalem 1981, sect.151, and R.S.Z. Auerbach, Minhat Shlomo vol.3, Jerusalem 1999, sect. 103 subsect.1 p.21; Abraham Steinberg, Encyclopedia Hilkhatit
Refuit, vol.4, Jerusalem 1994. pp.115-127, citing R. Yitzhak Isaac Weiss, Minhat Yitzhak, vol.5, Jerusalem 1978, sect. 113 , concerning a woman's "weakness, lack of energy,
tiredness, nervousness, even though there is no real danger, one may consider the issue because of extreme distress, according to the discretion of the rabbi (ibid. p.228), but restricted to the use of pills". And cf. ibid. vol.4, Jerusalem 1979, sect.40, p.22, on the dangers of
insanity as *pikuah nefesh,* threat to life.

[Here you have cited many fine references to
rulings permitting the use of birth-control when there is suspicion of mental illness. But there is a great gap between mental illness and mere unwillingness to have additional children. S.R.]
Certainly. However, in the case as reported above the husband claims his wife is sickly and suffers from weak nerves – not that she is "merely unwilling."

[1]

To strengthen my argument I would refer one to
his responsa in Even ha-Ezer vol.1, sect.13, and ibid. sect. 63-64, where he permitted the use of *moch* in cases of danger, and ibid. vol.2, sect.25,
67 etc.

[1]

In the Journal Or Yisrael, vols. 8/4, 10/1,
2004-2005, pp.13-126, 31-98, some twenty-three responsa were published. (As to the various views on the status of *meshamshei avodah zarah*,
belonging to a Jew, see the responsa of R. Avraham of Sochochev. Avnei Nezer, Hoshen Mishpat sect.99, Jerusalem 1959, p.135, and Shulhan Arukh 146.2.)

[1]

I shall not relate to the question of whether the wearing of any kind of sheitel is halachically appropriate, or whether a sheitel of any kind of human hair is permissible. These issues require a separate discussion and are not within the scope of this article. See, for example, the booklets of Rabbi Pesach Eliyahu Falk, Sheitels: A Halachic Guide to Present-Day Sheitels, Gateshead 2002; Oz ve-Hadar Levushah: Peot, Gateshead 2004.

[1]

[I agree with this criticism entirely. Furthermore, an examination of several responsa reveals that there is an element of "I told you so", resulting from the view that a sheitel is in any case forbidden, and how much more so if they are costly ones made out of human hair. And even should one argue that the lack of examining the facts is a well-established tradition, this is unforgivable in our days where the information is readily available. S.R.]

[1]

The summit was convened under the auspices of the World Council of Religious Leaders: An Initiative of the Millenium World Peace Summit, headquarters New York, whose director general is Bawa Jain.

[1]

They base this assertion on passages from the most ancient and canonical of their sacred writings, whose formulations surely attest to such belief. The following are some examples that they offer:

Rgveda Sambita

There
is one reality; the wise speak of it in various ways. Rg. Veda.I.164.46c

Chandogya Upanisad (Sama Veda)

> Only one non-dual
> limitless reality. ChU 6.2.1

Brhadaranyaka Upanisad (Shuklayajur Veda)

> There is no second
> thing here at all. BrU 4.4.19

Taittiriya Upanisad (Krsnayajur Veda)

> The one that is in
> this person is the one that is in the universe; he is one. TaiU 2.8.5

Katha Upanisad: (Krsnayajur Veda)

> He has no sound, no
> texture, no form, is changeless, free from taste, time and smell, has no beginning or end, is beyond the intellect and absolutely constant. KaU 1.3.15

A series of verses (2.2.9-12) in this Upanisad
uses illustrations to show that the one being is both immanent and transcendent.

Just as fire, which
is one, having entered the world, assumed a form corresponding to each of its
manifestations, so too the being self within all beings, who is one, assumed a
form corresponding to each, yet is apart (transcendent). KaU 2.2.9

Just as air, which is
one, having entered the world, assumed a form corresponding to each of its
manifestations, so too the being within all beings, who is one, assumed a form
corresponding to each, yet is apart (transcendent). KaU 2.2.10

Just as the sun,
which is the eye of the world, is not touched by the defects of external things
that are seen, so too the being within all beings, who is one and transcendent,
is not touched by the grief of the world. KaU 2.2.11

One being within all
beings, who is the master, who makes a single form manifold – those wise ones
who recognize clearly that one who abides in themselves, have lasting happiness, not anyone else. KaU 2.2.12

Svetasvatara Upanisad (Krsnayajur Veda)

The one effulgent
being, hidden in all beings, all-pervasive, the being/self within all beings,

who presides over actions and their results, who dwells in all beings, the witness, consciousness, who is absolute and free from attributes, SvU 6.11

Kena Upanisad (Sama Veda)

That which is not
revealed by speech, and by which speech is revealed; know only that as Brahaman, not what people worship as an object. KaU 1.5

That which is cannot
be thought of by the mind, and because of which, they say, the mind thinks:
know only that as Brahman, not what people worship as an object. KaU 1.6

That which one does
not see with the eyes, and because of which the eyes see; know only that as
Brahman, not what people worship as an object. KaU 1.7

Mundaka Upanisad (Atharva Veda)

The one who cannot be
seen or grasped, who has no lineage or class, no ear or eye (no limitation in
knowledge) or hand or foot (no limitation in power), is free from time, all-pervasive, extremely subtle, changeless and the source of all beings, the
wise ones recognize clearly. MuU 1.6

However, this is by no means simple, for, as pointed out to me by Prof. Meylekh Viswanath, in a private communication (Feb. 10, 2007) there are many different "sampradayas" or traditions. He explained as follows:

> Although the Shankaracharya had, in fact, not come to the Summit due to ill-health, there were acharyas (heads of ashrams) from many other traditions. Many of them were from the tradition of Shankara (6th century, C.E.), but some were from other traditions, such as Madhva and Swaminarayan. The tradition of shankara is called "advaita" or non-dualism. This refers to the essential identity of the Self (Atman) and the Whole (Brahman). Advaita teaches that the world is seen as multiple because of avidya (ignorance). However, in reality, everything is a manifestation of the attributeless and formless Brahman. In fact, the Chandogya Upanishad says "Tat tvam asi," which can be translated as "Thou art That," i.e. asserting the identity of the Thou (The Self) and the That (Brahman). (The Upanishads are canonical texts that, along with the Vedas and the Bhagvad Gita are acknowledged by all Hindus are representing the revealed Truth.)

> Now, this is definitely problematic for Judaism, which in its Orthodox form insists on the distinction between the Created and the Creator.

> [I am not sure this is universally accepted. Haham David Nieto, 1654-1728, claimed that God and Nature are one and the same. Some called him a heretic, but the Hakham Zvi defended him, in his Responsa no.18.

> D.S.] It was therefore surprising to me to hear Swami Dayananda Saraswati, the foremost Hindu leader at the Summit (in the absence of the Shankaracharya)
> present an alternative interpretation of the mahavakya (or great utterance)
> "Tat tvam asi" usually translated as "Thou are That,"
> equating the human being with the Supreme Consciousness, known as Brahman. According to the alternative interpretation
> that Sri Dayananda Saraswati placed on this mahavakya or "great utterance," this does not mean the identity of Man with Brahman. In fact,
> he said that the fact that the two were placed in some kind of equivalence
> itself indicated that the two were not identical; else the statement would be
> nonsensical. What it means is that both of them share at a fundamental level
> that unboundedness of essence. "Tat tvam asi" is true, only at a transcendental level, but not at an individual level.

Be that as it may. See following note.

[1]

The fact that they believe in one supreme
being does not automatically absolve them from being regarded as idolators, if they do indeed worship idols. Such, at any rate, is the opinion of Maimonides in Hilkhot Avodah Zarah 1.1 (transl. M. Hyamson, Jerusalem 1965, p.66a):

> In the days of Enosh,
> the people fell into gross error, and the counsel of the wise men of the generation became foolish. Enosh himself was among those who erred. Their error
> was as follows: "Since God", they said, "created these stars and

spheres to guide the world, set them on high and allotted unto them honour, and since they are ministers who minister before Him, they deserve to be praised and glorified, and honour should be rendered them; and it is the will of God, blessed be He, that men should aggrandize and honour those whom He aggrandized and honoured – just as a king desires that respect should be shown to the officers who stand before Him, and thus honour is shown to the king." When this idea arose in their minds, they began to erect temples to the stars, offered up sacrifices to them, praised and glorified them in speech, and prostrated themselves before them – their purpose, according to their perverse notions, being to obtain the Creator's favour. This was the root of ifolatry, and this was what the idolators, who knew its fundamentals, said. They did not however maintain that there was no God except the particular star (which was the object of their worship). Thus Jeremiah said "Who would not fear thee, O king of nations? For it befitteth Thee; for as much as among all the wise men of the nations and in all their kingdom, there is none like unto Thee. But in one thing they are brutish and foolish. The vanities by which they are instructed are but a stock" (Jerem. 10:7-8). *This means that all know that Thou alone are God: their error and folly consists in imagining that this vain worship is Thy desire*. [My emphasis. D.S.]

However, they would argue that they do not "worship" idols, but use images as means of communication with the supreme being, and as aids to concentrate their thoughts on the single " limitless reality." Furthermore, they assert that the objects of their

ritual devotion, such as elephants, monkeys, cows etc., are not gods, but that we do not understand the various Sanscrit terms that distinguish between the notion "God" and that of "agents of communication". I hope to discuss this in detail elsewhere. Be that as it may, we should also consider the position of the Meiri vis-à-vis idolatry, discussed below in the section on the Lookstein affair.

[1]

[Clearly there is an additional question, namely: is the view of the "scholarly class" that which is the determinant, or the understanding of the general public who donate their hair to the Temple. I am not an expert on India, but I have read many books on the land and the prevalent beliefs there, and think, that even the literati and the intellegentsia among them are certain that their religion is idolatrous.

An additional question is the degree of stringency with which we should relate to questionable (*safek)* idolatry. Can we relate to benefit from idolatry in the same manner of leniency in times of need and monetary loss, as in other similar cases. It seems likely that in cases of suspicion of idolatry one deals more stringently. This is not related to the permission to do business with gentiles on the eve of their holy days, lest there be loss of livelihood, for in such a case there is no suspicion of transgressing a biblical prohibition, but only the danger of leading others astray (as R. Mosheh defined it in his Dibrot Mosheh, Shabbat sect.2). The prohibition against partnership in something forbidden, when the business dealings are mandated by economic pressure, does not demonstrate a partnership or tolerance of idolatry. Not so when one benefits from idolatrous offerings (*tikrovet avodah zarah)* which is an independent prohibiton, for which it would be difficult to rule leniently even when great personal loss is involved. S.R.] Much of the discussion referred to above in note 9, centers upon whether the Tirupati case actually involves *tikrovet avodah zarah*. If that were to be positively demonstrated, then, of course, R. Shabtai's remarks would be very pertinent.

[I am not persuaded, since there still remains an element of uncertainty for reasons mentioned above. And even in the case of

possible
(safek) idolatry I do not think one can take a lenient position, notwithstanding there being serious financial loss. S.R.]

[1]

Shulhan Arukh Hoshen Mishpat 166:51; Orah Hayyim 156:1; Tosafot Megillah 28a s.v. Teiti Li; Tzitz Eliezer vol.15 sect. 48, according to Tana de-Bei Eliyahu chapter 6 [8], ad fin. ed. Ish Shalom, Vienna 1901, pp.45-46; Braude & Kapstein transl., U.S.A. 1981, p.144: As a Jew who was not to enter into partnership with a heathen; Tora Shelemah, by M.M. Kasher, vol.3, Jerusalem 1934. p.860 no.123.

[1]

This is an exceedingly complex problem, depending, among other things, on the status of limited companies, etc. See the detailed discuss of R. Ezra Basri, Dinei Mamonot, vol.2, Jerusalem 1976, pp.315-321.

[1]

Further on the Meiri's attitude to Christianity, see Y. Ta-Shma, Tarbiz 47, 1978. pp.197-210. ibid. 49, 1980. pp.218-219; E. Urbach, Sefer ha-Yovel le-Katz, Jerusalem 1980. pp.34-44; Y. Blidstein, Zion 51, 1984, pp.153-166; D.Z. Hilman, Tzefunot 1/1, 1989 pp.65-72; S.Z. Havlin's editions of the Meiri's Sefer ha-Kabbalah, Jerusalem 1995, pp.21-22 note 70; idem ed. Beit ha-Behirah Avot, Jerusalem 1995. p.129 note 127; M. Halbertal, Bein Torah le-Hokhmah: R. Menachem ha-Meiri ve-Baalei Halachah ha-Maimoniim be-Provence, Jerusalem 2000, pp.80-108.

[1]

This very complex halakhic issue has recently been dealt with in great detail by R. Moshe Wiener, in his volume Sefer Sheva Mitzvot Hashem, vol.1, Jerusalem 2008, pp. 89-104, especially note 9, and see also ibid 132-134, and note 110 ibid. See also R. Hayyim Benyamin Goldberg, Bein Yisrael la-Nokhri, vol.3 (Hoshen Mishpat), Jerusalem 2003, p.276 note 2. An interesting and novel approach to the whole Jewish understanding of idolatry is to be found in R. Dr. Michael Avraham's article, "Ha-Im Yesh Avodah Zarah 'Neorah' ?", Akdamot 18, 2007, pp.65-86, (and pp. 78-81, 84 on the Meiri).

[1]

R. Moshe Feinstein, Iggrot Moshe, Yoreh Deah vol.3, sect. 129 subsect.6, p.382, forbids entering into a church, even just to look at its ornamentation etc. See at the end of that section where clearly he was advised by his Son R. David against any sort of dialogue with Christians. This, undoubtedly, is the prevalent view among the poskim, as may be seen from the references in Bein Yisrael le-Nokhri, vol. Yoreh Deah, Jerusalem 1994, pp.375-376 notes 20,21. Nonetheless in view of the above discussion, I believe the issue needs to be reevaluated.

[1]

[Here again, I do not wholy agree with the position of the RCA. However, consistent policy with regard to relations with other religions is important. At all events, in my opinion R. Moshe Feinstein's position was that there are no "religions", just one religion, and one may not grant legitimacy to another religion. Hence, dialogue is not permissible, and accordingly also participation in a ceremony of this nature in a Church. The courageous refusal on the part of Jewish Orthodoxy to take part in Obama's ceremony would be seen, perhaps, in much the same way as the brave refusal of a community which regards its religion on the true one in a state that grants religious freedom to its citizens by law. S.R.]

[1]

See the very interesting remark cited by R.
David Cohen, in his Ha-Akov le-Mishor, Brooklyn, Jerusalem 1993, p.34, in the name of R. Moshe Feinstein, that we do not rule like R. Shlomo Luria in his Yam shel Shlomo to Bava Kama chapter 4 sect.9 (on Bava Kama 38a), and the note in Encyclopedia Talmudit vol.22, Jerusalem 1995, 7.0 note 193. And though the issues are not identical, in that there was no immediate life-threatening danger to the Jewish community which might result from R. Lookstein's refusal, nonetheless, there is clear evidence of rabbinic consensus actively to avoid possible negative friction with non-Jewish governmental authority. On *mishum aiva,* see Encyclopedia Talmudit
vol.1, second ed., 492 et seq., vol.13. 360 note 439. On *mi-shum darkei shalom* , see ibid. vol.7, 722-724.

[1]

[Here too I think that one cannot necessarily
use these arguments concerning the Jewish Community's dealing with the United States of America, where freedom of religion is enforceable by
law. An atheist, who for reasons of conscience refuses to enter a church would not be regarded negatively, in my opinion; how much more so a God-fearing Jew. However, I am not sufficiently acquainted with the social and political reality
in order to express a definitive view.
S.R.]