# Marriage and its obstacles in Jewish law

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SELECTED REFORM RESPONSA

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# SELECTED REFORM RESPONSA

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# THE TABLE OF CONSANGUINITY

Walter Jacob

QUESTION: The Table of Consanguinity currently used by the Reform Movement is male-centered, and clearly discriminates against women. Should we change the Table to reflect our equal treatment of men and women?

ANSWER: The Table of Consanguinity as produced in the *Rabbis' Manual* is based largely upon Biblical law (Lev. 18:11-21; Deut. 23:3, 27:20-23; Kid. 67b; Yoma 67b; Maimonides, *Yad, Hil. Ishut* IV, *Isurei Bi-a* II; *Shulhan Arukh, Even Ha-ezer* 15:44.6). The Biblical laws were somewhat modified and expanded by the Talmud. A full discussion of those modifications may be found in Mielziner, *Jewish Marriage Laws,* 1897. Each of these statements has approached the entire matter from a male point of view. It would, of course, be possible to rewrite these statements so that they would reflect the views of the current feminist movement. This, however, would add a number of prohibitions, if we simply paralleled masculine prohibitions which exist already. It would be unwise and unrealistic to follow this path for the following reasons: (1) The last major change in Jewish marriage laws was made in the eleventh century through the decree of Rabbenu Gershom, which prohibited polygamy. This decree was effective because polygamy had largely ceased in practice by Ashkenazic Jews, as the general population among whom they lived did not practice it either. The decree, however, was not followed by the remainder of world Jewry, and polygamy continued to be practiced up to modern times by Jews in various Eastern countries. In other words, the decree was effective only because it fitted into the mood of the time and place. Such additional restrictions would, however, not evoke a similar response in our age. The decree of Rabbenu Gershom had long been completely accepted by Ashkenazic Jewry. (2) The presumption of inequality for women has led Judaism to adopt the most lenient definition of bastardy in the Western world. Only the off-spring of those prohibited from marrying by the laws of

consanguinity and adultery on the part of the married woman are considered *mamzerim.* Any change would also alter this definition to the disadvantage of infant children. (3) It is extremely doubtful whether our rabbis or our laymen would follow any additional restrictions in the field of marriage. It is difficult enough to enforce some strictures which we have now, much less impose others. In other words, any restrictive decision on the part of our committee in this matter would represent a mere gesture toward the feminist movement rather than an effective effort. Anyhow, one should not legislate when it is obvious that no one will follow what has been decreed (Yev. 65b, Shabbat 148b)

In addition, our Reform Movement has made some changes: (1) We have recognized the marriage of divorcees to those of priestly descent. This permissive change was made as we no longer recognize priestly privileges. (2) We have accepted civil divorce as sufficient for remarriage. The reliance on civil divorce is, *ipso facto, an* effective and realistic measure toward equality of both sexes, since women can and do institute divorce proceedings in their own right under State laws. Both changes have gained complete acceptance by Reform Jews and also by a large percentage of the American Jewish community.

The existing Table could be rewritten in a more permissive way That also does not seem appropriate for us for the following reasons: (1) We are continuing to try to work out distinctive, but naturally agreeable approaches to family law along with our Conservative and Orthodox co-religionists in order to avoid conflict over family matters in the Land of Israel. A decision such as this on our part would increase the difficulties of this task. (2) Most state legal systems parallel our Table of Consanguinity or are very close to

it. Any changes we might make would only raise additional problems. In this case, the abstract notion of complete quality would hinder rather than help us or the feminist movement.

For these reasons the Table of Consanguinity should remain as it now stands.

Walter Jacob (ed.), *American Reform Responsa,* New York, 1983, #129

# ORTHODOX ASPERSIONS AGAINST REFORM MARRIAGES

Solomon B. Freehof

QUESTION: This problem is involved in the situation which is described in the letter which follows:

"You may be aware that in Great Britain there seems to be now a more or less concentrated attack on the Reform Movement, especially in connection with the acceptance by Orthodox authorities of marriages conducted in our synagogues It has gone so far as to cast doubts that Orthodox synagogues would accept such marriages as valid, and it has been intimated that the Jewish status of children from such marriage may be in question. I speak of marriages among Jewish persons, excluding proselytes." (Dr. W. Van der Zyl, Senior Minister of the West London Synagogue, London)

ANSWER: There are certain technical differences between Orthodox and Reform marriages as to witnesses, *ketubah,* and so forth. Some Orthodox authorities in England have spoken of declaring marriages performed by Liberal or Reform rabbis invalid. Is such a declaration of invalidity justified by the *halakhah* itself? In general, what is the validity in Orthodox law of marriages in which procedure varies from that which is normally required by Orthodox laws.

Orthodox Jewish marriage requires a *minyan* present at the ceremony, a *ketubah* and kosher witnesses to the declaration of marriage, the giving of the ring the reciting of the seven blessings, and so forth. While all these observances are *required,* are they indispensable? Suppose a marriage takes place without some of them; what is it in Jewish law which makes a marriage valid?

It must be noted that this question has been an important one and a practical one for many centuries: for example, in the case of the Marranos in Spain and Portugal who escaped to Jewish communities

and said they had been married in a church, or in the cases of civil marriage in modern times. Are such marriages valid?

It is true that there is a considerable disagreement as to what is the basic requirement for the validity of a Jewish marriage, but the majority of opinion, which is becoming increasingly weighty in modern times with the spread of civil marriage, is that the validity of the marriage is not dependant at all upon most of these ceremonial or ritual requirements.

The basic marriage requisite is that the man speaks of his intention to be married and gives the woman an object of some value - "he says and he gives." And, indeed, the basic ground for marriage is that the man takes the woman into his house and they live together in physical relationship. Now, while this Mishnaic method of marriage *(biah)* was frowned upon in the Middle Ages by Israel Isserlein (*Terumat Hadeshen* 209), nevertheless when it does occur the general attitude of the law is that such a marriage is valid, This is based upon the opinion of Rav (Ketubot 72b to 73a), that if a man takes a woman into his house for the purpose of marriage, she cannot be freed from that marriage without a formal divorce (i.e., this simple marriage is valid). The opinion of Rav is based upon the belief that a man does not generally intend his sexual relationship to be adulterous (*ein adam oseh*, and so on). However, this presumption that the sexual relationship is intended as a marriage relationship, and not as an adulterous one, broke down in later years and was no longer held to be valid; as, for example, in the case of certain Marrano marriages about which some authorities said that, since they could have escaped and did not escape, we no longer apply to them the presumption which we grant to righteous people, that their sexual relationship was meant to be a marriage relationship.

However, suppose the couple thus informally married stay together as husband and wife, and this is public knowledge. Then the fact that they are known to live together as husband and wife proves retroactively their original intention, and the presumption *(hazakah) is* thus reestablished and their marriage, therefore, is valid. This attitude is increasingly held by Orthodox authorities, namely, that they follow Rav in the Talmud, that the very bringing of the woman into his house constitutes proof of proper intention and therefore of the validity of the marriage. Thus, for example, Isaiah Trani (Riaz), quoted as part of *Shiltei Hageborim* to AIfasi to *Kiddushin* 3, says definitely: "Although there are no witnesses of the marriage itself, or even witnesses that they secluded themselves (*yihud*), nevertheless it is presumed in their locality that they are man and wife. This presumption is equivalent to clear and perfect testimony."

This, too, is the basis of the famous responsum of Isaac Elchanan Spektor of Kovno in his responsa (*Ein Yitzhak*, vol. I, *Even Haezer* 47, especially paragraph 12). He discusses the case of a Jewish soldier who lived with a Jewish woman without formality of marriage, and then the man deserted the woman. Is she married to him or not? Spektor, on the basis of the above-mentioned laws, says that if they were known as man and wife for thirty days in the city where they lived, the marriage is valid and cannot be broken without a *get. So* also the late Orthodox authority Yechiel Epstein (*Arukh Ha shulhan Kiddushin* 26.11) says that if a Jew and a Jewess live together and say that their living together is meant to be a marriage - if it is known to all that they live together the marriage cannot be broken except by a *get.* The most recent authority is Joseph Henkin, of New York (*Perushei Ibra*, chapters 3 and 4) proves the general thesis that

if a man takes a woman for the purpose of marriage and they just live together (under that intention) this is an absolutely valid marriage. Their physical relationship (known in the Jewish neighborhood) makes the marriage as valid as if there were all the necessary witnesses. This source *(Perushei Ibra)* gives the fullest discussion of the laws involved. Rabbi Henkin returns to give a briefer statement of the law (*Hapardes*, XXXIII, no. 10, p. 12), in which he simply says that if a man lives with a woman and the Jews of the neighborhood know it, it is a full marriage.

Of course, the opposite opinion is also held in the law, that such free unions or, for that matter, civil marriages are not Jewishly legal. However, the opinions cited above that such marriages are legal are sufficiently important that they must be given considerable weight and certainly cannot be brushed aside. Furthermore, the tendency of the law among recent Orthodox scholars is to consider such marriages as Jewishly legal (Abraham Haim Freiman, *Seder Kiddushin Unissuin*, p. 362).

Now let us assume that Reform or Liberal marriages lack many of the observances which Orthodox law considers necessary to marriage, kosher witnesses (i.e., those who do not violate the Sabbath and other ritual observances), a properly written *ketubah*, and so forth; nevertheless none of these defects can possibly invalidate the marriage, for the couple live together as man and wife in the knowledge of the community. Add to this the fact that in Reform marriages the *intention* clearly is to be according to the laws of Moses and Israel as the contracting parties understand it; then even the objection which some scholars made against the Marrano marriages falls to the ground. Here, in Reform marriages, there is the clear intention of marriage, of *Jewish* marriage. There is also the living

together in the knowledge of the community. In that case, the wedding ceremony may be objected to by the Orthodox, but the *marriage* itself is absolutely valid according to Orthodox law.

This being the case, any Orthodox official who casts doubt on the validity of such marriage is not only callous to human considerations, but ignores the main development and tendency of Orthodox law.

There is a much more serious aspect to the whole question than the technical implications of the *halakhah* itself. It involves the unity and the integrity of the Jewish people, and also raises the problem of what should be the mutual relationship of Jewish groups who differ from each other in religious matters.

First of all, it must he realized that the Jewish legal tradition on marriage is so complicated and is such a melange of laws and customs that it is only too easy to cast aspersions on the validity or at least the propriety of almost any marriage. For instance, the marriages conducted in Orthodox synagogues in the United States and in England have been subject to bitter attack by those who are more extreme in their Orthodoxy or who give special weight to specific customs. As an example, though Maharil, of the fourteenth century in Mainz, conducted marriages in the synagogue, the overwhelming opinion of Orthodox authorities of the last century has been that it is absolutely forbidden to have marriages within the synagogue; they must be conducted elsewhere, preferably out of doors, or at least under an open skylight in order to fulfill Isserles' suggestion that marriages should be under the stars as a sign of blessing. Most of the marriages taking place in Orthodox synagogues in England and in America are thus open to serious objection.

Then further, modern Orthodox weddings generally take place in the presence of men and women sitting too "ether. This has been strongly denounced by many Orthodox authorities. Some rabbis turn over the task of reciting the seven blessings to some bystander in order not to recite them in a mixed company. What about the witnesses at these Orthodox marriages? Is the rabbi sure that they are valid witnesses, truly kosher witness, and not violators of the Sabbath, and so on (*Hoshen Mishpat* 34, 2, 3, 17 ff.)? If the mood of belligerence is permitted to hold sway, as it does in some quarters, then perhaps fifty percent of the Orthodox marriage in England and in America can be deemed improper.

In this regard Orthodoxy is indeed more vulnerable than we are, for to Orthodoxy no commandment is minor and all established customs have their importance. Ben Zion Uziel and also Hillel Posek, of Tel Aviv, both bitterly objected to the mood surrounding the breaking of the glass at weddings (*Mishptei Uziel* II, *Even Haezer*, p. 431; *Omer Hillel, Even Haezer* 59). But both indicated that they dared not abolish this aged custom. How, then, can Orthodox rabbis permit the modern custom of holding marriages in the synagogue or in the midst of a mixed company of men and women, and with witnesses of dubious eligibility

Our own attitude to these variations of observance in both Orthodox and Reform Judaism is based on our general attitude to Jewish tradition. We respect the spirit of both Bible and *halakhah*, but we seek to find this spirit according to our conscience and judgment, rather than to be bound by specific enactment. We ask ourselves, therefore: What is the spirit of Jewish law in relation to variant types of marriage and the families derived from such variant marriages?

To discover the basic mood of Jewish law, it is not sufficient to study one enactment or another; we must cover whole sections of the law to see if there is one prevalent mood, or a tendency toward a certain consistency. Let us consider, for example, an extreme case, the case of the Karaites. These people, unlike ourselves, are a separate sect, a separate community with no communal cooperation or fellowship with the rest of Israel They reject outright the entire rabbinic tradition. They have been hostile and have been met with hostility since the days of the Gaon Saadia almost down to our day. One would therefore think that this hostile sect, the occasion of so much controversy, would be rejected outright as a potential part of the Jewish people, that their marriages would be declared invalid and that any intermarriage with them would be prohibited unless after conversion. Certainly this would seem to be the case if one merely judges by the statement of Moses Isserles (*Even Haezer* IV, 37) in which he says it is forbidden to enter into marriage with Karaites because all of them are under suspicion of bastardy and we do not even accept them if they wish to return. Actually this statement of Isserles is based upon one opinion, cited by Joseph Caro in his *Bet Joseph* from a responsum of Rabbi Samson. But this opinion of Rabbi Samson is only one opinion. There are contrary opinions of such various shades that the law of the marital status of Karaites is a vast confusion.

The fullest discussion of the question is found in the responsa of Jacob Castro, of Egypt (died 1610), who was greatly honored by Joseph Caro. In his response (*Ohalei Yaakov* 33)he quotes the various opinions of the great authorities on both sides of the question. An analysis of his large and complete responsum essay will reveal something of the spirit of the *halakhah* in this regard. It becomes

clearly evident that the rabbis on both sides of the question are eager to find some way in which the Karaites might not be rejected. Those rabbis who say that Karaite marriage is not valid conclude from that statement that therefore their wives are not actually wives, that therefore there is no bastardy among them (since in Jewish law a bastard is the offspring of a *married* woman and a man not her husband), and that therefore we *may marry with them.* But those rabbis who say that we may not marry with them base it on the interesting ground that there *is* the suspicion of bastardy since their mothers *are* married women, in as much as Karaite marriages are *valid marriages,* if not by rabbinic law and custom, at least by Biblical law. In other words, both sides in dealing with this ancient enemy want in some way to continue the bond with them, either by permitting us to marry them or by declaring their marriages Biblically valid.

This reluctance to exclude Jews from the family fellowship of Israel is basic to the *halakhah* It can be seen still more clearly from the relationship of the law to an apostate (*mumar*). A *mumar* (which would include a public violator of the Sabbath) is ineligible as a witness, cannot be counted to a *minyan*, and so forth. He loses all his Jewish rights except one basic one, namely, his marital status. "His marriage is marriage and his divorce is divorce." This inalienable marital and family status of the apostate (whatever else he has lost) has in clearest expression in the resonsum of Saadia (*Otzar Hageonim, Yevamot*, pp. 1-7), in which he says that a man's status with regard to his trustworthiness as witness, and so on, depends upon his observance of the commandments, but his marriage rights and status depend upon his birth. Saadia ends his statement by saying

firmly, "This is the law and one may not change it." In other words, whether a man is obedient or disobedient to the commandments can never invalidate his marriage and family rights.

This reluctance of Jewish legal tradition to invalidate marriages when such will break up the unity of our people has its august precedent in the relations of the school of Hillel and the school of Shammai to each other. They disagreed as to the permissibility of a certain form of levirate marriage. Then the Mishnah says, after stating the disagreement (*Yevamot* 1.4): "Although these forbade and those permitted these declared unfit and those declared eligible, nevertheless, the school of Shammai never hesitated to marry women from the school of Hillel nor did the school of Hillel hesitate to marry women from the school of Shammai." Bertenoro, to make the situation unmistakable, says, "Even though, according to the interpretation of one school the children of the marriages which they prohibited would be deemed *mamzerim*, the two groups nevertheless intermarried."

To sum up: If we keep from getting lost in the maze of separate enactments and customs and look for the basic spirit of our *halahic* tradition, we find from the days of the schools of Hillel and Shammai, through the Talmudic and Gaonic laws pertaining to apostates, and in all the complicated laws in regard to the hostile sect of Karaites, that the ruling spirit of the tradition was to maintain as much as possible the unity of our people.

Clearly, then, anybody or any group which seeks to declare another group of Jews unfit to marry with according to Jewish law is violating the basic tendency of the law. Even though certain specific

requirements can serve to bolster their opinion, they themselves are not free from similar accusations upon the ground of their own violation of certain other enactments.

But the practical question is, how shall we react to thos embittered people who, in the heat of controversy, would break the family unity of our people there is no answer to this. Those who want to exclude will find reasons for it. We may face them, however, in the confidence that they will not succeed. We are part of the Jewish people. We share its destiny. We join in every great Jewish cause. No legalists will succeed in persuading the majority of Jews - Orthodox, Conservative, or Refom - that we must cease marrying one with another. We may leave the decision as to "Who is a Jew?" to the sound instinct of our people, which has expressed itself magnificently in the spirit of the *halakhah*: "Let the people of Israel alone [they will find their way]. If they are not prophets, they are certainly the children of prophets." (*Pesahim* 66a)

Solomon B. Freehof, *Recent Reform Responsa*, Cincinnati, 1963 # 42.

# JEWISH MARRIAGE WITHOUT CHILDREN

Walter Jacob

QUESTION: Is it possible to have a valid Jewish marriage without children? Should a rabbi perform such a marriage when a couple specifically states that they plan to have no children? (Michael A. Robinson, Croton-on-Hudson, New York)

ANSWER: First, we should address the validity of a marriage without children. There is no doubt that procreation, companionship, joy, unity of the family, etc., are basic elements of marriage as seen by the Jewish tradition (Ket. 8a). Procreation was considered essential as already stated by the *Mishnah*: "A man may not desist from the duty of procreation unless he already has children." (Yev. 6.6) The Gemara to this concluded that a man may marry a barren woman if he has fulfilled this *mitzvah* of procreation, *as* in any case he should not remain unmarried (Yev. 61b). If the parties marry beyond the years when child-bearing is possible, or if one of them is sterile the same wedding blessings are, nevertheless, recited (Abudraham, *Birkhot Erusin* 98a) There was a difference between the schools of Hillel and Shammai about what was required to fulfill the *mitzvah* of procreation. The tradition followed Hillel, who minimally required a son and daughter, yet the codes all emphasize the need to produce children beyond that number (Tos. Yev. 8; *Yad, Hil. Ishut*, 15.6; *Shulhan Arukh, Even Ha-ezer* 1.5).

Tradition emphasized the need for a greater number of children as the fulfillment of two Biblical verses: Is. 45:18, "He created the world for habitation *(lashevet),"* and Eccl. 11:6, the obligation to sow seed in the evening *(la-erev)* as well as in he morning. In other words, one should constantly expand the Jewish population (Yev. 62a,b) This was

also in keeping with the thought that before the Messiah could come, all the souls waiting for bodies will have to be placed into the world *(ibid.;* Nidda 13b) During our entire history, persecution and natural disaster have decimated our people, and so repopulation has always been emphasized. Lack of children was considered grounds for divorce after a decade of childless marriage, but Isserles indicated that nowadays we do not force the issue and permit the couple to remain together (Isserles to *Shulkhan Arukh, Even Ha-ezer* 1.3 and 8; also Isserles to 154.10) This was particularly true if the man had already had children by a previous marriage. All of this makes it clear that children were considered essential to a marriage, and it was considered desirable to have a large number of children, but a marriage without them was also condoned (Abraham di Boton, *Lechem Mishneh* to *Yad, Hil. Ishut* 4.10; Yair Hayyim Baharach, *Havat Yair,* #221)

The strictest interpretation of the traditional *halakhah* which makes a distinction between the obligations of men and women (a distinction not accepted by Reform Jews) would allow a woman to marry a sterile male, since the obligation of procreation was not incumbent upon her. When the husband or wife was sterile and it was not possible to have children, the marriage was always considered valid *(bedi-avad);* i.e., since it had been entered in good faith, it need not be terminated as mentioned earlier This was stressed by Maimonides who considered such a marriage valid under any circumstances *(Yad, Hil. Ishut* 4.10), whether the individual was born sterile or was sterilized later. Later authorities went somewhat further, and Yair Hayyim Bacharach stated that as long a the prospective wife realized that her prospective husband was infertile, though sexually potent, and she had agreed to the marriage, it was valid and acceptable *(Havat Yair,* #221). Isaac b. Sheshet *(Responsa,* #15)

permitted a couple who knew that they would not have children to become married As long as both were fully aware of the situation, it was permissible, even *lehat-hilah*

In sum, the traditional attitude was as follows: Our tradition encourages marriage for the purpose of procreation and would strongly urge all couples to have children. However, if they enter the marriage fully aware of the refusal of one or the other to have children - either because of a physical defect or because of an attitude - the marriage can be considered valid, either *lehat-hilah* or *bedi-vad.* Nothing should prevent a rabbi from conducting such a marriage; although some rabbis would refuse to officiate. In light of the Holocaust and the current diminution of the world Jewish population, it is incumbent upon each of us to urge Jewish couples to have two or more children. Although young people may marry reluctantly and late, the marriage at least represents a step in the direction of children.

In Jewish law, the marriage is valid, yet given the Reform emphasis on the underlying spirit of the law as a guide to modern practice, marriage without children is very distant from the Jewish ideal of marriage. The letter of the law may permit it, but we must encourage every couple to have at least two children.

Walter Jacob, *American Reform Responsa*, New York, 1982, #132

# MARRIAGE AFTER A SEX-CHANGE OPERATION

Walter Jacob

QUESTION: May a rabbi officiate at a marriage of two Jews, one of whom has undergone a surgical operation which has changed his/her sex?

ANSWER: Our responsum will deal with an individual who has undergone an operation for sexual change for physical or psychological reasons. We will presume (a) that the operation is done for valid, serious reasons, and not frivolously; (b) that the best available medical tests (chromosome analysis, etc.) will be utilized as aids; and (c) that this in no way constitutes a homosexual marriage.

There is some discussion in traditional literature about the propriety of this kind of operation. In addition, we must recall that tradition sought to avoid any operation which would seriously endanger life (*Yoreh De-ah* 116; Hulin 10a). The *Mishnah* dealt with the problem of individuals whose sex was undetermined. It divided them into two separate categories, *tumtum* and *androginos*. A *tumtum* is a person whose genitals are hidden or undeveloped and whose sex, therefore, is unknown. R. Ammi recorded an operation on one such individual who was found to be male and who then fathered seven children (Yev. 83b). Solomon B. Freehof has discussed such operations most recently; he permits such an operation for a *tumtum*, but not for an *androginos* (*Modern Reform Responsa*, pp.128ff). The *androginos* is a hermaphrodite and clearly carries characteristics of both sexes (M. Bik. IV. 5). The former was a condition which could be corrected and the latter, as far as the ancients were concerned, could not, so the *Mishnah* and later tradition treated the *androginos* sometimes as a male, sometimes as a female, and sometimes as a separate category. However, with regard to marriage, the *Mishnah* (Bik. IV.2) stated unequivocally: "He can take a wife, but not be taken as a wife like men." If married, they were free from the obligation of bearing children (*Yad, Hil. Yibum Vahalitzah* 6.2), but some doubted the validity of their marriages (Yev. 81a; *Yad, Hil. Ishut* 4.11; also *Sh.A., Even Ha-ezer* 44.6). The Talmud has also dealt

with *ailonit*, a masculine woman, who was barren (*Yad, Hil. Ishut* 2.4; Nid. 47b; Yev. 80b). If she married and her husband was aware of her condition, then this was a valid marriage (Yad, *Hil. Ishut* 4.11); although the ancient authorities felt that such a marriage would only be permitted if the prospective husband had children by a previous marriage, otherwise, he could divorce her in order to have children (Yev. 61 a; M. Yev. 24.1). Later authorities would simply permit such a marriage to stand.

We, however, are dealing either with a situation in which the lack of sexual development has been corrected and the individual has been provided with a sexual identity, or with a situation in which the psychological makeup of the individual clashed with the physical characteristics, and this was corrected through surgery. In other words, our question deals with an individual who now possesses definite physical characteristics of a man or a woman, but has obtained them through surgical procedure, and whose status is recognized by the civil government. The problem before us is that such an individual is sterile, and the question is whether under such circumstances he or she may be married. Our question, therefore, must deal with the nature of marriage for such individuals. Can a Jewish marriage be conducted under these circumstances?

There is no doubt that both procreation and sexual satisfaction are basic elements of marriage as seen by Jewish tradition. Procreation was considered essential, as is already stated in the *Mishnah*: "A man may not desist from the duty of procreation unless he already has children," The *Gemara* to this concluded that he may marry a barren woman if he has fulfilled this *mitzvah*; in any case, he should not remain unmarried (Yev. 61b). There was a difference between the Schools of Hillel and Shammai about what was required to fulfill the *mitzvah* of procreation. Tradition followed Hillel, who minimally required a son and a daughter, yet the codes all emphasize the need to produce children beyond that number (Tos., Yev. 8; *Yad, Hil. Ishut*

15.16, etc.). The sources also clearly indicate that this *mitzvah* is only incumbent upon the male (Tos., Yev. 8), although some later authorities would include women in the obligation, perhaps in a secondary sense (*Arukh Hashulkhan, Even Ha-ezer* 1.4; *Hatam Sofer, Even Ha-ezer*, #20). Abraham Hirsh (*Noam,* vol.16, pp.152ff) has recently discussed the matter of granting a divorce when one spouse has had a transsexual operation. Aside from opposing the operation generally, he also states that no essential biological changes have taken place and that the operation, therefore, was akin to sterilization (which is prohibited) and cosmetic surgery.

Hirsh also mentions a case related to our situation. A male in the time of R. Hananel added an orifice to his body, and R. Hananel decided that a male having intercourse with this individual has committed a homosexual act. This statement is quoted by Ibn Ezra in his commentary on Lev. 18:22. We, however, are not dealing with this kind of situation, but with a complete sexual change operation.

Despite the strong emphasis on procreation, companionship and joy also played a major role in the Jewish concept of marriage. Thus, the seven marriage blessings deal with joy, companionship, the unity of family, restoration of Zion, etc., as well as with children (Ket. 8a). These same blessings were to be recited for those beyond child-bearing age, or those who were sterile (Abudarham, *Birkhot Erusin* 98a).

Most traditional authorities who discussed childless marriages were considering a marriage already in existence (*bedi-avad*) and not the entrance into such a union. Under such circumstances the marriage would be considered valid and need not result in divorce for the sake of procreation, although that possibility existed (*Shulkhan Arukh, Even Ha-ezer* 23; see Isserles' note on 154.10). This was the only alternative solution, since bigamy was no longer even theoretically

possible after the decree of Rabbenu Gershom in the 11th century in those countries where this decree was accepted. (Oriental Jews did not accept the *Herem* of Rabbenu Gershom). Maimonides considered such a marriage valid under any circumstances (*Yad, Hil. Ishut* 4.10), whether this individual was born sterile or was sterilized later. The commentator, Abraham di Boton, emphasized the validity of such a marriage if sterility has been caused by an accident or surgery (*Lehem Mishneh* to *Yad, Hil. Ishut* 4.10). Yair Hayyim Bacharach stated that as long as the prospective wife realized that her prospective husband was infertile though sexually potent, and had agreed to the marriage, it was valid and acceptable (*Havat Yair*, #221). Traditional *halakhah*, which makes a distinction between the obligations of men and women (a distinction not accepted by Reform Judaism) would allow a woman to marry a sterile male, since the obligation of procreation did not affect her (as mentioned earlier).

There was some difference of opinion when a change of status in the male member of a wedded couple had taken place. R. Asher discussed this, but came to no conclusion, though he felt that a male whose sexual organs had been removed could not contract a valid marriage (*Besamim Rosh*, #340 - attributed to R. Asher). The contemporary Orthodox R. Waldenberg assumed that a sexual change has occurred, and terminated the marriage without a divorce (*Tzitz Eliezer* X, #25). Joseph Pellagi came to a similar conclusion earlier (*Ahav Et Yosef* 3.5).

Perhaps the clearest statement about entering into such a marriage was made by Isaac bar Sheshet, who felt that the couple was permitted to marry and then be left alone, although they entered the marriage with full awareness of the situation (*Ribash*, #15; *Sh.A., Even Ha-ezer* 1.3; see Isserles' note). Similarly, traditional authorities who usually oppose contraception permitted it to a couple if one partner was in ill health. The permission was granted so that the

couple could remain happily married, a solution favored over abstinence (Moses Feinstein, *Igerot Mosheh, Even Haezer*, #63 and #67, where he permits marriage under these circumstances).

Our discussion clearly indicates that individuals whose sex has been changed by a surgical procedure and who are now sterile may be married according to Jewish tradition. We agree with this conclusion. Both partners should be aware of each other's condition. The ceremony need not be changed in any way for the sake of these individuals.

Walter Jacob (ed.), *American Reform Responsa*, New York, 1983, # 137.

# MARRIAGE OF A COHEN TO A DIVORCEE

Israel Bettan

QUESTION: There is a problem which I am trying to help a young couple solve. The young woman is a divorcee; the boy is a *kohen*. The man's father objects to the marriage. I wonder: Is there any argument, based on Jewish law, which I can use with the father to keep him from making his son's life miserable because of this marriage?

ANSWER: The status of the modern *kohen* has long been questioned by leading authorities in Jewish law. As early as the 14th century, Isaac ben Sheshet differentiated between the ancient priest and the modern *kohen* in no uncertain terms. He contended that the *kohen* of his time, lacking any documentary evidence of his rightful claim to the priestly title, owed his special privileges and obligations, not to the express mandate of the law, but rather to the force of custom or common usage: *"Kol sheken kohanim shebedorenu she-ein lahem ketav hayachas ela mipenei chezkatan nahagu hayom likro rishon batorah. Kohen afilu am ha-arets lifnei chacham gadol shebeYisrael" (Sefer Bar Sheshet, Responsum* 94, Lemberg, 1805).

Solomon Luria, the well-known 16th century authority, states it categorically that because of the frequent persecutions and expulsions of the Jews, the original priestly families, in most instances, failed to preserve the purity of their descent: *"Uva-avonoteinu, merov arichut hagalut, gezerot vegerushim, nitbalbelu. Vehalevai shelo yehe nitbalhel zera kodesh bechol, aval zera kohanim uleviyim karov levadai shenitbalbelu, ve-im lo kulo, harov nitbalbel" (Yam Shel Shelomo,* B.K., ch. 5, sec. 35).

Likewise, the author of the *Magen Avraham* assumes the impurity of the modern *kohen's* descent when he seeks to account for the doubtful status accorded him in the law: *"She-ein machazikin oto kechohen vadai dedilema nitchalela achat me-imotav" (Magen Avraham, Orakh Hayim, Hil. Pesah,* sec. 457).

Jacob Emden was so impressed with the questionable character of the *kohen's* claims that, while hesitating to invoke the

power of the law, he urged upon the *kohen* the wisdom to refund the sum given him for the redemption of the first-born, and thus preserve his own moral integrity. Since he could not be sure of his priestly origin, Emden declared, the *kohen*, in keeping the redemption fee, ran the risk of pocketing money to which he had no legal claim: *"Nir-eh she-ein kohen yafeh lehafkia mamon bechezkato hageru-a. Vechim-at she-ani omer demidina tserichin lehachzir, ulefachot kol kohen yachush la-a tsmo lifrosh misafek gadol shems eino kohen" (She-elot Ya-avets,* part I, *Responsum* 155).

When, therefore, Reform Judaism chose to ignore the nominal distinction between the ordinary Israelite and the *kohen* - a distinction which has persisted to this very day - it did not so much depart from tradition as it did display the resolute will to surrender a notion the validity of which eminent Rabbinic authorities had repeatedly called in question.

Walter Jacob (ed.), *American Reform Responsa*, New York, 1983, #133.

# ADULTERY AND MARRIAGE

Walter Jacob

QUESTION: One of the partners in a marriage has engaged in an adulterous relationship, and the marriage has terminated in acrimonious divorce. Subsequently, the adulterous party has asked the rabbi to officiate at the marriage to "the other person." Should the rabbi comply with the request?

ANSWER: The sources are clear in their prohibition of adultery (Ex. 20.13) and of marriage between the adulterous party and her lover (Sot. 27b; *Shulhan Arukh Even Haezer* 11.1, 178.17). The traditional statements, of course, deal primarily with the adulterous woman and her lover. They are very strict in this regard and even prohibit remarriage to her former husband, though she may not have been married to anyone else subsequent to the divorce *(Shulhan Arukh Even Haezer* 11.1). The prohibition against marrying her lover holds true not only after divorce but even after the death of her former husband (Yev. 24b *Shulhan Arukh Even Haezer* 11.1).

Despite these strictures the reality of the situation, which usually led the adulterous parties to live together and possibly to marry, brought rabbinic recognition of this status. Tradition gives its grudging consent by stating that if, nevertheless, the adulterous parties marry, they are not compelled to divorce *(Shulhan Arukh Even Haezer* 11.2 ff and commentaries, 159.3; *Otzar Haposqim Even Haezer* 11.1, 44).

A rabbi may, in this instance, find herself/himself in a difficult position as she is duty-bound to strengthen family life and defend the sanctity of marriage. If he/she, however, refuses to marry this couple, they may simply opt to live together, as is frequent in our time, that will not help their situation or the general attitude towards family life. Therefore, the rabbi should officiate at such a marriage, while at the same time discussing her own hesitation in keeping the tradition.

She/he may insist on some special counseling before the ceremony. He/she should insist that it be a simple ceremony and one which places special emphasis on the seriousness and sanctity of marriage.

Walter Jacob, *Contemporary American Reform Responsa*, New York, 1987, # 192.

# CONCUBINAGE AS AN ALTERNATIVE TO MARRIAGE

Walter Jacob

QUESTION: Does Reform Judaism recognize concubinage as an alternative to formal marriage? If a man cannot or does not wish to divorce his disabled wife may his "arrangements" with another woman be formalized? Can formal Jewish status be give to two retired individuals living together without marriage? Can these "arrangements" be formalized in a manner akin to the ancient form of concubinage? (CCAR Family Life Committee)

ANSWER: Each of the arrangements suggested by the question is clearly illegal and violates the laws of all the states within he United States and of the provinces of Canada. Therefore, no rabbi can formalize such an arrangement through a Jewish ceremony. Since the Paris Sanhedrin of 1807, we have recognized the supremacy of State in matter of marriage (See M.D. Tama, *Transactions of the Parisian Sanhedrin,* pp 133ff). This has been accepted by most modern Jews. It would be helpful, however, to discuss briefly the forms of marriage and concubinage. We should understand that concubinage in Biblical times seems to have referred solely to wives in addition to the primary wife. From the Hellenistic period on, a concubine could be any wife of lower status. As is well known, rabbinic tradition recognized three forms of entering a full marriage. Consent was, of course, always necessary *(Shulhan Arukh, Even Haezer* 42.1), and all three forms were combined in the Jewish concept of marriage as developed during the Middle Age.

The three ways of effecting a marriage cited by the *Talmud* are:through a document, through money, or by intercourse (Kid. 2a; *Shulhan Arukh, Even Ha-ezer* 25.4)

(a) The most common form featured a deed witnessed by two competent individuals and handed by the groom to the bride (Kid. 9a; *Shulhan Arukh, Even Ha-ezer* 32.14) This has remained the essential covenant of the modern wedding. The deed is the modern *ketubah* signed by two witnesses.

(b) In addition, it was possible to effect a marriage through the transfer of an item of value *(kesef)* in the presence of two competent witnesses. This remains as part of the modern wedding in the form of presenting a ring or for us exchanging rings with the formula *"Harei at mekudeshet....."* (Kid. 2a,b; *Shulkhan Arukh, Even Haezer* 27.1)

( c) Finally, marriage can be effected through intercourse *(bi-a)* preceded by a statement indicating the wish to take this woman as wife and with two witnesses who saw the couple leave for a private place (Kid. 9b; *Shulhan Arukh, Even Ha-ezer* 33.1). This last method was severely frowned upon by the Rabbis, but *bedi-avad* it was valid. Marriage simply through intercourse with proper intent would be akin to "common law" marriage.

There is an additional form of marriage - the concubinage *(pilegesh) -which* needs to be discussed. Concubines were mentioned fairly frequently in the Biblical literature, especially for kings (II Sam. 3:7, 21:8ff, 5:13; I Kings 11:3; II Chron. 11:21, etc.). These references dealt with women who possessed the status of an inferior wife. We should remember that the nature of concubinage changed radically from the Biblical period to the Greco-Roman period (Louis Epstein, "The Institution of Concubinage Among Jews," *Proceedings of the American Academy for Jewish Research,* vol. 6, pp. 153ff) Epstein has pointed out that the status of the Biblical concubine was determined by the ancient Near Eastern corporate family with the head of the household *(ba-al)* possibly consorting with wives at various levels, from his main wife to a slave girl. The legal relationship of the half-dozen subsidiary wives is no longer clear to us. According to some ancient codes, the *pilegesh* was second to the main wife and had definite rights as did her children. This was also her status in ancient Israel. The custom of concubinage died out during the late Biblical period, according to Epstein, and was then reintroduced among the Hellenistic Jews of the Roman Empire into a family structure which

was no longer corporate, but monogamous. Among the Romans and Greco-Roman Jews, the *pilegesh* became a mistress of doubtful legal status, and in Roman law had no legal status. Nevertheless, concubinage became an accepted institution during this period, and was carried over into the Christian era; concubines were, frequently found among the ruling and upper classes well as among Christian priests. This was the form of concubinage known to the Talmud and the medieval Jewish literature, and it was read back into the Biblical period.

In the Talmud, according to R. Judah, quoting Rav the difference between a wife and a concubine was that the latter had neither *kiddushin* nor *ketubah* (San. 21a Maimonides, *Yad, Melakhim* 4.4, and commentaries to this section) However, according to the Palestinian Talmud a concubine had *kiddushin,* but no *ketubah* (Yerushalmi Ket. 5.2; 29b) The former, not the latter, definition was generally followed by most of the authorities (Caro to *Yad, Melakhim* 4.4; de Boton to *Yad, Melakhim;* Radbaz *Responsa,* vol. IV, #225, V1. VII, #33; Adret, *Responsa* vol;. IV, #314). However, Rashi, Ribash, *Maggid Mishnah*, and others followed the latter. The two definitions may refer to two levels of concubinage, as will be discussed later, or they may reflect errors in the original Talmudic text (G. Ellinson, *Nisu-in Shelo Kedat Mosheh VeYisra-el, pp.* 40ff) The sources clearly indicated that we are dealing with an individual of intermediate status who did not have all the rights of a married wife, but on the other hand was not to be considered as a prostitute either.

Maimonides protested vigorously against concubinage, and sought to eliminate it by claiming that it was a right limited to royalty and not permitted to ordinary Jews *(Yad, Melakhim* 4.4) The woman was, therefore, to be considered a prostitute *(zona),* and both she and the male involved could be whipped *(Yad, Ishut* 1.4). Jacob b. Asher

and Caro later also prohibited concubines *(Tur* and *Shulhan Arukh, Evan Ha-ezer,* 26.1 and 2.6) This prohibition was accepted by most Jews, but not all. Concubines were permitted by many Spanish and Provencal authorities - such as Abraham ben David, Abulafia, R. Jonah A. Nissim, R. Adret, R Asher Meiri, etc. (Ellinson, *Op. Cit.*, p. 54) - although they disagreed of their precise status. Nahmanides also accepted concubines *(Responsa,* #284; commentary to Gen. 25:6), although he warned against the moral evil involved Concubines were discussed in the Middle Ages among both Sefardic and Ashkenazic Jews, and were often considered outside the *herem* of R. Gershom *(Tzeida Laderekh* III, #1, 2; Adret, *Responsa,* vol. I, #1205, IV, #314; Rabbenu Nissim, #68; Asheri, #37.1; Meir of Padua, #19; *Shulhan Arukh, Even Ha-ezer* 13.7; *Otzar Haposkim, Even Ha-ezer* 26.3ff). Isserles permitted concubines as long as they were careful about *mikveh* (Isserles to *Shulhan Arukh, Even Ha-ezer* 26.1). Most authorities previously cited based their prohibition and cautions on the Deuteronomic law prohibiting prostitution in Israel (Deut. 23:19ff; Lev. 19:29, 21:9)

The general mood of the Rabbinic authorities was to prohibit concubines or accept them only reluctantly. The latter position was partially the result of embarrassment about Biblical concubines. Concubinage was further restricted by the *herem* of Rabbenu Gershom *(Shulhan Arukh, Even Haezer* 1.10; *Arukh Hashulhan* 1.23) This ordinance prohibited the individual from marrying an additional wife, unless special permissions were provided by one hundred rabbis from three districts. It also prohibited a husband from divorcing a wife against her will. This ordinance has continued in force for Ashkenazic Jews, but was not made universally effective among Sephardic Jews until 1950 (Ben Zion Schereschewsky, *Dinei Mishpahah,* pp. 72ff) These decrees and their legal interpretations virtually eliminated concubinage. An exception to the general prohibition of concubinage

was the 18th century Jacob Emden, who favored the institution as a way of increasing the population of the Jewish community (Emden, *She-elot Ya-avetz* II, 16)

The status of a concubine with *kiddushin,* but no *ketubah,* was as follows: Regarding adultery and incest, she was considered a wife; in financial matters, her consort's responsibility was limited, and he was obligated for neither maintenance nor ransom, but, if he became tired of her, he had to divorce her (Adret, *Responsa* V, #242).

A concubine actually needed no formal divorce (*get*), but some felt hat tor the sake of public appearance, she should have a *get.* If the man with whom she lived did not wish it, or had simply disappeared, she could remarry without a *get* (*Shulhan Arukh, Even Ha-ezer* 26, 26.1). The children of a concubine bore no blemish and possessed all the rights of other children, i.e., inheritances etc. (Adret, *Responsa,* vol. IV, #14, 315) A concubine who entered the relationship without *kiddushin* or *ketubah* needed no divorce when the relationship ended; in fact, a man could simply give her to his son (Asheri, #32.1; Ribash, #395). This woman was simply a mistress; she could not be charged with adultery, although she could be flogged for lewd conduct, and she had no legal or financial standing.

All this would show that two forms of concubinage have existed in Jewish tradition till the beginning of the l9th century. Both of them were accepted only reluctantly *(bedi-avad).* The practice of concubinage was rare in northern Europe and became infrequent even in the Mediterranean basin after the l6th century. It continued to be discussed in the codes and in occasional responsa.

This discussion has clearly shown us that Judaism sought to remove the practice of concubinage and various authorities prohibited it. Only the Biblical example made it difficult to eliminate it entirely as

a recognized form of marriage We cannot validate this form of marriage, as it violates our ideals of marriage and the laws of the states or provinces in which we live. It is contrary to the general development of Jewish law in the last eight hundred years.

Walter Jacob (ed.), *American Reform Responsa*, New York, 1983, # 133.

# REFORM JUDAISM AND MIXED MARRIAGE

Walter Jacob

QUESTION: May a Reform rabbi officiate at a marriage between a Jew and a non-Jew? What is the attitude of Reform Judaism generally to such a marriage?

ANSWER: Reform Judaism has been firmly opposed to mixed marriages. This was true in the last century and in this century. At its New York meeting in 1909, the Central Conference of American Rabbis passed the following resolution: "The Central Conference of American Rabbis declares that mixed marriages are contrary to the tradition of the Jewish religion and should, therefore, be discouraged by the American rabbinate" (CCAR Yearbook, vol. 19, p. 170). This resolution was reaffirmed as part of a lengthy report in 1947 (CCAR Yearbook, vol. 57, p. 161). A considerably stronger resolution was passed in Atlanta in 1973. Its text reads as follows:

The Central Conference of American Rabbis, recalling its stand adopted in 1909 "that mixed marriage is contrary to the Jewish tradition and should be discouraged," now declares its opposition to participation by its members in any ceremony which solemnizes a mixed marriage.

The Central Conference of American Rabbis recognizes that historically its members have held and continue to hold divergent interpretations of Jewish tradition. In order to keep open every channel to Judaism and *K'lal Yisrael* for who have already entered into mixed marriage, the CCAR calls upon its members:

1. to assist fully in educating children of such mixed marriage as Jews;

2. to provide the opportunity for conversion of the non-Jewish spouse; and

3. to encourage a creative and consistent cultivation of involvements in the Jewish community and the synagogue. (*CCAR Yearbook*, vol. 83, p. 97)

These resolutions clearly state the position of the Reform

rabbinate in this matter. They reflect only the latest steps in the long struggle against mixed marriage which began in Biblical times and will now be traced as background for this resolution.

*The Bible and Mixed Marriage*

If we review the marriages of the Patriarchs, we can see that they went to considerable trouble to obtain wives within the family circle, presumably with individuals who would be friendly to the religious ideals which the Patriarchs held. It is clear that endogamous marriages were preferred to exogamous marriages: Abraham married his half-sister (Gen. 20:12); Isaac married Rebecca, the granddaughter of Abraham's brother and niece, his double first cousin once removed (Gen. 24:5); Jacob married Leah and Rachel, who also were his first cousins, the daughters of his mother's brother (Gen. 29:12); and Esau married Mahalat the daughter of Ishmael, his uncle, also a first cousin (Gen. 28:9). It is quite clear that Abraham wished Isaac to marry someone not a Canaanite; later Esau understood that the daughters of Canaan would not please his father, Isaac. There were many instances which demonstrated that endogamous marriages were preferred for religious, family, and national reasons.

It would be appropriate to look at the Biblical legislation against mixed marriage more closely. A prohibition against marriage with Edomites and Egyptians appeared in Deuteronomy 23:8-9. Children of such unions were not to be admitted into the congregation until the third generation. The Bible reported no marriages with Edomites, but mentioned a number of marriages with Egyptians and two involved problems. Leviticus 24:10-11 dealt with the son of an Israelite woman and an Egyptian father who became a blasphemer. Solomon married many foreign wives for the purpose of political alliance, and among them was a daughter of Pharaoh (I King 3:1, 9:16, 11:1). The Book of Kings specifically warned against these foreign wives: "You shall not enter into marriage with them, neither

shall they with you, for surely they will turn away your heart after their gods (I Kings 11:2), which happened in the case of Solomon. Finally, there is a reference to Sheshan who married his daughter to Jarha, an Egyptian slave (I Chronicles 2:34). These three isolated incidents indicate that such marriages involved both male and female Egyptians.

Moabite and Ammonites were prohibited from being "admitted to the congregation of the Lord.....even in the tenth generation (Deut. 23:4). This statement contains no reference to mixed marriages. Negative references connected with mixed marriages to Ammonites were associated with Rehoboam, who was considered an evil king and his mother was Ammonite (II Chronicles 12:13); in addition, Joash was slain by assassins whose mothers were Ammonite and Moabite (II Chronicles 24:26). While the Israelites were in the desert, they consorted with Moabite women and were led astray after their gods (Num. 25:1ff)). In that same section we have a report of an Israelite who brought a Midianite woman into camp and was slain by a zealot. In both these instances the danger of other religious was decried. Ruth, a Moabite woman, demonstrated an opposing point of view as she became the antecedent of David (Ruth 4:18).

The most thorough Biblical injunctions were directly against mixed marriages with the seven Canaanite nations; so the Hittites, Girgashites Amorites, Canaanites Perizzites, Hivites, and Jebusites (Deut. 7:1; also Exodus 34:11) were prohibited. "You shall not intermarry with them and not give your daughters to their sons or take their daughters for your sons: (Deut. 7:3). A clear exception was made for a woman taken as prisoner of war (Deut. 21:11ff). After a period of delay, her captor could marry her; and the legislation made no comments of a religious nature, nor did it mention conversion. The Bible contains few references to proselytes (Is. 14:1; Esther 10:27).

When the Israelites entered Canaan, they intermarried with the local inhabitants and served other gods (Judges 3:6). The most striking example of such a mixed marriage was that of Samson and Delilah (Judges 14:1). She was a Philistine, and became responsible for his downfall. Later Solomon married many foreign women as part of royal alliances (I Kings 11:1ff), and they, too, led him astray in his old age. If we look at the subsequent record of the kings of Judah and Israel we may be surprised at the paucity of mixed marriages. Among the nineteen kings of Israel who ruled for two hundred forty-one years we find only Ahab, who was married to Jezebel (I Kings 16:31). Among the twenty kings of Judea who ruled for three hundred ninety-three years we have only Jehoram (II Chronicles 21:6), and possibly Jehosaphat (II Chronicles 18:1), whose mother's name may have been omitted because she was not an Israelite (Leopold Loew, "Eherechtliche Studien," *Gesammelte Schriften*, vol. 3, pp. 138ff.).

The Book of Proverbs contains a number of references against associating with loose or foreign women (Prov. 2:16-17, 5:3-20, 7:5-27). These are horatory statements, not prohibitions. The prophet Malachi denounced such marriages (Mal. 2:11).

The clearest statements against mixed marriage appeared at the end of the Biblical period in the days of Ezra and Nehemiah, when we find specific legislation prohibiting such marriages and demanding that Israelites separate themselves from foreign wives (Ezra 9:12, 10:10ff). Ezra scrutinized the marriages of the citizens of Jerusalem and neighboring villages. Considerable time was taken to complete this task against some opposition. A list of priests, Levites, and other Israelites who had intermarried and relinquished their foreign wives was provided (Ezra 10:18ff). Among those listed by Ezra as having engaged in intermarriage we find priests, ten Levites and eighty-six Judeans. The problem was not entirely solved as the same difficulty arose again in the days of Nehemiah, who railed against those who had taken wives from Ashdod, Ammon, and Moab. Nehemiah did not

advocate the dissolution of these marriages, although he removed the son of a High Priest who had entered such an alliance.

Each of these statements prohibiting mixed marriage was subjected to detailed Talmudic discussion, which provided a totally different interpretation. We should remember that all of these Biblical statements which dealt with mixed marriage or prohibited it, did not declare such a marriage invalid. That thought was foreign to the Bible and did not appear until a later period.

## Hasmonean and Hellenistic Period

Mixed marriages were discussed by the *Book of Jubilees,* which opposed them with the same vigor as Ezra and Nehemiah earlier. In it, Abraham, and later Rebeccah, condemn marriages between Israelites and Canaanites (Jub. 20:4, 25:1). This theme also continued in later portions of the book (Jub. 22:16ff) Those who permitted their daughters to marry Gentiles were to die through stoning and the daughters through fire (Jub. 30:7ff). There could be no atonement for this sin, and the act was considered akin to presenting the child to Moloch.

The *Book of Maccabees* reported mixed marriages as part. of the general pattern of assimilation to the Hellenistic culture and condemned them (I Macc. 1:5, 11:18). The *Prayer of Esther,* an interpolation to the Biblical Esther, stressed her detestation "of the bed of the uncircumcised and of any alien." It was only necessity which brought her into the palace and into her position *(Prayer of Esther*, 115f). Charles considered this and other additions as dating from the first century of our era or earlier.

The same reluctance to engage in public intercourse or

marriage with non-Jews was reflected in Josephus' tale of Joseph, who loved a pagan actress (Josephus, *Antiquities* XII, 4.6); he was eventually tricked into marrying the Jewish daughter of his own brother. Further evidence of mixed marriage is provided by some of the papyri (Tcherikover, *Hellenistic Civilization and the Jews*, p. 70). Those who left Judaism and probably were motivated by the desire to marry Gentiles were also vigorously denounced in Egypt by Philo (*Moses* I, 147) and by the author of *III Maccabees* (7:10ff).

*Talmudic Period*

The vast literature of the Talmud contains few discussions concerning mixed marriage. Each of the Biblical statements cited in the earlier section provided a basis for further development Every effort was made to create a protective wall against the outer pagan world and to shield Jews from contact with non-Jews. During the most restrictive periods, non-Jewish bread, wine, and oil were prohibited, and anything cooked by non-Jews could not be consumed by a Jew (Avoda Zara 35b-38a); virtually all contact with non-Jews was prohibited (Nid. 34a; Shab 16b; Avoda Zara 36b). Naturally, this prohibition extended to casual sexual contact, and those who violated this injunction faced punishment without trial in the same fashion as imposed by Phinehas (Num. 25:7f; Avoda Zara 36b). If the parties involved went further and actually married, they were subject to whipping (Avoda Zara 36b; Kid. 6b; *Yad, Isurei Bi-a* 12.1).

Not all the Talmudic authorities and not all periods were as restrictive as those previously cited and, and the exchange of food, as well as social intercourse, with non-Jews was allowed but the basic wall of separation remained (Avoda Zara 57a, 58b, and 59a).

The most significant change made during this period was the declaration of invalidity of mixed marriages. This remained a dictum of rabbinic literature (Mishna, Kid. 6b, 68b). This Talmudic tractate

provides a long list of marriages which are null and void as no *kiddushin* is possible. This new view may have reflected an internal Jewish development, or it may have been influenced by Roman law (Boaz Cohen, *Jewish and Roman Law*, vol. I, pp. 339f).

The Biblical laws against intermarriage were reinterpreted sometimes more strictly, and on other occasions leniently. The Schools of Hillel and Shammai expanded the list of nations excluded from intermarriage beyond the seven peoples of Canaan, to include all pagans. Simeon ben Yochai agreed with this interpretation (Avoda Zara 36b).

A very strict view was taken by Rava, who felt that the prohibition against the seven nations continued after their conversion. This was one of the many attempts to maintain absolute family purity. It meant that intercourse or marriage with pagans was seen as prohibited from a biological or racial point of view; it was *zenut*, and would be punished through whipping (Yev. 76a; *Yad, Isurei Bi-ah* 12.1).

Part of the strong feeling against mixed marriages was reflected in a general emphasis on family purity. It existed from the time of Ezra and Nehemiah to the destruction of the Temple. The loss of records at that time and in the later revolt of Bar Kochba made such genealogical practices difficult. The long genealogical lists in *Chronicles* reflected the mood, as did the Mishnaic concern with *mamzerim* and *netinim*. Degrees of family purity were established for various Israelites (Kid. 71b, 75aff). Such laws of purity were especially enforced for the priesthood (Kid. 66a, 76a, 77a).

The Tannaitic interpretation of the prohibition against marrying Ammonites and Moabites was limited to males, and did not

extend to females - provided that they converted to Judaism. They could marry a native Israelite in the third generation (M., Yev. 8.3; Yev. 76bf). Rabbi Simeon sought to apply the same principle to Egyptians. Another *mishnah* simply declared that Ammonites could no longer be clearly identified since the days of Sennacherib (M.,Yadayim 4.4; Ber. 28a; *Yad, Isurei Bi-a* 12.25)

Deuteronomy had prohibited Egyptians and Edomites until the third generation, and in this case there was no tradition to make marriages with females possible after conversion, while excluding males. Although Rabbi Simeon sought to establish such a practice (M. Yev. 8.3; Yev. 76b, 77b), but his view was not accepted. If the Egyptians and Edomites converted, they were not permitted to marry born Jews until the third generation (*Yad, Isurei Bi-ah* 12.19).

Others rejected these interpretations, so Rav Asi stated that the century-long mingling of pagans and Jews in Babylonia meant that many might be descendants of the ten lost tribes. One could marry them without conversion or any other step, as they were Jews of doubtful status (Yev. 16b, 17a).

Similarly, Sennacherib so mixed the nations that it was no longer possible to tell who belonged to the seven prohibited peoples. This meant that they were eligible for conversion and acceptance as Jews (M. , Yadayim 4.4). Rabbi Judah and Rabbi Johanan simply stated that Gentiles outside of the land of Israel were not idolaters, but bIndly followed the habits af their fathers, so matters of belief were no longer at issue, nor was there a danger of being led astray by them (Avoda Zara 65a; Hulin 13b). The principle of population mixture could be applied to Egyptians and Edomites also, and there was some Talmudic discussion about this (M., Yadayim 4.4; Tos., Kid. 5.5; *Yad, Isurei Bi-a*h 12.25).

In general, the Talmudic period expanded the prohibition

against intermarriage so that it included all pagan people. Restrictions against specific nations were eliminated. This meant that they, as welI, as any other pagan, could convert to Judaism and thus become part of the Jewish people. If this occurred without ulterior motive, but simply because of an attraction to Judaism, then the convert - no matter what his national origin - was treated as any other Jew.

The Talmudic invalidation of all mixed marriages meant that an insurmountable wall had been erected between the Jewish and pagan communities. As marriage to a pagan was simply not recognized (*einan tofsin*), that family unit did not exist as far as the Jewish community was concerned, and was effectively excluded from the community. The union had no Jewish legal status in the various Christian communities. It was then unlikely that such unions would occured with any degree of frequency.

## The Middle Ages

The discussion of mixed marriage continued into the Gaonic period. The responsa of the Gaonim show some incidence of mixed marriage. The prohibitions of the Talmudic period were extended with further discussion about their implications but without substantial changes (B. Lewin, *Otzar Haga-onim*; Yev. 48b; Kid. 22b, 66b, 68b, etc.). In these instances both casual intercourse and long-term relations with servants, concubines, or wives were contemplated. We should recall that interdictions toward mixed marriage were expressed with equal vigor by Christians; this occurred frequently during the Middle Ages. The statements generally followed the pattern of those of the Council of Orleans, adopted in 538 C.E., which declared:

*Christians quoque omnibus inerdicimus, ne Judaeorum*

*conjugiis misceantur: quod si, fecerint, usque ad sequestrationem, quisquis ille est, communione pellatur. Item Christianis convivia interdicimus Judaeorum; in quibus si, forte fuisse probantur, annuali excommunicationi pro hujusmodi contumacia subjacebunt.* (Ephraim Feldman, "Intermarriage Historically Considered," *CCAR Yearbook*, vol. 19, p. 300).

Similar prohibitions can be found expressed by Church Councils throughout the Middle Ages (Toledo, 589; Rome, 793; etc.). Their constant renewal may point to a continuing series of mixed marriages, or it may indicate the Church's desire to reemphasize its hostility toward Jews and Judaism.

The highest rate of mixed marriage in the Middle Ages occurred in Spain, and we find reports of Gentile wives and concubines. Such relations were already reported in Visigoth Spain in the fifth, sixth, and seventh centuries. The Arian Christian Church did its best to halt them and frequently adopted statements of Church Councils, most to no avail (Georg Caro, *Sozial und Wirtschaftsgeschichte der Juden*, vol. I, 85ff, II, 225ff). Various forms of illicit relationships between Jews and Christians were reported (Adret, *Responsa* I, 1187, IV, 257; Asher, *Responsa* VIII, 10; Baer, *Die Juden im Christlichen Spanien*, "Urkunden und Regesten" I, 171, 442). We should remember that stiff penalties for such illicit intercourse were also imposed by Christians; it could mean death by fire (Baer, *Die Juden im Christlichen Spanien*, "Urkunden und Regesten" II, 125, no. 72; Asher, *Responsa* VIII, 10; Baer, *Ibid.*, I, 456, 1037-1038, II, 63, p. 48). As such transgressions could endanger the entire Jewish community, they were dealt with severely by Jewish authorities (*Zikhron Yehudah*, #80, 91). A considerable number of cases of adultery and intercourse between Gentiles and Jewish women was reported in the responsa literature (*Adret*, I, 1187, 1250, IV, 257; Asher, *Responsa* VIII, 10, XVIII, 113). We also find occasions of intercourse between master and slave, presumably non-

Jewish (Adret, *Responsa* I, 7.10, 6.28, 12.05, IV 3.14; Asher, *Responsa* XXXII, 13, 15). The medieval authorities, like their Talmudic predecessors, made some distinction between relationships with Gentile men or women. Although they prohibited such relationships with both, they tended to be a little more lenient if it was between a Gentile and a Jewess, as the possible offspring of such a union would be Jewish (Rashba to Kid. 21a in *Otzar Haposkim*, p. 253). An anonymous Spanish rabbi commanded, "You should proclaim a ban with the sounding of a horn against anyone who would have intercourse with a Gentile woman. He that is found to have done so should be severely punished, since many children have been born to Jews by their non-Jewish maid-servants." (*Zikhron Yehudah*, #91) Zakuta reported that some Jews killed during the persecution of 1391 were actually slain by their own Christian sons born to Christian women (*Yohasin*, ed. Filiopowski, 225a). These conditions were endemic to Spanish Jewry and continued after the expulsion in the lands to which Jews fled (David ben Zimri, *Responsa* I, 48, 409, III, 443, 520). Moses of Coucy succeeded in getting a number of Spanish coreligionists (about 1236) to set aside their Christian or Moslem wives (*Semag, Lo Ta-aseh* 112). Loew has suggested that these marriages probably referred to concubines (Loew, *Op. Cit.*, vol. III, p. 176). Isaac Aramah (*Akedat Yitzhak*, #120, etc.) denounced irregular sexual unions in his sermons. He may have painted an excessively gloomy picture, but was certainly dealing with a real problem.

Among the Spanish authorities we should also mention Simon of Duran, who dealt with Jews who had more casual relationships with Gentile women (Radbaz, *Responsa* III, 158), and Solomon Adret, who reported relationships and concubinage with Moslem women (*Responsa* V, #242) with some frequency.

Medieval Egypt seems to have been an exception to the continuing problem of mixed marriage. S.D. Goitein (*A Mediterranean Society,* vol. II, pp. 277f) reported no such marriages in the Geniza material without conversion. Marriages between Karaites and Jews were mentioned, but none between Moslems and Jews.

Mixed marriages also occurred in Northern Europe although there less data is available (G. Caro, *Op. Cit.*, I, 57, 70, 94, II, 224). In contrast numerous instances of mixed marriage and sexual relationships with non-Jews were reported during the Renaissance in Italy (Cecil Roth, *The Jews and the Renaissance*, pp. 45ff, 344ff).

The *halakhic* literature of the Middle Ages which prohibited mixed marriage had to concern itself with the status of Moslems and Christians, who were not pagans. The pattern for a new attitude toward these monotheistic religions had already been set by R. Johanan (third century) , who stated that Gentiles outside the Land of Israel were not to be considered as idolaters, but merely as people who followed the practices of their ancestors (Hul. 13b). Non-Jews could, therefore, be subdivided into three categories: (a) idol worshipers, (b) Gentiles outside of Israel, who simply continued the habits of their ancestors, and (c) Gentiles who observed the seven Noahide commandments, which included the prohibition of idol worship. Maimonides considered Christians and Moslems in the second of the above categories (Commentary on M., Avoda Zara 1.3; Zimmels, *Op. Cit.*, p. 208. On other occasions he went even further and categorized Christians and Moslems as *benei noah*. In that category they assisted the preparation for the Messianic era (*Yad Hil. Melakhim* 11.4). The Tosafists of Northern Europe generally included Christians among the *benei noah* (Tos. to Avoda Zara 2a), but occasionally also saw them as simply following the practices of their ancestors (responsum by Gershom b. Judah Meor Hagola). Rashi had come to a similar conclusion, quoting the Gaonim (Tos.,

Avoda Zara 2a, 57b). There were some variations in the outlook adopted toward Christians or Moslems, depending on the economic and social circumstances of the Jewish communities, as well as on the distinction between Ashkenazim and Sephardim.

This new and friendlier outlook towards Christians and Moslems had definite limits, both in commenrcial transactions and in communal festivities. (Tos. to Avoda Zara 57b; *Yak, Hil. Ma-akhalot Asurot* 40.7; Ribash, *Responsa*, 255, 256; Moses Schick, *Responsa, Yoreh Deah* 15). The restrictions definitely prohibited both sexual relations with non-Jews and mixed marriage. Marriages of Jews with Christians or Moslems were clearly prohibited by Maimonides and others (*Yak, Hil. Ishut* 4.15; *Hil. Isurei Bi-ah* 12.1; *Hil. Melakhim* 8.7; *Tur, Even Ha-ezer* 16.1; *Shulhan Arukh, Even Ha-ezer* 16.1, 44.9).

All the medieval codes contain the Talmudic prohibition against mixed marriage. The codes differed in their interpretation as to whether the prohibition represented a Biblical or Rabbinic ordinance (based on Yev. 76a) . Maimonides considered it Biblical, while Jacob ben Asher in his *Tur* invalidated such marriages on Rabbinic rounds. The codes, like the Talmud, indicate definite punishment for intercourse with Christians or for mixed marriages. Thirty-nine lashes were prescribed for such intercourse, and if a man lived with a Gentile concubine, then the punishment was to be tripled (*Shulhan Arukh, Even Haezer* 16.1-2). In addition, the sinner was also to suffer divine punishment. Maimonides' code mentioned the Talmudic teaching that the slayer of a Jew engaged in intercourse with a non-Jew was not liable for punishment (*Yad Hil. Sanh.* 18.6).

Rabbi Simon of Duran reported that the government permitted the Jewish community to stone Jews who had illicit sexual relations

with a non-Jewess (*Responsa* III, 158). The responsa not only reported a variety of forms of such relationships, but also tried to discover solutions. So, when unions between Jewish masters and Gentile slaves were reported (*Zikhron Yehudah*, 91, p. 44a; Baer, *Die Juden im Christlichen Spanien*, "Urkunden und Regesten," I, 164; #6), this was sometimes used to compel a master to liberate such a slave and convert her to Judaism. In those instances, she may have become his Jewish concubine (Adret, *Responsa* I, 12.19).

In the 18th century, when social barriers between Jews and non-Jews decreased in England, intermarriage increased. Coversions to Judaism were rarely permitted, so such individuals usually were married in the church. Intermarriage did not necessarily mean that the party wished to leave the Jewish community, but they had little choice, as they were inevitably expelled from the synagogue. Sometimes the children of such unions later converted to Judaism, and were brought back into the community. Although no numbers were provided, there were enough to be worth noting. (Albert M. Hyamson, *The Sephardim of England*, pp. 176ff). We find a similar phenomenon in France before and during the French Revolution (Z. Szajkowski, "Marriage, Mixed Marriages and Conversions among French Jews During the Revolution of 1789," *Jews and the French Revolutions of 1789, 1830 and 1848*, pp. 826ff). We can see from this essay that a goodly number of individuals who entered mixed marriages subsequently converted to Catholicism. All of these incidents have been cited to demonstrate the reality of the problem throughout the medieval period. The codes and legal literature attempted to halt the process, and generally succeeded, but never completely.

## Conversion for the Sake of Marriage

Many non-Jews joined the Jewish community in the Biblical and early post-Biblical periods. However, formal conversion was first discussed by the Talmud, which required sincere motivation as a

prerequisite. Sincere converts could, of course, marry Jews (*Shulhan Arukh, Even Ha-ezer* 4, 8-10). Those who converted for the sake of marriage or for the sake of wealth or power, or those who were prompted by greed, were not considered proper proselytes (Yev. 24b, 76a; *Shulhan Arukh, Yoreh De-ah* 268.12) , but the matter is not quite as clear cut as it might seem, since various Biblical texts were interpreted as referring to conversion for the sake of marriage. This is how the captive woman (Deut. 21:13) was seen (Kid. 68b; Yev. 48a). Furthermore, prohibition against marriage with the Ammonite or a Moabite was limited to males, while females were permitted to be married immediately after conversion (Yev. 76b). Another statement in the same tractate held that we do not question the motivation of converts if they joined us during persecution or if they could gain no improvement of status by doing so (Yev. 24b). Others went even further; thus Hillel converted a Gentile who sought to become a High Priest (Shab. 31a), while Rabbi Hiya converted a woman who simply wished to marry a Jew (Men. 44a).

In the Middle Ages a major distinction concerning converts developed between the Spanish authorities and the Franco-German rabbis (B.Z. Wacholder, "Proselytizing in the Classical Halakhah," *Historia Judaica,* Vol. 20, 77ff). The form represented chiefly by Alfas and Maimonides, emphasized purity of purpose, and did not recognize any injunction to seek proselytes, a matter questioned by Simon ben Zemah of Duran (*Encyclopedia Talmudit* VI, p. 426). Therefore, only those who came with noble and lofty purposes were to be accepted (*Yak, Hil. Isurei Bi-a* 13.14ff). The Tosafists, on the other hand, stressed the commandment of seeking converts and were willing to do so even if not all the technical requirements could be met (Tosafot to Kid. 62b; Git. 88b, 109b; Yev. 45bff; *Or Zarua* II, 26a, 99). There were a fair number of converts during the Tosafist period despite the Church injunctions against conversions. So, Wacholder

found twenty-five converts in the responsa of the 12th and 13th centuries (B. Z. Wacholder, "Cases of Proselytizing in the Tosafist Responsa," *Jewish Quarterly Review*, Vol. 51, pp. 288ff). A number of them were due to mixed marriages and were cited by Rabbenu Tam (Tos. to Ket. 3b; Yoma 82b) and Yehiel of Paris (Mordechai, San. 702; *Toledot Adam Vehava* 23.4). In addition, there were numerous converts among slaves of Jews, which in some cases involved sexual unions and concubinage.Social relationships, mixed marriage, and conversion remained a factor in Jewish life even in the most difficult periods of the Middle Ages. They led to conversions in both directions, with probably a larger number leaving Judaism than joining it. Any conversion could endanger the life of the convert his family, and in some instances the entire Jewish community (Jacob ben Moses, *Maharil*, 86b; J. R. Rosenblum, *Conversion to Judaism*, 74ff).

The issue of convertiong for marriage is discussed at length by Caro and Joshua Falk in their commentaries to the *Tur, Yoreh De-ah* 268). Caro concludes that some proselytes who convert for the sake of marriage may, nevertheless, be sincere; all depended on the judgment of the court (*hakol lefi re-ut beit din*). Falk concludes that such conversion would be accepted *bedi-avad*. There are, therefore, good grounds in tradition for acceptng such converts.

## Modern Times

Mixed marriages occurred with increasing frequeny beginning in the latter part of the 18th century. This was true in all lands of Western Europe and in the United States. Szajkowski has shown that such marriages occurred among the obscure and the prominent during the French Revolution (Z. Szajkowski, *Op. Cit.*, pp. 826ff). Mixed marriagrs increased rapidly during the succeeding century as a number of careful studies have indicated (E. Schnurmann, *La Population Juive en Alsace*, pp. 87ff; N. Samter, *Judentaufen im Neunzehnten Jahrhundert*, pp. 86ff).

The largest incidence of mixed marriage and conversion to Christianity, in many cases, was found in the German-speaking lands of Central Europe. This began in the generation after Moses Mendelssohn, and occurred in the fashionable circles of the upper class as well as among those who sought upward mobility. Much has been written about Rachel Varnhagen and her intellectual circle, but we should note that the phenomenon also existed among those further down the social ladder. Eastern European Jews who settled in Central Europe in large numbers throughout the 19th century were equally involved in this phenomenon. If we look at the entire 19th century, we shall find that approximately ten percent of the Jewish population was intermarried (A. Ruppin, *The Jews in the Modern World*, pp. 157ff). The peercentage remaioned fairly stable throughout the century, but increased in the 20th century.

The lands of Eastern Europe and the Balkans were not entirely free from this problem although the numbers involved were smaller (Ruppin, *Op. Cit.*, p. 159).

We should remember that opposition to mixed marriages remained equally strong on the part of Catholics and Protestants granted concessions if the children were raised as Christians. The Catholic Church insisted that such marriages were not valid and that remarriage was necessary after conversion of the non-Catholic partner, although some changes in this view began to occur in 1821 (Leopold Loew, "Eherechtliche Studien," *Gesammelte Schriften*, vol. 3, pp. 194ff). Slowly intermarriage was legalized in modern European states. This occurred in Germany in 1875, in Hungary in 1895, and in Rumania a little later. In 1913 it was still prohibited in Austria, Russia, Spain, Portugal, and Islamic lands. Even within the Jewish community, marriages between sub-groups like Ashkenazim and Sephardim were rare in the 19th century.

Intermarriage was highest in lands where the number of Jews was small and where there was little discrimination, as in Denmark, Italy, Australia (Ruppin, *Op. Cit.*, p. 161). It reached 34.1% in Italy in 1881, while in New York in the same year it was one percent, as most Jews had settled there only recently. The figures in Germany between 1904-1908 were 22.2%. It should be noted that the authorities in pre-World War I Hungary stipulated that those about to "contract a mixed marriage can make an arrangement as to the religion they wish their children to have. In the absence of such an agreement, the sons follow the religion of the father, the daughters that of the mother" (Ruppin, *Op. Cit.*, p. 177).

The pattern of increasing mixed marriage, which was noted for England in the 18th century, grew especially with the establishments of civil marriages in 1837. Before that time Jews who married Christians were forced to do so in the Church (C. Roth, "The Anglo-Jewish Community in the Context of World Jewry," *Jewish Life in Modern Britain*, pp. 83ff; S. J. Prais and M. Schmool, "Statistics of Jewish Marriages in Great Britain," *Jewish Journal of Sociology*, IX, no. 2).

Such marriages were also found with fair frequency in early America (M. Stern, "Jewish Marriage and Intermarriage in the Federal Period 1776-1840," *American Jewish Archives*, vol. 19, pp. 142ff; J. Goldstein, *A Century of Judaism in New York*, pp. 328ff; H. B. Grinstein, *The Rise of the Jewish Community of New York, 1654-1860*, pp. 372ff). Studies for the mid-20th century indicated an increasing rate of mixed marriage, which has now reached approximately thirty-five percent of all Jewish marriages. Accurate broad statistics are not available, but many specialized studies have been undertaken (Erich Rosenthal, "Studies of Jewish Intermarriage in the United States," *American Jewish Yearbook*, 1963, pp. 3ff; B. Kligfeld, "Intermarriage: A Review of the Social Science Literature on the Subject," *CCAR Yearbook*, Vol. 72, pp. 87ff; M. Davis, "Mixed

Marriage in Western Jewry," *Jewish Journal of Sociology* 10, pp. 197 ff; J. Rosenbloom, *Conversion to Judaism,* pp. 121ff).

The issue of mixed marriage was raised in a formal way by the Napoleonic Sanhedrin in 1806. Among the questions posed to this body was the following: "Can a Jewess marry a Christian, or a Jew a Christian woman, or has the law ordered that Jews should only marry among themselves?" As a result of the French Revolution, marriage and divorce had been made a concern of the State. Keenly aware of the implications, the Sanhedrin conducted lengthy discussions, in which reference was made to marriages between Jews and Christians which had taken place in France, Spain, and Germany and which had sometimes been tolerated by the rulers. The final answer stated: "The Great Sanhedrin declared further that marriages between Israelites and Christians, contracted according to the laws of the Code Civil, are civilly binding, and that, although they cannot be invested with religious forms, they shall not result in anathema." (Tama, *Transaction of the Parisian Sanhedrin*, transl. F. Kirwan, p. 155; G. Plaut, *The Rise of Reform Judaism*, pp. 71ff). The French text here simply declared civil marriages between a Jew and a non-Jew valid, but avoided the issue of religious marriage; the Hebrew text deemed such marriage religiously invalid (E. Feldheim, "Intermarriage Historically Considered," *CCAR Yearbook*, vol. 19, p. 296). The Napoleonic Sanhedrin here applied the legal principle *dina demalchuta dina* to civil marriage, without granting religious status. This Talmudic principle was constantly used for civil and criminal law, but never previously in matters of personal status. Some modern Orthodox authorities recognize such marriages, while others do not and therefore require no religious divorce for them (Abraham Freimann, *Seder Kiddushin Venisu-in*, pp. 362 ff; C. Ellinson, *Nisu-in Shelo Kedat Mosheh Veyisra-el*, pp. 170ff).

The Rabbinical Conference of Braunschweig in 1844 intended to endorse the statements of the Napoleonic Sanhedrin, but as no one possessed a copy of the resolution, it actually went further by stating: "The intermarriage of Jews and Christians and in general, the intermarriage of Jews with adherents to any of the monotheistic religions is not forbidden provided that the parents are permitted by the law of the state to bring up the offspring of such marriage in the Jewish faith." A motion was also made to permit rabbis to officiate at such marriages, but that was rejected, and so no Jewish authority was authorized to conduct such marriages. (For a summary of the debate, see W. G. Plaut, *The Rise of Reform Judaism*, pp. 220ff). The author of the general resolution, Ludwig Philipson, later changed his mind on this question (L. Philipson, *Israelitische Religionslehre*, vol. III, p. 350; Moses Mielziner, *The Jewish Law of Marriage and Divorce*, p. 48). Abraham Geiger similarly opposed mixed marriages (A. Geiger, *Referat ueber die der ersten Israelitischen Synode ueberreichten Antraege*, pp. 187ff). At the conference held in Breslau in 1846, Samuel Holdheim suggested that rabbis should officiate at mixed marriages, but this motion was rejected (*CCAR Yearbook*, vol. 1, p. 98). Resolutions calling for acceptance of civil marriage and marriages between Jews and Christians were introduced at the Leipzig Synod of 1869, but none were passed. The Synod of Augsburg (1871) stated that civil marriages were to be considered as valid (*CCAR Yearbook*, vol. 1, p. 113). None of the other rabbinical conferences held in Germany or in the United States during the last century passed resolutions on this subject; a number of individual rabbis dealt with the issue in essays and lectures. The radical David Einhorn called mixed marriage "a nail in the coffin of the small Jewish race" (*Jewish Times*, 1870). This citation was frequently quoted by others in the last century and in our own.

The Central Conference of American Rabbis has dealt with the question of mixed marriage extensively from its earliest days. Mendel Silber read a lengthy historical essay on the subject to the Conference

in 1908 (Mendel Silber, "Intermarriage," *CCAR Yearbook*, 1908, p. 207). This represented part of the concern over the subject and the desire to establish a policy of the question. The following year a major portion of the Conference was dedicated to this subject with the presentation of two papers (E. Feldman, "Intermarriage Historically Considered," and S. Schulman, "Mixed Marriages in their Relation to the Jewish Religion," *CCAR Yearbook*, 1909). Both cited a considerable number of sources and reviewed the positions taken by various Reform groups in the 19th century. The discussion of the Conference indicated that all the rabbis present opposed mixed marriages, although some were wiling to officiate at them. The debate dealt with the freedom of the individual rabbis versus the power of the Conference and the general force of the rabbinic tradition. The debate on the subject dealt with the question itself and with the issue of rabbis officiating at such marriages. The resolution which was passed read:

"The Central Conference of American Rabbis declares that mixed marriages are contrary to the tradition of the Jewish religion and should, therefore, be discouraged by the American rabbinate."

There was no substantial additional discussion in the following years, but the matter was mentions peripherally in a lengthy paper by Kaufmann Kohler ("The Harmonization of the Jewish and Civil Laws of Marriage and Divorce," *CCAR Yearbook*, 1915, pp. 335ff). This essay made it clear that Reform Judaism accepts civil marriages as valid and does so in the case of mixed marriages as well.

The following decades saw some discussion of this subject in responsa of the Conference ("Forfeiture of Congregational Membership by Intermarriage," *CCAR Yearbook*, 1916, pp. 113ff; "Burial of Gentiles in a Jewish Cemetery," *CCAR Yearbook*, 1963, pp. 85ff), and those of Solomon B. Freehof in his various volumes. Fairly

frequent articles in the *CCAR Journal* and elsewhere by Reform rabbis demonstrate continued concern; minor discussions of this question occurred at conferences through the years. It was not brought to the floor of the Conference again until 1947, when a lengthy report of a special committee under the chairmanship of Solomon B. Freehof proposed a set of recommendations with considerable annotations, which were adopted after some debate ("Report on Mixed Marriages and Intermarriage," *CCAR Yearbook*, pp. 158ff). The Conference reaffirmed the 1909 resolution on mixed marriage and then proceeded to deal with the specifics involved in mixed marriage through resolutions embodied in the report. These were as follows:

> II. The CCAR considers all sincere applicants for proselytizing as acceptable whether or not it is the intention of the candidate to marry a Jew.
>
> III. We consider civil marriage to be completely valid but lacking the sanctity which religion can bestow upon it. We recommend that whenever a civil marriage between Jews has taken place, it be followed as soon as possible by a Jewish religious marriage ceremony.
>
> IV. Since it is the point of view of the Conference that all sincere applicants for conversion be accepted whether marriage is involved or not, and since, too, we recognize the validity of civil marriages but urge that they be sanctified by a religious marriage ceremony, we surely would accept such a proselyte and officiate at the religious marriage. However, it should be clear that the fact that the couple is already married by civil law does not obviate the necessity of conversion of the Gentile party before the Jewish marriage service can take place.

V. The Conference may well take the stand that wherever the state acknowledges the validity of common law marriage, we likewise consider them to be valid; but that just as in cases of civil marriage we urge that they be changed to regular marriage by license and religious ceremony.

VI. We cannot take quite the same attitude which traditional law has taken inasmuch as marriage, especially in England and the United States, is not only church marriage; it has also, to some extent, the status of civil marriage, at least to the extent that the license to marry was issued by the state. Nevertheless, in this case, the mood of the traditional attitude must determine our point of view. We cannot declare such a marriage invalid but would consider it highly improper and should endeavor, as much as possible, to persuade the couple to be married subsequently by Jewish ceremony. Likewise, on the basis of the unanimous attitude of traditional law, it would be improper for a rabbi to participate with a Christian minister at such a marriage.

Children of religious school age should likewise not be required to undergo a special ceremony of conversion but should receive instruction as regular students in the school. The ceremony of Confirmation at the end of the school course shall be considered in lieu of a conversion ceremony. Children older than confirmation age should not be converted without their own consent. The Talmudic law likewise gives the child who is

converted in infancy by the court the right to reject the conversion when it becomes of religious age. Therefore, the convert should receive regular instruction for that purpose and be converted in the regular conversion ceremony.

Considerable background material for each conclusion was provided. These specific recommendations have gone much farther than any other material in providing an orderly and uniform approach to the questions connected with mixed marriages.

A further recommendation was made by a special committee under the leadership of Eugene Mihaly in 1962 ("Report of the Special Committee on Mixed Marriage," *CCAR Yearbook*, 1962, pp. 86ff). It analyzed the problem and recommended a resolution which would have changed the position of 1909 and permitted rabbis to officiate at mixed marriages. There was considerable debate in which all matters connected with mixed marriage were thoroughly discussed. The substantive portion of the resolution failed, but it was decided to study the matter further and monitor it.

The issue of mixed marriage was raised again in 1971 with a demand for further study which was brought to the floor of the Conference in 1973 through a report under the chairmanship of Herman E. Schaalman ("Report of the Committee on Mixed Marriage," *CCAR Yearbook*, 1973, pp. 59ff). In this instance the majority report was accompanied by several minority statements. The entire matter was then subjected to lengthy discussion. The resolution accompanying the report urged that the 1909 statement be reaffirmed and then proposed a series of detailed statements which sought to restrain rabbis officiating at such marriages and co-officiating with Christian clergy. It also dealt with the question of welcoming those who had already entered a mixed marriage as well as their children. The discussion which followed dealt again with every

aspect of mixed marriage as well as the issue of rabbinic freedom. The resolution finally adopted read:

> The Central Conference of American Rabbis, recalling its stand adopted in 1909 that "mixed marriage is contrary to the Jewish tradition and should be discouraged," now declares its opposition to participation by its members in any ceremony which solemnizes a mixed marriage.
>
> The Central Conference of American Rabbis recognizes that historically its members have held and continue to hold divergent interpretations of Jewish tradition. In order to keep open every channel to Judaism and *K'lal Yisrael* for those who have already entered into mixed marriage the CCAR calls upon its members:
>
> 1. to assist fully in educating children of such mixed marriage as Jews;
> 2. to provide the opportunity for conversion of the non-Jewish spouse; and
> 3. to encourage a creative and consistent cultivation of involvement in the Jewish community and the synagogue.

The Conservative Movement felt it necessary to deal with the intermarried Jew and his rights within the synagogue and community at length ("Intermarriage and Membership in a Congregation," *Rabbinical Assembly Annual*, 1958, pp. 110ff). The statement which opposed mixed marriage also sought to deal with the non-Jewish partner in a conciliatory manner. "It should be clearly understood that in frowning upon intermarriage and in voicing opposition to the choice of a non-Jewish mate, neither Judaism at large, nor Conservative Judaism in particular, expresses any judgment about the morality of

character of these non-Jewish men and women." A list of fourteen reasons for not accepting the non-Jewish partner into a congregation was provided. Congregational membership could be retained by those already holding it, even after a mixed marriage, but would not be accepted initially. Such an individual would be permitted to worship with the congregation, but could not join it. In either case, it was recommended that synagogue honors be withheld, and the non-Jewish members of the family were not granted burial rights. The statement concluded with a milder injunction considering it "a mistake to permit the unconverted non-Jewish wife to be a member of the women' organization of the congregation." The Law Committee of the Rabbinical Assembly has dealt with the question further, but not in published responsa.

Orthodox Judaism has not changed its approach to this question. Civil marriages are not recognized by most Orthodox authorities. When a civil marriage has united a Jew and a non-Jew and, subsequently, the non-Jew converts to Judaism, some Orthodox authorities have refused to conduct a religious marriage (*Mishnah*, Yev. 11.8), while others have followed a more lenient point of view as did Ben Zion Uziel (*Mishpetei Uzi-el, Yoreh De-ah,* #14; also see B. Schereschewsky, *Dinei Hamishpaha*, pp. 80ff).

There were a number of responsa by David Hoffman (*Melamed Leho-il,* vol. 3, #10, 14, etc.) which dealt with the status of intermarried individuals, especially in cases of a later desire to convert, or where there was some concern about the future of the offspring of such a union. Such converts were refused. Similar responsa are also found in Moses Feinstein's *Igerot Mosheh, Even Ha-ezer*, #73, 44, etc.) and elsewhere. All of them simply reported the incidence of intermarriage and decried it.

Israeli law has followed Orthodox law in matters involving family and personal status. It has, however, recognized civil marriages

conducted in other lands in accordance with international law (*Skornik V. Skornik*, 1951, 8:155-156). For Purposes of the Law of Return, a non-Jewish spouse and his/her children possess similar rights of immigration as Jews (*Law of Return*, Amendment, 2, 4a, March, 1970).

## Summary

Reform Judaism and the Central Conference of American Rabbis has opposed mixed marriages. We recognize the problem as significant in every period of Jewish history. It has become more severe in 20th-century America, and, therefore we have made provisions for families of mixed marriages and their children. They are welcome in our congregations, and we continue to urge them to convert to Judaism. The Conference resolution of 1973 succinctly summarizes our position:

The Central Conference of American Rabbis, recalling its stand adopted in 1909 that "mixed marriage is contrary to the Jewish tradition and should be discouraged," now declares its opposition to participation by its members in any ceremony which solemnizes a mixed marriage.

The Central Conference of American Rabbis recognizes that historically its members have held and continue to hold divergent interpretations of Jewish tradition. In order to keep open every channel to Judaism and *K'lal Yisrael* for those who have already entered into mixed marriage, the CCAR calls upon its members:

1. to assist fully in educating children of such mixed marriage as Jews;

2. to provide the opportunity for conversion of the non-Jewish spouse; and

3. to encourage a creative and consistent cultivarion of involvement in the Jewish community and the synagogue.

Walter Jacob (ed.), *American Reform Responsa*, New York, 1983, # 146

# THREE GENERATIONS OF MIXED MARRIAGE

Walter Jacob

QUESTION: A young man who grew up in the South is the product of three generations of mixed marriage. His great grandfather was Jewish and his great grandmother was Christian. His grandmother was raised as a Christian, but married a few. Both of his parents come from mixed marriages, and have provided him with no formal religious education. He would now like to claim his Jewish heritage and feels that the recent decision of the Central Conference of American Rabbis would make this easier for him. (H. S., Washington, DC)

ANSWER: The resolution of the Central American Rabbis, passed in 1983, has stated:

"The Central Conference of American Rabbis declares that the child of one Jewish parent is under the presumption of Jewish descent. This presumption of the Jewish status of the offspring of any mixed marriage is to be established through appropriate and timely public and formal acts of identification with the Jewish faith and people. The performance of these *mitzvot* serves to commit those who participate in them, both parents and child, to Jewish life.

"Depending on circumstances, *mitzvot* leading toward a positive and exclusive Jewish identity will include entry into the covenant, acquisition of a Hebrew name, Torah study, *Bar/Bat Mitzvah,* and *Kabbalat Torah* (Confirmation). For those beyond childhood claiming Jewish identity, other public acts or declarations may be added or substituted after consultation with their rabbi."

This resolution deals with the current generation and cannot be applied retroactively. In any case, there was no Jewish education or commitment in the previous generations. This young man has been raised in a secular fashion which has been colored by Christian traditions. Although there was very little formal Jewish education for three generations, some Jewish heritage survived. Otherwise, the young man in question, who now lives in a slightly larger town, would

not be interested in reclaiming his Jewish identity. From a traditional Jewish point of view, he would not be considered Jewish as the link was broken in the second generation in which the father was Jewish and the mother, non-Jewish. Had this not been the case, traditional Judaism might consider him as a Jew in accordance with the view of Solomon ben Simon of Duran (Rashbash, *Responsa #89).* He was concerned with the offsprings of Marranos and considered them Jewish indefinitely, if the female Jewish lineage remained unbroken. Most authorities would insist on some form of *haverut* to mark a formal re-entry into the Jewish community *(Shulhan Arukh Yoreh Deah* 268.10 f; Ezekiel Landau, *Noda Biyehudah, #150, etc.).*

We, however, feel that there must be a strong educational component which will create a positive identity, and so would demand more regardless of matrilineal or patrilineal descent.

As this young man and his forefathers had no Jewish education or contact, we should treat him as a convert to Judaism and welcome him to Judaism. In the process of conversion and the final ceremony, we should stress his links to a Jewish past which he now wishes to establish firmly for himself and for future generations.

Walter Jacob, *Contemporary Reform Responsa*, New York, 1987, # 59.

# MARRIAGE WITH A "MESSIANIC JEW"

Walter Jacob

QUESTION: May a Reform rabbi officiate at a marriage between a Jewish girl and a boy who was born a Jew but now considers himself a "Messianic Jew?" Is this in consonance with Reform Judaism? (Rabbi Seymour Prystowsky, Lafayette Hill, Pennsylvania)

ANSWER: Reform Judaism has been firmly opposed to mixed marriages. This was true in the last century and in this century. At its New York meeting in 1909, the Central Conference of American Rabbis passed the resolution, "The Central Conference of American Rabbis declares that mixed marriages are contrary to the tradition of the Jewish religion and should, therefore, be discouraged by the American rabbinate" (*CCAR Yearbook*, vol. 19, p. 170). This resolution was reaffirmed as part of a lengthy report in 1947 *(CCAR Yearbook*, vol. 57, p. 161). A considerably stronger resolution was passed in Atlanta in 1973. Its text reads as follows:

"The Central Conference of American Rabbis, recalling its stand adopted in 1909 that "mixed marriage is contrary to the Jewish tradition and should be discouraged," now declares its opposition to participation by its members in any ceremony which solemnizes a rnixed marriage.

The Central Conference of American Rabbis recognizes that historically its members have held, and continue to hold divergent interpretations of Jewish tradition. In order to keep open every channel to Judaism and *K'lal Yisrael* for those who have already entered into mixed marriage the CCAR calls upon its members:

1. to assist fully in educating children of such mixed marriage as Jews;

2. to provide the opportunity for conversion of the non-Jewish spouse; and

3. to encourage a creative and consistent cultivation of involvements in the Jewish community and synagogue.
(*CCAR Yearbook*, vol. 33,p. 97)

These resolutions clearly state the position of the Reform rabbinate in this matter. They reflect only the latest steps in the long struggle against mixed marriage which began in Biblical times. The Responsa Committee has written a long responsum on this subject.

If we consider a "Messianic Jew" as an apostate Jew, what would his status be for us? Judaism has always considered those who left us as sinners, but still as Jews. They could always return to Judaism through *teshuvah* and the exact response of Judaism depended very much on the conditions of the time. Hai Gaon (as quoted by Adret, *Responsa* VII, #292) felt that an apostate could not be considered as a Jew. Centuries later the rabbis of the Mediterranean lands had to face the problems of the Marranos (*anusim*). Their attitude differed greatly and may be summarized under five headings: (1) Apostates are Jews who sinned but, nevertheless, are considered Jewish (Isaac bar Sheshet; Simon ben Zemah of Duran but on some occasions he did not grant this status; Solomon ben Simon Duran; Zemah ben Solomon). (2) The apostates are considered Jewish only in matters of matrimony (and so their offspring are Jewish), but not in any other area (Samuel de Medina). (3) Marranos (*anusim*) are considered non-Jews in every respect, including matters of marriage; their children are not considered to be Jews (Judah Berab, Jacob Berab, Moses ben Elias Kapsali, etc.). (4) An apostate is worse than a Gentile (ben Veniste, Mercado ben Abraham) (5) Descendants of the Marranos who have been baptized are like Jewish children who have been taken captive by non-Jews and their chldren are Jewish (Samuel ben Abraham Aboab). All of these references and excerpts from the

relevant literature may be found in H. J. Zimmels, *Die Marranen in der Rabbinischen Literatur*, 21ff. One extreme position was held by Solomon ben Simon Duran (Rashbash *Responsa*, #89) who felt that not only the apostate, but also the children would continue to be considered Jewish forever into the future as long as the maternal line was Jewish. He also felt that nothing needed to be done by any generation of such apostates when they returned to Judaism. No ritual bath nor any other act was considered necessary or desirable. In fact he emphasized that no attention be given to their previous state for that might discourage their return. Rabbenu Gershom gave a similar view and urged the quiet acceptance of all who returned to Judaism (*Machzor Vitry*, 96 and 97).

The other extreme has been presented by Rashi (in his commentary to Kid. 68b and Lev. 24:10). He felt that any returning apostate, or the children of a Jewish mother who had apostacized, are potentially Jewish, but most undergo a process akin to conversion if they wish to become part of the Jewish continuity. That point of view was rejected by most later scholars, as for example Nahmanides (in his commentary to Leviticus 24: 10; *Shulhan Arukh Yoreh De-ah* 268. l0f, Ezekiel Landau, *Responsa*, #150 etc.). We, therefore, have two extremes in the Rabbinic literature; both, of course, represented reaction to particular historic conditions. Solomon ben Simon of Duran wished to make it easy for a large number of Marranos to return to Judaism; unfortunately, this did not occur. Even when it was possible for Jews to leave Spain, the majority chose to remain. Rashi's harsh attitude probably reflected the small number of apostates who were a thorn in the side of the French community. Normative rabbinic Judaism chose a middle path and encouraged the apostate's return along with some studies, but without a formal conversion process. If an apostate did not wish to return to Judaism he would, nevertheless, be considered as part of the Jewish people (San. 44a). His or her marriage, if performed according to Jewish law as Marranos, and therefore as unwilling apostates, were valid (Yev. 30b; *Shulhan Arukh, Even Ha-*

*ezer* 44.9); divorce procedures for them are somewhat modified. Such an individual was not considered as reliable witness except in the case of an *aguna.* Penalties may be imposed on his inheritance (Kid. 18a), although he does have the right to inherit (B.B. 108a, 111a). Normal mourning rites should not be observed for such a person (M. San. 6.6; *Shulhan Arukh, Yoreh De-ah* 345.5). It is clear, therefore, that an apostate stands outside the community in all but relatively few matters until he has repented. We cannot officiate at his marriage with a Jewish girl.

We should be much stricter in our relationship with "Messianic Jews" than with other Christians with whom we continually attempt to establish good interfaith relations. The normative Christian churches are known for their beliefs and practices and are easily distinguishable by our people. Although they may continue to seek some converts from Judaism, most churches have not pursued active missionary activities in modern times. Directly the opposite is true of "Messianic Jews." They have established a vigorous missionary presence and often seek to confuse Jews about the nature of their religion. They have frequently presented themselves as Jews rather than Christians through misleading pamphlets, advertisements, and religious services. We should do everything in our power to correct these misconceptions and to maintain a strict separation from anyone connected with this group. We should, of course not officiate at such a marriage.

Walter Jacob (ed.), *American Reform Responsa*, New York, 1983, # 150.