Sexual issues in Jewish law

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SELECTED REFORM RESPONSA

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SELECTED REFORM RESPONSA

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VIRGINITY AND THE *KETUBAH*
1984

QUESTION: The traditional *ketubah* classifies a bride as a virgin or places her in a number of other categories. Nowadays, many couples have lived together before marriage. Should this fact be taken into account in writing the *ketubah?* Should an inquiry be made by the officiating rabbi? What would the consequences be if the bride is called a "virgin" and this is not so? (Rabbi R. Marcovitz, Pittsburgh, Pennsylvania)

ANSWER: Chastity before marriage has been urged by both the Bible and the Talmud (Proverbs; Lev. 19.29, 20. 10; Tos. Kid. 1.4, etc.). These and other sources, of course, apply to both men and women. However, virginity has only been mentioned in the marriage document in the case of women. Virginity determines the *mohar,* in other words, the amount of the legal purchase agreement, which has been an age old portion of the marriage document. A difference in the sum to be provided exists between virgins and those who are not virgins. In the *Bible* the price seems to have been fifty *sheqel* for virgins (Ex. 22.15; Deut. 22.29; Ket. 10, 29b, 30b). In the later rabbinic periods, the *tiiohar* for a virgin was two hundred zuzim, which seems to have been the equivalent of fifty *sheqel* (Ket. 10a, 110b), while a non-virgin had a *inohar* of one hundred zuzim (B. K. 36b; Ket. 10a, b; Tos. to Ket. 10a -Ila ff, *Yad Hil.* Ishut 11.3). The priestly aristocracy established a *niohar* of double this amount (L., M. Epstein, *The Jewish Marriage Contract,* pp. 73 ff). In more recent times, the ring symbolizes the former cash *mohar* without the prejorative overtones of a purchase agreement. We have interpreted the ring as a symbol of mutual love.

The status of the bride is not only reflected in them *mohar* but also through the descriptive term used with her name in the *ketubah.* We must now ask whether the *ketubot* of the past made an effort to accurately reflect the status of each bride. They were, of course, to

contain no false material (Git. 10b, 87b; *Yad Hil.* Ishut 3.8). No problem ever existed for women who were widowed or divorced; they were so designated in the *ketubah.* Their status was public knowledge and there was no reason to hide it or to be ashamed of it. If a woman was no longer a virgin, due to accident or intercourse, this should have been so designated. Yet we find that in ancient Judea, where premarital intercourse seems to have been frequent, the Judeans did not permit such a reflection to be cast on their women and insisted on a *mohar* of two hundred *zuzim* for everyone including the widowed and divorced. In other words, all women were automatically classified as virgins. It seems that at this time it was not customary to mention the status of the bride when her name appeared in the *ketubah* (Ket. 10b, 12a; Tos. Ket. 1.4; J. Ket. 25c). There were a number of other periods in Jewish history when loose standards of conduct were widespread. However, this does not seem to have affected the wording of the *ketubot* (Isaac b. Sheshet quoting Nahmanides #6, 395, 398, 425; L. Epstein, Sex *Laws and Customs in Judaism, p.* 128). There is some likelihood that the joining together of *erusin* and *nisuin,* which occurred in the Middle Ages, was due to illicit intercourse which took place during the longer interval between the two ceremonies, which were often separated by as much as a year (Z. W Falk, *Jewish Matrimonial Law in the Middle Ages, pp.* 43 ff; A. Freiman, *Seder Qidushin Venisuin*).

Let us now look at the document itself and the various categories of nonvirgins, such as widows and divorcees. In the case of a divorcee, this designation is placed in the *ketubah* in order to indicate that she is prohibited from marrying a priest. In the case of someone who has been raped or seduced, this lack of virginity may be omitted in the *ketubah* in order to refrain from shaming her through this memory; some scholars insisted that it be mentioned and made public knowledge *(Nahalat Shivah* 12.15). However, we should also note that no authorities demand an inquiry to see whether the individual involved is in fact a virgin. B. Schereschewsky states that

if the bride is neither widowed nor divorced, the *ketubah* should indicate "virgin" *(Dinei Mishpahah*, p. 99).

We should also note that the traditional *ketubah* makes no demands of virginity upon the groom. There is no statement about his virginity or lack of it, nor was this reflected in the economic segment of the *ketubah*.

Now let us go one step further and see what is the consequence of writing "virgin" in a *ketubah* when this is not so. It is clear from the biblical text (Deut. 22.14) that an accusation of non-virginity could be brought by the groom after the wedding night. The parents would then proceed with the defense of their daughter. If indeed she was not a virgin, the death penalty was involved (Deut. 22.20, 21). If she had been accused erroneously, then her husband was fined a hundred pieces of silver and forfeited the opportunity of ever divorcing her (Deut. 22.13 - 19). All of this has been discussed further by the Talmud and later literature (Ket. 10a, 46a; etc.) One authority however, indicated that if such an accusation was brought before him, the young man was to be whipped, as the accusation indicated that he himself had engaged in illicit intercourse earlier. Another limited such a challenge to a man previously married since he possessed legitimate experience (Ket. 10a). Furthermore, after a girl is more than twelve years and six months old *(bogeret),* the hymen may disappear naturally and no sign of virginity remains (Ket. 36a). Should she have lost her virginity by accident, then the only change would be a reduction in her *ketubah* by 100 *zuzim;* no such reduction is made if she claims rape after bethrothal *(Yad* Hil. Ishut 11.10 ff). It was generally made almost impossible for a groom to file a complaint of non-virginity (Ket. 10a b; *Yad*; *Shulhan Arukh*).

We should also note that if there was any kind of misrepresentation of a physical defect on the part of the wife, without the knowledge of the husband, then this is grounds for divorce or for the annulment of the marriage (Tos. Ket. 7.8 - 9; Ket. 72b ff). This is also true if the groom found that his wife was not a virgin. In order to

accuse her, he had to show that he had never been together with her without a chaperon. The laws concerning chaperonage are extremely strict (Ned. 20a; J. Kid. 66b; Git. 81a; Ket. 27b ff; *Yad* Hil. Is. Biah 21.27; *Arukh Hashulkhan* Even Haezer 119.25 - 28).

The husband has to bring his complaint to a court immediately (Ket. 3b, 11b, 12a; Yeb. 111b). Such an accusation does not necessarily reflect illicit intercourse. The woman could claim that she lost her virginity due to an accident, without intercourse (Ket. 13a). Her only penalty then is a reduction in the *mohar*.

Before we leave the subject we should note that the Gaonim composed a special *berakhah* to be recited by the groom on his wedding night if his wife was a virgin (B. Lewis, *Otzar Hagaonim, Vol.* 8, Ket. pp. 14-15; Lawrence A. Hoffman, *The Canonization of the Synagogue Service, p.* 136). The recital of such a blessing if the wife was not a virgin would be *levatalah.* The ritual was, however, not continued and no post-Gaonic discussions exist.

From this we can see that with our modern system of dating it would be absolutely impossible for any man to bring a successful accusation of non-virginity against his wife. Therefore, there are no legal consequences which can be drawn from a statement of virginity made in the *ketubah* or represented by the *mohar* when, in fact, the bride is not a virgin.

In summary, we realize that there were periods in our history when female virginity was very important. However, we can also see that during other times looser moral standards prevailed, and the *ketubot* written during them were not changed.

We must also express our modern concern for equal rights for men and women. If we expressly name the status of the female, we should also do so for the male.

We might also view the entire matter differently and see the marriage as already taken place, through the intercourse of the couple who lived together. This form of marriage is legal, *bediavad,* although frowned upon since the Talmudic period (Kid 9b; *Shulkhan Arukh*

Even Haezer 33.1, 42. 1). The marriage subsequently conducted in the synagogue, and the resultant *ketubah,* would confirm an already existing status. The bride may very well have entered into the original relationship as a virgin.

On all these grounds, it would be wise either to refrain from any kind of designation of status for the woman in the *ketubah* (for which there is ample precedent), or simply to use the designation "virgin" as part of a standard formula. We may standardize it in exactly the same spirit as some of the economic elements of the *ketubah* which no longer possess significance for us.

Walter Jacob

Walter Jacob, *Contemporary American Reform Responsa*, New York, Central Conference of American Rabbis, 1987, # 187.

MARRIAGE AFTER A SEX-CHANGE OPERATION
1977

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? (Rabbi D. Gluckman, Family Life Committee)

ANSWER: Our responsurn will deal with an individual who has undergone an operation for sexual change for physical or psychological reasons, We will presume (a) that this has been done for valid, serious reasons and not frivolously; (b) that the best available medical tests (chromosome analysis, etc.) have been utilized as aids; (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 *(Shulhan Arukh* Yoreh Deah 116; Hul. 10a). The *Mishnah* has dealt with the problem of individuals whose sex was undetermined. It divides them into two separate categories, *tutntum* and *androginos. A tutntum* 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 (Yeb. 83b). S. 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.* 128 ff). The *androginos is* a hermaphrodite and clearly carries characteristics of both sexes *(M.* Bik., IV, 5). The former is a condition which can be corrected, and the latter, as far as the ancients were concerned, could not. So, the *Mishnah* and later tradition treats the *androginos* sometimes like a male, sometimes like a female, and occasionally as a separate category. However, with regard to marriage, the *Mishnah* (Bik 4.2) states unequivocally, "he can take a wife, but not be taken as a wife." If married, they are free from the

obligation of bearing children *(Yad* Hil. Yibum Vehalitzah 6.2), but some doubted the validity of their marriages (Yeb. 81a; *Yad* Hil. Ishut 4. 11; *Shulhan Arukh* Even Haezer .44.6). The *Talmud* has also dealt with *ailoni,* a masculine woman who is barren (Nid. 47b; Yeb. 80b; *Yad* Hil. Ishut 2.4). If she marries and her husband was aware of her condition, then this is 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 may divorce her in order to have children (M. Yeb. 24.1; Yeb. 61a). Later authorities would simply permit such a marriage to stand.

We, however, are dealing with a situation in which either the lack of sexual development has been corrected and the individual has been provided with a sexual identity, or the psychological makeup of the individual clashes with the physical characteristics, and this has been 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 is considered essential as already stated in the *Mishnah.* "A man may not desist from the duty of procreation unless he already has children." The *Gemarah* to this concludes that he may marry a barren woman if he has fulfilled this *mitzvah;* in any case, he should not remain unmarried (Yeb. 61b). There was a difference between the schools of Hillel and Shammai about what is 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 (M. Yeb. 6.6; Ket. 8a; Yeb. 61b; *Tos.* Yeb. 8; Yeb. 8; *Yad* Hil. Ishut 15.16, etc.) The sources also indicate that this *mitzvah is* only incumbent upon the male (*Tos.* Yeb. 8), although some later authorities would include women in the obligation, perhaps in a secondary sense *(Arukh Hashulhan,* Even Haezer 1.4; Hatam Sofer, *Responsa,* Even Haezer 20). Abraham Hirsh *(Noam, Vol. 16,* 152 ff) has recently discussed the matter of granting a divorce when one party of a married couple has had a transexual operation. Aside from opposing the operation generally, he also stated that no essential biological changes had taken place and that the operation, therefore, was akin to sterilization (which is prohibited) or cosmetic surgery.

Hirsh also mentioned 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 had committed a homosexual act. This statement was 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 play 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 are to be recited for those beyond the childbearing age or those who are sterile (Abudraham, *Birkhot Erusin,* 98a).

Most traditional authorities who discuss childless marriages were considering a marriage already in existence *(bediavad),* 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 *(Shulhan Arukh* Even Haezer 23, see Isserles' note to 154. 10). This was the only alternative solution since bigamy was no longer even theoretically

possible after the decree of Rabbenu Gershom in the eleventh century in those countries where this decree was accepted; we should remember that 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 Hayim 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 do 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 authority, E. Waldenberg, assumed that a sexual change has occurred and terminated the marriage without divorce *(Tzitz Eliezer, X,* #25). Joseph Pellagi came to a similar conclusion earlier *(Yosef et Ahab* 3:5). Perhaps the clearest statement about entering into such a marriage was made by Isaac bar Sheshet who felt that a couple is permitted to marry and then should be left alone, although they entered the marriage with full awareness of the situation *(Ribash* #15; *Shulhan Arukh* Even Haezer 1.3; see Isserles' note). Similarly, traditional authorities who usually oppose contraception permit it to a couple if one partner is in ill health; the permission is granted so that the couple may remain happily married, a solution favored over abstinence (Mosheh Feinstein, *Igrot Mosheh,*

Even Haezer #63 and #67; he permits marriage under these circumstances). Our discussion 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.

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Walter Jacob, *American Reform Responsa*, New York, Central Conference of American Rabbis, 1983, # 137.

JEWISH ATTITUDE TOWARD SEXUAL RELATIONS BETWEEN CONSENTING ADULTS (1979)

QUESTION: What is the Jewish attitude toward hetero-sexual relations between two consenting adult single individuals? (CCAR Committee on Family Life)

ANSWER: The tenor of halachic literature, from the Talmud to the present, is against casual sexual relationships. Some extreme statements were made. For example, Reish Lakish has stated that even one who sins with his eyes may be an adulterer (*Lev. Rabbah* 23) ; but -this did not become normative. This kind of attitude, however, led to, or was a function of, the segregation of men and women. A man was not to walk behind a woman; men and women were separated on festive occasions and in public parks (*Yad*, Hil. Yom Tov 6.21); and separate days for men and women were even set aside for visiting cemeteries. The attitude which governed such restrictions may be shown through a Talmudic passage concerning an individual who became physically ill over his desire for a certain woman. His physicians stated that he should have intercourse with her, and the rabbi said: No, let him rather die. Finally, they suggested that the woman speak to the man, and the rabbi said: No, let him rather die. This was their feeling, although the woman in the tale was not married (San. 75a).

There was, of course, some conflict over these kinds of restrictions, and so we have a statement that Rabban Gamliel offered an exclamation of thanksgiving upon seeing a beautiful non-Jewish woman (A.Z. 20a,b; Yer. A.Z. 40a). Yet, on the same page we also have statements such as the following: One should refrain from looking at the little finger of a woman to whom one was not married. This statement is of interest even though it presumably was addressed to married men.

All of this led to a good many later restrictions; for example, not touching any woman other than one's wife, not even another adult relative; not reclining to rest, even when fully dressed, or permitting personal services of any kind (e.g., washing, delousing, etc.) to be performed by a woman for a man (Adret, *Responsa* I, 1188; *Shulhan Arukh*, Even Ha-ezer 21); not conversing much with women (Ned. 20a). This, of course, led to great difficulties with the customary handshake of the western world (*S'deh Hemed, Hatan Vekhalah* 26a). Certainly, no affection was to be shown to any strange woman, and no kissing was allowed (*Sh.A.*, Even Ha-ezer 21.6). We can be quite sure from this that in especially puritanical periods any relationship between the sexes was severely restricted, and every effort was made to keep men and women apart, even within the family circle.

This isolation led to tension and suspicion of illicit sexual relationships whenever men and women were alone together. A young man was supposed to be chaperoned after age nine, and a girl upon reaching the age of three (J. Kid. 66b). Even a divorced couple was not permitted to meet again privately or live in the same neighborhood; it was assumed that they would have sexual relations (Git. 81a; Ket. 27b, 28a; *Yad*, Hil. Isurei Bi-a 21.27; *Arukh Hashulhan*, Even Ha-ezer 119.25-28). The same assumption was made for spice peddlers who visited homes (B.K. 82a). This was permitted by a decree of Ezra, against the wishes of the townspeople, so that women could obtain perfume (B.B. 22a). It was generally assumed that all people constantly sought for sexual relations and had sinful thoughts (B.B. 164b; A.Z. 20b). In other words, the sexual drive is not only considered constant, but in many ways dominant. This was also illustrated by the statement that males who had not gotten married by the age of twenty would be plagued by immoral thoughts for the rest of their lives (Kid. 29b; *Yad*, Hil. Ishut 15.2). Unmarried women faced restrictions too numerous to be listed here.

None of these restrictive statements was entirely effective,

since it is clear from the literature that sexual relations took place often outside and also before marriage, although virginity for the female was greatly prized. Generally, intercourse with an unmarried girl fell under the concept of *z'nut*, which was prohibited. If an act of intercourse was intended as a mode of lawful betrothal, the betrothal was indeed lawful (*Mishnah*, Kid. 1.1). Children born of liaisons conducted without contemplation of marriage.were completely free of any blemish, and there was no question about their legality (Kid. 4.1,2; Yev. 100b). Aside from such alliances reported in the Talmud, we also hear of them often in the Golden Age of Spain and in Renaissance Italy. Nahmanides was lenient about such illicit unions, and was willing to overlook them (Isaac b. Sheshet, *Responsa*, quoting Nahmanides, 6, 398; also 425 and 395). They are mentioned as well in other ages, but less frequently.

We must remember that the sexual drive, when leading to marriage and procreation, has always been considered in a positive light. Its association with the *yetzer hara* (wicked inclination) was given two interpretations: sexual relations might be sinful, but they constituted a necessary sin; sexual relations were not evil per se, but capable of leading to evil. Certainly, within marriage – and to some extent outside of it – sex was considered good and perfectly acceptable (A.Z. 5a; *Yad*, Hil. Isurei Bi-a 22.18f; *Tur*, Even Ha-ezer 25, etc.). There is an enormous Midrashic literature (see L. Ginzberg, *Legends of the Jews*) on the *yetzer hara* and its sexual overtones.

Let us also deal with the question of sexual relationships between those who were engaged and might live together for some time. This has been prohibited by tradition (*Sh.A.*, Even Ha-ezer 55.1, etc.). In early times, such intercourse was reported as unobjectionable in Judea (Ket. 7b) , but not in the Galilee (Ket. 12a) . Some felt that the children of such a union should be declared *mamzerim* (Yev..69b; Kid. 75a), a view which was not adopted. In the final analysis, the stricter view prevailed. Such relations remained fairly common (Yer., Kid. 64a; *Otzar Hageonim*. 18ff, etc.; Elijah Mizrahi, *Responsa*, 4;

David ben Zimri, *Responsa* 111, 525). Louis Epstein felt that such looser standards, which prevailed in the Byzantine Empire, spread slowly through Rumania to Western Europe (L. Epstein, *Sex Laws and Customs in Judaism*, p. 128). This led to the combination of betrothal and marriage into a single ceremony in the medieval period and perhaps earlier. Prior to this time, the betrothed couple was faced with all the restrictions of marriage, and even needed a divorce in case of separation, but did not have the benefits of marriage. It is clear from all this that sexual intercourse between engaged couples was discouraged, but the prohibition was difficult to enforce. If the engagement had taken place through intercourse (*bi-a*), then further intercourse was not permitted until an official ceremony and *Hupah* had taken place (*Sh.A.*, Even Haezer 55.1, *Yad*, Hil. Ishut 6).

Given the indubitable fact that extramarital relations have become common in our day, can Judaism give them its approval? The answer is decidedly negative. We consider premarital and extramarital chastity to be our ideal.

On the question of informal heterosexual relations outside marriage between two consenting single adult individuals, we can then come to the following conclusions. Such relationships were prohibited and discouraged by authorities throughout the ages. Little was done when such relationships took place between two engaged persons, except in puritanical periods. Other sexual relationships between single adults were prohibited, and every effort was made to enforce such prohibitions. These prohibitions were equally strong upon the man and the woman. In times of lower moral standards, authorities were occasionally permissive or simply looked the other way. Generally, the effort to enforce high moral standards succeeded, and the responsa call attention to the failures. In our own period of loose standards, it would be appropriate to do everything within our power to encourage higher standards for both men and women. We should do whatever we can to discourage casual sexual relations.

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Walter Jacob, *American Reform Responsa*, New York, Central Conference of American Rabbis, 1983, # 154.

ADULTERY AND MARRIAGE
1986

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; *OtzarHaposqim* Even Haezer 11. 1, 44).

A rabbi may, in this instance, find herself in a difficult position as she is dutybound to strengthen family life and defend the sanctity of marriage. If 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 toward 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 may insist

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

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Walter Jacob, *Contemporary American Reform Responsa*, New York, Central Conference of American Rabbis, 1987, # 192.

ARTIFICIAL INSEMINATION
1951

QUESTION: Is artificial insemination permitted by Jewish Law?

ANSWER: The question involves many legal problems. Does the donor fulfill the duty of begetting children (*periya ureviya*) if a child is born (but the donor has no other children)? Does he commit the sin of wasting seed (*zerah levatalah*)? Is the woman henceforth forbidden to live with her husband on the ground that she has been fertilized by a man who is not her husband? Is the child a *mamzer*, since he is born of a married woman (*eshet ish*) and a man not her husband? Is there not a danger that the child, when he grows up, may marry his own blood sister or the wife of his own blood- brother (contrary to the Levirate laws)?

1. Even though the technique of artificial insemination is new, nevertheless, most of the questions mentioned above are not new in the Law, since the legal literature has already discussed them with regard to certain special circumstances which are analogous to artificial insemination; namely, if, for example, a woman is impregnated in a bath from seed that had been emitted there (*ibera be-ambatei*) (B. Hag. 15a, top).

2. Joel Sirkes (1561-1640), in *Bach* to *Tur*, Yoreh De-a 195 (quoting *Semak*) says that the child is absolutely *kasher* (i.e., not a *mamzer*), since there had been no actual forbidden intercourse (*ein kan bi-at isur*).

3. On the basis of the fact that there has been no illicit intercourse, Judah Rosanes (died in Constantinople in 1727), in his *Mishneh Lamelekh* to Maimonides, *Yad* Hil. Ishut XV.4, declares that the woman is not immoral and is therefore not forbidden to live with her husband.

4. But whose son is it? Samuel b. Uri Phoebus (17th century), in his commentary *Beit Shemu-el* to *Shulhan Arukh*, Even Ha-ezer 1, note 10, says that it is the son of the donor; otherwise we would not be concerned lest the child later marry his own blood sister. If he were not, the donor's daughter would not be his sister.

5. In modern times, since the development of the technique of artificial insemination, the subject has been discussed by Chayim Fischel Epstein in his *Teshuva Shelemah* (Even Ha-ezer, #4), and by Ben Zion Uziel of

Tel Aviv, the chief Sephardic rabbi of Palestine, in his *Mishpetei Uziel*, part II, Even Ha-ezer, section 19. Epstein – because of the danger that the child may some day, out of ignorance, marry one of the forbidden degrees of relationship opposes the use of seed from a stranger, but permits the use of the husband's own seed – if that is the only way the wife can be impregnated by her husband. Ben Zion Uziel says – as do earlier authorities – that the woman is not immoral because of this act and that the child is *kasher*, but – disagreeing with *Beit Shemu-el* – he says that the child is not the child of the donor as to inheritance and *Halitzah*. He adds that the woman thus impregnated (if not married) may not marry until the time of suckling the child is over.

Since he concludes that the child is not the donor's child, he therefore considers that the donor has sinned in wasting seed. However, inasmuch as he concludes that the woman is not immoral and not forbidden to her husband, he seems to incline toward permitting the procedure at the recommendation of the physician although he hesitates to say so.

6. My own opinion would be that the possibility of the child marrying one of his own close blood kin is far-fetched, but that since, according to Jewish law, the wife has committed no sin and the child is *kasher*, then the process of artificial insemination should be permitted.

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Walter Jacob, *American Reform Responsa*, New York, Central Conference of American Rabbis, 1983, # 157.

ARTIFICIAL INSEMINATION
1951

QUESTION: Is artificial insemination permitted by Jewish Law?

ANSWER: Talmudic and rabbinic sources do not discuss, or even mention, artificial insemination as understood (and practiced) in our day. Artificial insemination, with which we are concerned, is premeditated, planned. The physician performs it upon request by the parents, applying either the husband's sperm or that of a stranger. In the latter case, the identity of the donor must not be revealed to the parents (nor to the resulting child, of course).

Yet, since artificial insemination concerns family life – an area meticulously regulated and steadily supervised by Jewish religious leaders of all times – it is quite natural that rabbis of our day investigate the matter in order to find a solution that would be in character with Jewish practice and thought.

In an attempt at a solution of the problem, the first step, as a matter of course, is to search for sources that may have some bearing on the subject. Whereas many passages from Talmud and rabbinic literature could be, somehow, linked to the problem (as has been done), only those passages shall be discussed here which possess (or are believed to possess) real significance for the issue:

1. In Talmud Bavli (Hag. 14b), the question is raised whether a virgin who became pregnant is allowed to be married by the High Priest (in view of Lev. 21:13-14, *"Isha bivtuleiha"*). Subsequently (14b15a) the possibilities of a virgin's becoming pregnant are discussed. One of the possibilities suggested is that she was impregnated in a bath (from seed deposited there by a man).

Let us keep in mind that this incident, considered by some rabbis as being analogous to artificial insemination. is, in fact an accident, a calamity; the pregnancy was undesired. It was not artificial in the sense in which this expression is being used today.

2. *Helkat Mehokek* (Moses ben Isaac Jehudah Lima) on *Shulhan Arukh*, Even Ha-ezer 1, note 8, raises the question (in connection with the *mamzer*) whether the father fulfilled the commandment of *periya ureviya*

(procreation) if his wife was impregnated in the bath, and whether the resulting child is his child in every respect. Instead of giving a clear answer, *Helkat Mehokek* cites an incident from *Likutei Maharil*. According to this incident, Ben Sira was the result of a bath insemination (yet no blemish is attached to him).

3. *Beit Shemu-el* (Samuel ben Uri Phoebus), ibid., note 10, cites *Helkat Mehokek*'s question and answers it by referring in brief to *Hagahot Semak*, a note by Perez (ben Elijah) on Semak (Isaac ben Joseph of Corbeil). This note is related fully in *Bach* (Joel Sirkes) on *Tur*, Yoreh De-a 195, and tells us the following: A menstruous woman may lie on the sheet of her husband but not on that of a stranger lest she become pregnant from the seed of a stranger (emitted on the sheet). But why should she not be afraid of becoming pregnant from the seed of her husband while she is menstruating and thus producing a *ben hanidah* (child of a menstruous woman), which is prohibited? The answer: Since there is no prohibited intercourse, the child is entirely *kasher* (no stigma attached to him), even if she became pregnant (in such a way) by a stranger, since Ben Sira was *kasher* (see above). Yet, if it is a stranger, we have to be cautious (i.e., she must not lie on his sheet), because of the possibility that the resulting child might marry his own sister by his father (whose identity is unknown). *Beit Shemu-el* concludes from this note that the child resulting from such an insemination is that of the emitter of the seed in every respect.

This conclusion, needless to say, is irreconcilable with the fundamental rule of artificial insemination, requiring that the child belong to the mother's husband, not to the donor of the seed.

4. *Mishneh Lamelekh* (Judah Rosanes) on Maimonides' *Mishneh Torah*, Hilkhot Ishut XV.4, besides citing (see above), remarks: "*Ein safek dela ne-esra leva-alah mishum de-ein kan bi-at isur*" ("There is no doubt that she does not become prohibited to her husband because no prohibited intercourse took place").

What *Mishneh Lamelekh* clarifies is that accidental insemination in a bath or on a sheet (i.e., without direct contact with a man) cannot be considered as adultery, which would make her prohibited to her husband (rape of a Kohen's wife would have the same result). For our problem, this does not reveal any clue, since we are not trying to solve the question

of accidental insemination. Planned artificial insemination involves some problems which do not exist at all with regard to accidental insemination. One of these problems is whether or not the emitting of seed for artificial insemination would be *hotsa-at zera levatalah* (wasting of seed), which is prohibited. Let us return to this point in a brief reference to recent responsa on the subject.

One of these is found in *Mishpetei Uzi-el* (Tel Aviv, 1938), part II, Even Ha-ezer Responsum 19, pp. 46-69, by Ben Zion Uziel. Uziel equates, basically, artificial insemination with accidental (bath, sheet) insemination.But, as to the emitting of seed for bath or artificial insemination, he can see no way for permitting it. In Uziel's concluding words the matter belongs to the category of the halakhot which bear the designation *halakhah ve-ein morin kach*, i.e. , halakhah which must not be translated into practice (cf. Michael Guttmann, *Zur Einleitung in die Halacha* 11, p. 91).

Haim F. Epstein, in his *Teshuvah Shelemah* (St. Louis, 1941), vol. II, Even Ha-ezer, Responsum 4, pp. 8-10, like Uziel, basically equating artificial insemination with accidental insemination, finds no way of allowing the use of a stranger's sperm. However, as to the use of the husband's seed for artificial insemination, he states *efshar dezeh mutar*, i.e., "It is possible that this is allowed," if the physician finds that this is the only possible way for his begetting a child.

Epstein's argument as to the necessity of limiting of the concept *hotsa-at zera levatalah* (wasting of seed), based primarily on Yevamot 76a, is sound and provides at least some justification for his hesitant conclusion (cf. also Responsum 5, ibid.).

Let me sum up the problem of artificial insemination considered from the viewpoint of historical Judaism, as follows: Artificial insemination, as understood and practiced today, is not mentioned in rabbinic literature. What we find here is merely accidental, indirect insemination. We must also keep in mind that the bath insemination of the Talmud is not merely an *ex post facto* case, but it also involves the concept of Ones, meaning flaccident." Jewish law mostly, though not always, clearly distinguishes between accidental and premeditated deed. I do not believe that we do justice to Jewish law or to Judaism by disregarding its concepts and principles in an effort to force certain

conclusions, one way or the other.

Also, the fact that the laws and discussions of the Rabbis with regard to bath insemination are of a theoretical nature, is of importance. Not one incident of actual bath insemination is attested to in Jewish literature. What we find, including the Ben Sira case, is mere *aggada*. Had such an incident actually occurred, the rabbis might have found a solution entirely different from the known theoretical considerations. Noteworthy is the fact that the sages never recommend bath insemination, even if this were the only means of saving a marriage, which ranks very high with the Rabbis. A case in point is an incident in Yev. 65b (see ibid.).

I do not claim that the last word has been said on artificial insemination in its relation to Jewish life and practice. It is hardly possible to draw safe conclusions from the theoretical accidental insemination found in Jewish sources to the artificial insemination of our day. While indications strongly point to a negative answer (particularly if the seed of a stranger is to be used), other aspects of Judaism must be explored as well, in order to arrive at a conclusion reflecting Judaism at its best.

Whereas I do not see sufficient evidence for recommending the issuance of a prohibition against artificial insemination, I should like to caution against a hasty *heter* (permit) for which I found no backing worth the name in our Jewish teachings.

Alexander Guttmann

Walter Jacob, *American Reform Responsa*, New York, Central Conference of American Rabbis, 1983, # 158.

THE TRANSPLANTED OVUM
1978

QUESTION: The gynecological procedure involved in the question is as follows: A fertilized ovum will be removed from a woman's womb and inserted into the womb of another woman, who will then bear the baby for the full term of months and is expected to give birth to a normal child. The question is, will this baby be considered to be the child of the donor of the fertilized ovum or of the woman who carried it in her womb for full term and gave birth to it? (Asked by Rabbi Harold L. Robinson, Hyannis, Massachusetts.)

ANSWER: It is not quite clear whether the procedure described has already been practiced a considerable number of times or whether it is just contemplated and is for the present theoretical. Even if it is only theoretical, it is an interesting and important question because it may become practical (if actually feasible); then, as the practice becomes widespread, it will certainly find strong echoes in the Jewish legal literature. What, then, is (or would be) the halachic attitude to this procedure of transplanting a fertilized ovum from one woman's womb to another's?

As far as I know, there has not been the slightest mention of such a procedure in the Halachic literature. If the practice becomes known, the earliest mention of it will very likely be in the medical-legal symposia conducted in Israel these days and published under the imprint Assia. When the matter is discussed, it is fairly clear that the basic question will be that which is asked here, namely, what is the parentage of the child. It is also clear on what basis the discussion will begin and proceed.

The foundation for this forthcoming halachic discussion on ovum transplants will be the already well-known practice of artificial insemination, which, although also fairly new, has been widespread enough to find considerable discussion in the halachic literature.

As for this debate on artificial insemination, like all such halachic debates, it is based upon the Talmud. The Talmud (Hag. 14b-15a) discusses a question based upon the biblical verse in Leviticus 21:13-14, which states that the High Priest may marry only a virgin. The Talmud

then asks this question of Ben Zoma: If a High Priest had married a virgin but then discovered that, although still a virgin, she is pregnant, what is the status of the child, etc.? Ben Zoma is asked how it was possible that this wife of the High Priest could be pregnant and yet remain a virgin. He said that it was possible that she was impregnated in the bath. Rashi explains this answer as follows: In a public bath place, some male bather had emitted semen, and later this young woman, bathing there too, was impregnated by it. (By the way, a gynecologist has implied to me that this talmudic idea of impregnation without intercourse is quite possible.) This talmudic idea of a woman thus receiving sperms without sexual intercourse is the basis of all the halachic debate on artificial insemination. It will also be the basis of the debate on the question you have raised here.

By the way, Dr. Alexander Guttmann of the College faculty and I have both written responsa on artificial insemination. They are found in the *Conference Year Book, Vol. 62. 1* will mention now only the two latest responsa on the subject, namely, one by the former Sephardic Chief Rabbi of Israel, Benzion Uziel (in *Mishpatei Uziel, Even Hoezer, # 19),* and also one by Moses Feinstein, the most honored American Orthodox respondent, in his second volume on *Even Hoezer # 11. 1* mention both of these scholars to point out the rather important fact that after perhaps thirty years of Halachic debate, these leading authorities disagree with each other on the basic problem of the child's paternity in artificial insemination. Benzion Uziel is inclined to the opinion that the mother who receives the seed in artificial insemination is the true parent, whereas Moshe Feinstein believes that the donor of the seed in artificial insemination is the true parent.

It might be worth mentioning that Feinstein's decision that it is the donor who is the true parent is not an absolutely firm conviction with him, because, he says, although the donor is to be considered the parent, he is not a parent to the extent that the child born from his donation would free his wife from *chalitza.* That is to say, if a man dies childless, his wife cannot remarry unless her brother-in-law gives her *chalitza,* but if her husband has had a child from any woman (even a woman who was not his wife), the wife is freed from *chalitza.* In other words, Moses Feinstein says that the donor is to be the parent, but not completely so; if he has no other children, his wife must undergo *chalitza* if he dies.

It is, then, upon the basis of the laws developed in the debate over artificial insemination that the question of paternity involved in the ovum transplant will be decided; and since the question of paternity in artificial insemination is still a subject of disagreement between the two prime authorities, we may well say that the question of paternity and inheritance in the case of the ovum transplant is quite open and undecided. It will, of course, have to be cleared up later if the practice becomes widespread, but at present we may say it is an open question.

I am now informed that the actual situation is as follows: The sperm from the husband of the infertile woman is placed in the womb of another woman, the ovum donor, by means of artificial insemination. Thus the ovum of the ovum donor and the sperm of the husband are united and the ovum becomes impregnated. After a brief time, this impregnated ovum is put into the womb of the barren wife and she carries it to full term and a normal baby is then bom. As to this situation, it should be mentioned that the mixing of a man's seed with the ovum of a woman not his wife cannot be considered adulterous. If it were adulterous, then the child would be considered a *mamzer*. But it is not adulterous because in this mixture of sperm and ovum there is no *bodily* contact. This decision was already made by many authorities in the case of artificial insemination. So, first of all, it is to be stated that there is no Jewish legal objection to this mixture of sperm and ovum.

As for the parentage of the child, it is almost impossible to come to a definite conclusion on the basis of the Halachah, inasmuch as this situation is totally unprecedented. However, while we cannot be certain, we can speak of the probabilities involved here. In general, the tendency of Jewish law is to emphasize the relation of the child to the *paternal* parent. This is based first upon the Mishnah *Kiddushin 3:12.* The rule there given is as follows: Whenever there is a valid marriage and no sin involved, the child has the status of the male parent. Thus, for example, if a Kohen marries an Israelite woman, such a marriage is both valid and without sin, and therefore the child follows the male and is a Kohen. So, too, if an Israelite marries a Kohen woman, this again is a valid, sinless marriage, and the child again follows the male and is Israelite since his father is Israelite. In other words, the general rule of the law with regard to normal, everyday marriages is that the child has the status of the father.

This is discussed in the Talmud, *Kiddushin* 66b-67a. Rashi there explains why, in general, in normal marriages the child follows the status of the father rather than that of the mother. He bases it on Scripture, the first chapter of the Book of Numbers, which says a number of times that the Children of Israel shall be numbered according to their *father's* house.

There is also a second consideration. The fertilized ovum is carried in the womb of the wife for full term. Does the fact that the body matures in the womb of the wife have any bearing on the status of the child? It does, definitely. This can be seen from the special case of a pregnant proselyte. A woman became pregnant while a Christian (presumably pregnant by a Christian man). During her pregnancy, she becomes converted to Judaism. After her conversion, her child is born. What is the status of the child? Is it a Gentile who needs to be converted, since both parents were Gentile? The answer of the overwhelming number of authorities on this matter is that the child is part of the mother's body and the conversion ritual (the *mikvah)* converts not only the mother, but the child that she is carrying (see the authorities cited in the responsum, "The Pregnant Proselyte," in *Modern Reform Responsa,* pp. 143 ff.).

While the situation here is far different from normal marriage, the attitude of the law to normal marriage may serve as an analogy in this special situation. Since the tendency of the law is to emphasize the influence of paternity, and since the wife carries the child and, therefore, according to the law her status impresses itself upon the child, these constitute two reasons why the child here in question should be considered the offspring of the married couple. Of course, as has been said, the situation is unusual, but the likelihood is that as the study of this problem develops, the tendency of the law will likely be to reach the above conclusion.

Solomon B. Freehof

Solomon B. Freehof, *New Reform Responsa*, Cincinnati, 1980, Hebrew Union College Press, # 48.

SURROGATE MOTHER
1981

QUESTION: What is the status of a child born to a surrogate mother who has been impregnated through artificial insemination with the sperm of a man married to another woman? The child will eventually be raised by the husband and his wife. (O.Z., New York City)

ANSWER: We must inquire about the Halacha and the use of surrogate mothers, as well as the status of the child. The Talmud and later rabbinic literature seem to have dealt with a subject akin to the question of a surrogate mother when they discussed pregnancies which were not caused by intercourse. The rabbis felt that a girl could conceive by taking a bath in water into which male semen has been discharged (Hag. 14b); in other words, without intercourse or penetration. This line of thought has been continued by some later commentators and respondists (Eibeschutz, *Commentary* to *Yad*, Hil. Ishut 15.6; Ettlinger, *Arukh Laner* to Yev. 12b). The medieval author of *Hagahot Semak*, Perez ben Elijah of Corbeil, felt that a woman should be careful and not lie upon linen on which a man had slept so that she might not become impregnated by his sperm (Joel Sirkes to *Tur*, Yoreh De-a 195).

Here we have instances of conception, through an unknown outside source, and this was not considered to cause any halachic problem for the woman or the child, who was legitimate. Yet there is a striking difference between these situations and ours, as the child in question there was raised by its natural mother while ours will be raised by other parents. Furthermore, there is a commercial aspect in our situation, as the surrogate mother presumably has been paid for her efforts.

A biblical parallel seems to exist in the tales of the Patriarchs (*birkayim*, Gen. 30:3, 50:23) as Hagar was given to Abraham by Sarah so that there would be a child. Similarly, Rachel gave Bilhah to Jacob. In both instances the primary wife reckoned the child as her own and was able to accept it (as Rachel) or reject it (as did Sarah). The differences here, however, are as follows:

1. The child and biological mother were part of the same household and family; and

2. the biological mother continued to play a major role in the life of the child.

There are also some problems with an apparent Talmudic parallel, i.e., the situations of a concubine, whether of a temporary or permanent nature (see the responsum "Concubinage," #133 above). These women bore the children of a man who usually was already married to another woman as his primary wife, but the concubines raised the children themselves.

There is nothing then akin to our problem in the literature of the past. A vague example in Noam (vol. 14, pp. 28ff) actually deals with organ transplants, in this case ovaries. The midrash which dealt with the transfer of a fetus from Leah to Rachel and vise versa (*Targum Jonathan* to Gen. 30:12; Nida 31a; Ber. 60a) is also not relevant as the parents seemed unaware of this.

We would, therefore, have to treat the use of a surrogate mother as a new medical way of relieving the childlessness of a couple and enabling them to fulfill the *mitzvah* of procreation. It should cause us no more problems than modern adoptions, which occur frequently. There, too, the arrangement to adopt is often made far in advance of birth, with the complete consent of one or both biological parents. Here we have the additional psychological advantage of the couple knowing that part of the genetic background of the child which they will raise as their own. This may prove helpful to the adoptive parents and, at a later stage, to the child.

If we were to treat this child as the offspring of a concubine or the result of a temporary liaison between a man and an unmarried woman, there would be no doubt about its legitimacy. The issue of biblical and rabbinic *arayot* does not arise.

We should look at the halachic view of artificial insemination with a mixture of sperm as is common practice. The majority of the traditional authorities consider such children legitimate (Nathanson, *Sho-el Umeshiv*, part 3, vol. 3, #132; Uziel, *Mishpetei Uziel*, Even Ha-ezer, #19; Walkin, *Zekan Aharon*, Even Ha-ezer 2, #97; Feinstein, *Igerot Mosheh*, Even Ha-ezer, #10). Waldenberg *(Tzitz Eliezer*, vol. 9, no. 51.4) considered such children to be *mamzerim*. Additional discussion of the different authorities may be found in vol. 1 of *Noam* (1958). S.B. Freehof also considered them legitimate ("Artificial Insemination," #157 above), but

Guttmann was cautious (see #158 above).

We would agree that there is no question about the legitimacy of such children, as long as the surrogate mother is not married. However, we realize that problems still exist in civil law in various states.

It is more difficult when we consider a married surrogate mother. Different factors are involved. On the positive side, we have the *mitzvah* of procreation to fulfill. Certainly, that *mitzvah* ought to be encouraged in every way possible. It is for this reason that both adoption and artificial insemination have been encouraged by traditional Judaism and Reform Judaism. In a period when the number of Jewish children has declined rather rapidly, we should do everything possible to make children available to families who wish to raise them.

Problems are raised by the marital status of both couples in civil law and halakhah. Is this to be considered adulterous or not? Certainly, under normal circumstances sexual relations between a man and a married woman would be adulterous. The fact that the woman with whom the relationship is carried on has a husband who is willing to permit it makes no difference. In this instance however, insemination would be conducted artificially and no sexual penetration would occur. It would, therefore, not differ materially from circumstances under which artificial insemination with sperm from an unknown donor takes place. In that case, too, the donor may very well be married and certainly the woman recipient is married. This form of artificial insemination has been accepted by us (see #157-158 above) , by Freehof, and with some reservations by Guttmann. At least two of three Orthodox authorities (Baumol, *Emek Halakhah*, #68; Schwadron *Maharsham*, vol. 3, #268) have permitted this, too, however with reservations. We would therefore not consider the use of a married surrogate mother as adulterous, as the beginning of the process is akin to artificial insemination. We would therefore hesitantly permit the use of a married surrogate mother in order to enable a couple to have children and await further clarification of medical and civil legal issues.

Walter Jacob, Chairman
Leonard Kravitz

Isaac Newman
Harry Roth
Rav Soloff
Bernard Zlotowitz

Walter Jacob, *American Reform Responsa*, New York, Central Conference of American Rabbis, 1983, # 159.

BIRTH CONTROL
1927

In considering the question of the Talmudic-Rabbinic attitude towards birth-control we must seek to clear up the confusion that prevails in the discussion of the subject and define the principles involved in the whole question.

Some rabbis are inclined to regard all forms of birth-control, excepting self-control or continence, as *Hotsa-at shichvat zera levatala*, and therefore put them in a class with masturbation or self-abuse. Hence, they believe that by citing Agadic sayings from the Talmud and the Midrashim against the evil practice of self-abuse, they have also proved the opposition of Rabbinic law to the various forms of birth control. Such a method, however, is unscientific and not justified in the discussion of such a serious and important question.

In the first place, the method of adjudging questions of religious practice on the basis of Agadic utterances is altogether unwarranted. The Talmudic rule is *"Ein morin min hahagadot,"* i.e., that "We cannot decide the questions of practice by citing Agadic sayings" (Jer. Hagigah 1.8, 76d). The Agada may set up an exalted ideal of the highest ethical living. It may teach the lofty precept *"Kadesh atsmecha bamutar lecha,"* to aspire to a holy life and to avoid even such actions or practices which – though permitted by the law – do not measure up to its high standard. But it does not rest with the Agada to decide what is forbidden or permitted by the law. "The Agadist cannot declare anything forbidden or permitted, unclean or clean," says the Talmud (*"Ba-al agada she-eino lo oser velo matir, velo metame velo metaher,"* Yer., Horayot 111.7 48c). The answer to questions of practice – that is, as to what is permitted by Jewish law and what is not – can be given only on the basis of the teachings of the Halacha.

Secondly, it is absolutely wrong to consider cohabitation with one's wife under conditions which might result in procreation as an act

of *"otsa-at shichvat zera levatala,"* and to class it with sexual perversions such as self-abuse.

In the following, therefore, we must consider only what the Halacha teaches about the various forms of birth control and ignore what the Agada has to say in condemnation of the evil practices of self-abuse and sexual perversions.

In order to avoid confusion and for the sake of a clearer understanding and a systematic presentation of the Rabbinic teachings bearing upon our subject, it is necessary to formulate the question properly. It seems to me that the correct formulation of our question is as follows: Does the Talmudic-Rabbinic law permit cohabitation between husband and wife in such a manner or under such conditions as would make conception impossible; and if so, what are the conditions under which such cohabitation is permitted?

As to the first and main part of the question, there is no doubt that it must be answered in the affirmative. To begin with, the Rabbinic law not only permits but even commands the husband to fulfill his conjugal duties to his wife, even after she has experienced the change of life and has become incapable of having children. Likewise, the husband is permitted to have sexual intercourse with his wife even if she is congenitally incapable of conception, as, for instance, when she is *akarah*, sterile, or an *ailonit*, that is, a wombless woman (*Tosafot* and *Mordecai*, quoted by Isserles in *Shulchan Aruch*, Even Ha-ezer XXIII.2). The later Rabbinic law goes even further and permits even a man who has never had children (and thus has not fulfilled the duty of propagation of the race, *Mitzvat Periya Ureviya*) to marry a woman incapable of bearing children, that is, a sterile woman (*akarah*) or an old woman (*zekena*) (Isaac b. Sheshet, quoted by Isserles, op. cit., 1.3). From all this it is evident that the act of cohabitation, even when it cannot possibly result in conception, is in itself not only not immoral or forbidden, but in some cases even mandatory. Hence, we may conclude that the discharge of sperm through sexual intercourse, even though it does not effect

impregnation of the woman, is not considered an act of "wasteful discharge of semen" (*Hotsa-at shichvat zera levatalah*) , which is so strongly condemned by the Agadic sayings of the Talmud. For while – as regards procreation – such a discharge is without results and purposeless, yet since it results from legitimate gratification of a normal "natural desire," it has fulfilled a legitimate function and is not to be considered as in vain.

Now it may be argued that only in such cases where the parties—through no fault of their own – are incapable of procreation does the law consider the mere gratification of their natural desire a legitimate act and hence does not condemn it as *"Hotsa-at shichvat zera levatala."* We have, therefore, to inquire further whether the gratification of their legitimate desire by sexual intercourse in a manner not resulting in procreation would be permissible even to a young and normally healthy husband and wife who are capable of having children.

To my knowledge, the Halachaa– aside from recommending decency and consideration for the feelings of the wife in these matters – does not put any restrictions upon the husband's gratification of his sexual desire for his wife, and certainly does not forbid him any manner of sexual intercourse with her. This is evident from the following passage in the Talmud (Nedarim 20b) where R. Johanan b. Nappaha, commenting upon a saying of R. Johanan b. Dahabai in disapproval of certain practices indulged in by some husbands, says: "These are but the words [i.e., the individual opinion] of Johanan b.Dahabai; the sages, however, have said that the decision of the law, i.e., the Halacha, is not according to Johanan b. Dahabai, but a husband may indulge with his wife in whatever manner of sexual gratification he desires" (*"Amar Rabbi Yochanan 'Zo divrei Rabbi Yochanan ben Dahavai. Aval ameru chachamim: Ein halacha ke-Yochanan ben Dahavai, ela kol ma she-adam rotseh la-asot be-ishto, oseh'"*).

This Halacha of R. Johanan b. Nappaha, supported by the

decisions of Judah Hanasi and Abba Areka and reported in the Talmud (ibid., *loc.cit.*), has been accepted as law by all medieval authorities, and they accordingly permit intercourse with one's wife in any manner *("Kedarkah veshelo kedarkah")* (Maimonides, *Yad*, Isurei Bi-a XXI.9; Tur, Even Ha-ezer 25; and Isserles on *Shulchan Aruch*, Even Ha-ezer 25.2). Maimonides (l.c.) would limit the permission of sexual indulgence *("Shelo kedarkah")* only to such forms of *shelo kedarkah* which do not result in *hotsa-at shichvat zera levatala*, for he says: "Uvilvad shelo yotsi shichvat zera levatala." But other medieval authorities permit intercourse *shelo kedarkah* even when resulting in *hotsa-at shichvat zera levatala*. The only restriction they would put on this permission is that a man should not habituate himself always to do it only in such a manner: "Dela chashuv kema-aseh Er veOnan, ela keshemitkaven lehashchit zera veragil la-asot ken tamid. Aval be-akrai be-alma umit-aveh lavo al ishto shelo kedarkah--shari" (*Tosafot*, Yevamot 34b, *s.v. "Velo kema-aseh Er ve-Onan"*; *Tur* and Isserles, *loc.cit.*).

From the fact that they permit *shelo kedarkah* even when it necessarily results in *hotsa-at shichvat zera levatala* we need not, however, necessarily conclude that these authorities would also permit such practices of *Shelo kedarkah* as are performed *mimakom acher* or *shelo bamakom zara* (see Rashi to Yevamot 34b, and Rashi to Genesis 24:16, compared with *Genesis R.*, XL.5), which are really sexual perversions and not sexual intercourse. See R. Isaiah Horowitz in his *Shenei Luchot Haberit, Sha-ar Ha-otiyot* (Josefow, 1878, pp. 132-133). It seems rather that the Rabbis were of the opinion that when intercourse is had by what they euphemistically term *hafichat hashulchan*," whether *hi lema-ala vehu lemata* or *panim. keneged oref*, the very position of the woman is such as to prevent conception. Compare their saying *"Isha mezana mithapechet, kedei shelo tit-aber"* (Yevamot 35a; also Tur, Even Ha-ezer 76 end). Hence, according to their theory (though not sustained by modern medicine), there are forms of sexual intercourse – *shelo kedarkah* – which cannot

result in conception. These alone – not sexual perversions – do they permit. The statement of Rava (Sanhedrin 58b), taking for granted that an Israelite is permitted (*"DeYisra-el shari"*; see *Tosafot* and Maharsha, ad loc.) to have intercourse with his wife *shelo kedarkah* is also to be understood in this sense; though from the phrase *vedavak – velo shelo kedarkah* used in the amended saying of Rava it would appear that the term *shelo kedarkah* means *bi-a mimakom acher*. From a *baraita* in Yevamot 34b, we learn that during the period of lactation the husband is allowed, if not commanded, to practice *coitus abruptus* when having intercourse with his wife. The *baraita* reads as follows: *"Kol esrim vearba-a chodesh dash mibifnim vezoreh mibachuts, divrei Rabbi Eli-ezer. Ameru lo, 'Halalu eino ela kema-aseh Er ve-Onan.'"* ("During the twenty-four months in which his wife nurses, or should nurse, the child, the husband when having intercourse with her should, or may, practice *coitus abruptus* [to prevent her from becoming pregnant again; for in the latter eventuality she will not be able to continue nursing the child and the child might die as a result of an early weaning – Rashi, *ad loc.*: *"Kedei shelo tit-aber vetigmol et benah veyamut"*

l. The other teachers, however, said to R. Eliezer that such intercourse would be almost like the acts of Er and Onan.") One may argue that this permission or recommendation of practicing *coitus abruptus* represents only the opinion of R. Eliezer, and we should decide against him, according to the principle *yachid verabim – halacha kerabim*. But such an argument does not hold good in our case. In the first place, when the individual opinion has a good reason in its support *(Demistaber taameih)*, as – according to Rashi – R. Eliezer's opinion in our case has, the decision may follow the individual against the many (see Alfasi and Asheri to B.B., chapter 1, end; and comp. Maleachi Cohn, *Yad* Mal-achi, 296). Secondly, we cannot here decide against R. Eliezer, since the other teachers do not express a definite opinion contrary to his. For we notice that the other teachers do not say, "It is forbidden to do so." They do not even say

that it is Onanism. They merely say: "It is almost like the conduct of Er and Onan." This certainly is not a strong and definite opposition to R. Eliezer's opinion. It seems to me that even the other teachers did not forbid the practice under the circumstances. They merely refused to recommend it as R. Eliezer did, because they hesitated to recommend a practice which is so much like the acts of Er and Onan, even under circumstances which made it imperative that conception be prevented. And we have to understand R. Eliezer's opinion as making it obligatory for the husband to perform *coitus abruptus* during the period of lactation.

That this interpretation of the respective positions of R. Eliezer and the other teachers in our *baraita* is correct will be confirmed by our consideration of another baraita dealing with the question of using contraceptives. This other baraita is found in Yevamot 12b, 100b; Ketubot 35b; and Nida 45b. It reads as follows: *"Tanei Rabbi Bibi kameih deRav Nachman: Shalosh nashim meshameshot bemoch--ketana, me-uberet umeinika. Ketana, shema tit-aber vetamut; me-uberet, shema ta-aseh ubarah sandal; meinika, shema tigmol benah veyamut. Ve-eizo hi ketana? Mibat 11 shanim. veyom echad ad 12 shanim veyom echad; pachot mikan veyoter al ken meshameshet kedarkah veholechet. Divrei Rabbi Me-ir. Vacha-chamim omerim: Achat zo ve-achat zo meshameshet kedarkah veholechet, umin hashamayim yerachamu, mishum, shene-emar shomer peta-im Adonai."*

Before we proceed to interpret this *baraita*, we must ascertain the correct meaning of the phrase *meshameshot bemoch*, as there are different interpretations given to it. According to Rashi (Yevamot 12b), it means putting cotton or other absorbent into the vagina before the cohabitation, so the semen discharged during cohabitation will fall upon the cotton and be absorbed by it and conception will not take place. According to R. Jacob Tam *(Tosafot* ibid., s.v. "*Veshalosh nashim*"), however it means using the cotton (or the absorbent) *after the act* of cohabitation in order to remove the semen and thus prevent

conception. Whether the latter is, according to modern medical science, an effective contraceptive or not, is not our concern; the Rabbis believed it to be such.

It is evident that according to R. Tam, the use of a douche or any other means of removing or destroying the sperm would be the same as *meshameshot bemoch*. Likewise, according to Rashi, the use of other contraceptives on the part of the woman would be the same as *meshameshot bemoch*. Possibly R. Tam would permit the use of chemical contraceptives, even if employed before cohabitation. For his objection to the cotton put in before cohabitation is that when the semen is discharged upon the cotton, it does not touch the mucous membrane of the vagina. This he considers "no real sexual intercourse, but like scattering the semen upon wood and stone" (*De-ein derech tashmish bechach, vaharei hu metil zera al ha-etsim veha-avanim keshemetil al hamoch*) – a practice which. according to the Midrash (*Genesis R.* XXVI.6), was indulged in by the "generation of the flood" (*dor hamabul*). This objection, then, would not hold good when chemical contraceptives are used.

Again, according to Rashi, (Yevamot 100b) the phrase *meshameshot bemoch* means *mutarot leiten moch be-oto makom, shelo yit-aberu*, that is, that in these three conditions women are allowed to use this contra between R. Meir and the other teachers on the question of whether a pregnant or a nursing woman must take this precaution. For this is what the baraita says: "There are three women who, when having intercourse with their husbands, must take the precaution of using an absorbent to prevent conception: a minor, a pregnant woman, and a woman nursing her baby. In the case of the minor, lest she become pregnant and die when giving birth to the child." [It was believed by some of the Rabbis that if a girl became pregnant before having reached the age of puberty, she and her child would both die at the moment of childbirth. Compare the saying of Rabba b. Livai in Yevamot 12b and *Tosafot* ad loc., *s.v. shema tit-aber*; also saying in Yer., Pesachim, VIII.1, 35c: *Iberah veyaleda,*

ad shelo hevi-a shetei se-arot--hi uvenah metim.] In case of a pregnant woman, this precaution is necessary, lest, if another conception takes place, the embryo becomes a *foetus papyraceus* (comp. Julius Preuss, *Biblisch-Talmudische Medizin*, Berlin, 1921, pp. 486-487). In the case of a nursing mother, this precaution is necessary, for if she should become pregnant, she will have to wean her child before the proper time [which was considered to extend for twenty-four months], and the child may die as a result of such an early weaning. So far the baraita apparently represents a unanimous statement. It then proceeds to discuss the age up to which a woman is considered a minor in this respect. R. Meir says that the minor in this case is a girl between the age of eleven years and one day and twelve years and one day, and that during that period only must she take this precaution. Before or after this age she need not take any precaution, but may have natural intercourse (*meshameshet kedarkah veholechet*). The other teachers, however, say that even during the period when she is a *ketana* (i.e. , between the age of eleven and twelve), she may have natural intercourse and is not obliged to take any precautions; for the heavenly powers will have mercy and protect her from all danger, as it is said, "The Lord preserveth the simple" (Ps. 116:6). The other teachers evidently did not consider the danger of a minor dying as a result of childbirth so probable. They must have believed that a girl even before the age of puberty could give birth to a living child and survive (comp. Preuss, op. cit., p. 441). But as regards the nursing or the pregnant woman, even the other teachers do not say that she may dispense with this precaution, for we notice that they do not say, *"Kulan meshameshot veholechot."*

The rules of law laid down in this *baraita* according to our interpretation are, therefore, the following: When there is a danger of harm resulting to the unborn child or the child already born, all teachers agree that it is obligatory to take the precaution of using a contraceptive. According to R. Meir, however, this obligation holds good also in the case when conception might result in danger or harm

to the mother. But even if we should understand the baraita to indicate that the other teachers differed with R. Meir in all three cases, it would still only follow, as Lurya correctly points out, that in all three cases we decide the Halacha according to the Chachamim and do not make it obligatory upon these three women to take the precaution of using contraceptives; the rule indicated by the baraita would still teach us that, according to the opinion of all the teachers, it is not forbidden tce use a contraceptive in cases where conception would bring harm either to the mother or to the child born or unborn. And I cannot see any difference between the protection of a minor from a conception which might prove fatal to her and the protection of a grown-up woman whose health is, according to the opinion of physicians, such that a pregnancy might be fatal to her. Neither can I see any difference between protecting a child from the danger of being deprived of the nourishment of its mother's milk, and protecting the already born children of the family from the harm which might come to them due to the competition of a larger number of sisters and brothers. For the care and the comfort which the parents can give their children already born will certainly be less if there be added to the family other children claiming attention, care, and comfort.

The Talmudic law even permits a woman to sterilize herself permanently (*Ha-isha rasha-it lishtot kos shel ikarin, Tosefta*, Yevamot VIII.4). And the wife of the famous R. Hiyya is reported to have taken such a medicine (sama de-akarta') which made her sterile (Yevamot 65b). Whether there be such a drug according to modern medicine or not, is not our concern. The Rabbis believed that there was such a drug which, if taken internally, makes a person sterile (see Shabbat 110a,b and Preuss, *Op. cit.*, pp. 439-440 and 479-480), and they permitted the woman to take it and become sterile. According to Lurya (op. cit., Yevamot IV.44), this permission is given to a woman who experiences great pain of childbirth, which she wishes to escape, as was the case of the wife of R. Hiyya. Even more so, says Lurya, is this permitted to a woman whose children are morally corrupt and of

bad character, and who fears to bring into the world other moral delinquents: *"Ela lemi sheyesh lah tsa-ar leida ke-ein deveitehu deRabbi Chiya; vechol sheken im baneiha ein holechin bederech yeshara, umityare-a shelo tarbeh begidulim ka-elu, shehareshut beyadah."* To these I would add the woman who, because of hereditary disease with which she or her husband is afflicted, fears to have children who might be born with these diseases and suffer and be a burden to their family or to society.

From the passage in the Talmud (Yevamot 65b) we learn, however, that there is an objection which the Jewish law might have to a man's using contraceptive means, or having intercourse with his wife in such a manner as to make conception impossible. This objection is based not on the view that such an act is in itself immoral or against the law, but merely on consideration for another religious duty which could not be fulfilled if such a practice would be indulged in all the time. The wife of R. Hiyya – so the Talmud tells us – incapacitated herself only after she had learned that the duty of propagation of the race was not incumbent upon her, since, according to the decision of the Rabbis, women were not included in the commandment, "be fruitful and multiply" (Genesis 1:28), which was given to men only. Since a man must fulfill the duty of propagation of the race (*mitzvat periya ureviya*) he cannot be allowed the practice of having intercourse with his wife only in such a manner as to make conception impossible. For in so doing he fails to fulfill the law commanding him to have children. It is accordingly a sin of omission but not of commission; for the practice as such is not immoral or against the law.

But – and this is peculiar to the Jewish point of view on this question – the man who practices absolute self-restraint or total abstinence is also guilty of the same sin of omission, for he likewise fails to fulfill the duty of propagation of the race. No distinction can be made, according to Jewish law, between the two ways of avoiding the duty of begetting children, whether by total abstention from sexual

intercourse or by being careful not to have intercourse in such a manner as would result in conception. For, as has already been pointed out, the act of having intercourse with one's wife in a manner not effecting conception is in itself not forbidden by Jewish law. If, however, a man has fulfilled the duty of propagation of the race, as when he already has two children (i.e., two boys according to the School of Shammai or a boy and a girl according to the School of Hillel) and is no longer obliged by law to beget more children (Yevamot 61b and *Shulchan Aruch*, Even Ha-ezer 1.5), there can be no objection at all to the practice of birth control. For while the Rabbis of old, considering children a great blessing, would advise a man to continue to beget children even after he has already fulfilled the duty of propagation of the race, yet they grant that any man has a right to avoid having more children when, for one reason or another, he does not consider it a blessing to have too many children and the propagation of the race, this is not its sole and exclusive purpose. And the Rabbis urge and recommend marriage as such without regard to this purpose, or even under conditions when this purpose cannot be achieved. The companionship or mutual helpfulness in leading a pure, good, and useful life, achieved by a true marriage, is also a noble purpose worthy of this divine institution. In fact, according to the Biblical account, this was the first consideration in the Divine mind when creating woman for man. He said: "It is not good that the man should be alone, I will make him a helpmeet for him" (Genesis 2:18). He did not say, "I will make him a wife that he have children by her." The commandment to have children God gave to Adam later on. When husband and wife live together and help each other to lead a good life – whether they have children or no t– God is with them and their home is a place for the *Shechina*, the Divine purpose, says R. Akiva (Sota 17a). Ben Azzai did not say like Paul, "I would that all men were even as I myself" (I Corinth. VII:7). He did not set up celibacy in itself as an ideal, nor would he recommend it to others (comp. H. Graetz, *Gnosticismus und Judenthum*, Krotoshin, 1846, pp.

73ff). Ben Azzai considered marriage a divine institution and recognized the obligation of propagating the race as a religious duty. But he believed that he was exempted from this duty in consideration of the fact that it might interfere with another religious duty, e.g., the study of the Torah in which he was engaged. Of course the same right would, according to Ben Azzai, be given to others in a similar position, i.e. , to those pursuing studies or being engaged in any other moral religious activities which might be interfered with by the taking on of the obligation of having children. We have seen that the medieval Rabbinic authorities have concurred in the opinion of Ben Azzai and allowed a man engaged in a religious pursuit, such as the study of the Torah, to delay – or even altogether neglect – fulfilling the commandment of "Be fruitful and multiply." And we have also found that no distinction can be made between neglecting this duty by abstaining from marriage and neglecting it by practicing birth control.

The above represents the logical conclusion which one must draw from a correct understanding and a sound interpretation of the halachic statements in the Talmud touching this question, disregarding the ideas expressed in the Agadic literature as to the advisability of having many children.

The later Jewish mystics emphasized these Agadic sayings, as well as the Agadic condemnations of the evil practices of *hotsa-at shichvat zera levatala*. They came to regard any discharge of semen which might have resulted in conception but did not, almost like *hotsaat shichvat zera levatala*. Nay, even an unconscious seminal emission is regarded as a sin against which one must take all possible precautions and for which one must repent and make atonement. But even the mystics permit intercourse with one's wife even when she is incapable of having children (see *Zohar*, Emor 90b).

Some Rabbinic authorities of the 18th and 19th centuries – under the spell of the Agadic sayings of the Talmud and more or less influenced by the mystic literature – are loath to permit birth control. But even these authorities do not altogether prohibit the practice when

there is a valid reason for exercising it. The reasons given by some of them for opposing the practice are not justified in the light of the halachic statements of the Talmud which we discussed above. Their arguments are not based upon correct interpretations of the Talmudic passages bearing upon this question, and they utterly ignore or overlook the correct interpretations and the sound reasoning of R. Solomon Lurya quoted above. In the following I will present the opinions of some of the authorities of the 18th and 19th centuries on this question. R. Solomon Zalman of Posen, rabbi in Warsaw (died 1839), in his responsa *Chemdat Shelomo* (quoted in *Pitchei Teshuva* to Even Ha-ezer XXIII.2) – in answer to a question about a woman to whom, according to the opinion of physicians, pregnancy might be dangerous – declares that she may use a contraceptive. He permits even the putting into the vagina of an absorbent before cohabitation, declaring that since the intercourse takes place in the normal way, the discharge of the semen in such a case cannot be considered *hashchatat zera*.

R. Joseph Modiano, a Turkish rabbi of the second half of the 18th century, in his responsa collection *Rosh Mashbir*, part II (Salonica, 1840), no. 49, discusses the case of a woman who, during her pregnancy, becomes extremely nervous and almost insane. He quotes the great rabbinical authority R. Michael, who declared that the woman *should* use a contraceptive. R. Michael argued that since the woman is exposed to the danger by pregnancy she is in a class with the three women mentioned in the baraita of R. Bibi and should therefore, like them, use an absorbent, even putting it in before cohabitation (*sheyeshamesh ba-alah bemoch kedei shelo tit-aber*), and her husband cannot object to it. Modiano himself does not concur with the opinion of R. Michael; he argues that the use of the absorbent could only be permitted if employed after cohabitation, and the husband who may find the use of this contraceptive inconvenient or may doubt its effectiveness should therefore be permitted to marry another woman. But even Modiano would not forbid the use of this

contraceptive if the husband had no objection to it.,

R. Akiva Eiger in his Responsa (Warsaw, 1834), nos. 71 and 72, pp. 5lb-53a, also permits the use of an absorbent, but only if it is employed after cohabitation. The questioner, R. Eleazar Zilz, a rabbinical authority of Posen however argued that it should be permitted even when employed before cohabitation.

R. Moses Sofer in his *Chatam Sofer* (Pressburg, 1860), Yoreh De-a, no. 172, pp. 67b-68a, likewise permits it only when used after cohabitation. R. Abraham Danzig in his *Chochmat Adam* and *Binat Adam* (Warsaw, 1914), Sha-ar Beit Hanashim, no. 36, p. 156, permits the use of an absorbent or a douche or any other method of removing or destroying the semen after cohabitation. He adds, however, that according to Rashi's interpretation, it would be permitted to the woman in question to whom pregnancy was dangerous, to use this contraceptive even before cohabitation.

R. Jacob Ettlinger (1798-1871) in his Responsa *Binyan Tsion* (Altona, 1868), no. 137, pp. 57b-58b, and R. Joseph Saul Nathanson (1808-1875) in his Responsa *Sho-el Umeshiv*, *Mahadura Tenina* (Lemberg, 1874), part IV, no. 13, are inclined to forbid the use of any contraceptive, even when used after cohabitation.

The authorities objecting to the use of an absorbent before cohabitation, do so, of course, on the ground that, like R. Tam, they consider such a practice *kemetil al ha-etsim ve-al ha-avanim*. On the same ground they would no doubt object to the use of a condum. But, as was already pointed out above, they could have no objection to the use of chemical contraceptives on the part of the woman.

In summing up the results of our discussion, I would say that while there may be some differences of opinion about one detail or another, we can formulate the following principles in regard to the question of birth control which are based upon a correct understanding of the halachic teachings of the Talmud as accepted by the medieval Rabbinic authorities, and especially upon the sound interpretation given by R. Solomon Lurya to some of these Talmudic

passages:

(1) The Talmudic -Rabbinic law does not consider the use of contraceptives as such immoral or against the law. It does not forbid birth control, but it forbids birth suppression.

(2) The Talmudic -Rabbinic law requires that every Jew have at least two children in fulfillment of the Biblical command to propagate the race, which is incumbent upon every man.

(3) There are, however, conditions under which a man may be exempt from this prime duty: (a) when a man is engaged in religious work, such as the study of the Torah, and fears that he may be hindered in his work for taking on the responsibilities of a family; (b) when a man, because of love,,or other considerations, marries a woman who is incapable of having children (i.e., an old or sterile woman); (c) when a man is married to a woman whose health is in such condition as to make it dangerous for her to bear children; for, considerations for the saving of human life – *pikuach nefesh* or even *safek pikuach nefesh* – set aside the obligation to fulfill a religious duty. In this last case, then, the woman is allowed to use any contraceptives or even to permanently sterilize herself in order to escape the dangers that would threaten her at childbirth.

(4) In case a man has fulfilled the duty of propagation of the race (as when he has already two children), he is no longer obliged to beget children, and the law does not forbid him to have intercourse with his wife even in a manner which would not result in conception. In such a case the woman certainly is allowed to use any kind of contraceptive or preventive.

Of course, in any case, the use of contraceptives or of any device to prevent conception is allowed only when both parties, i.e., husband and wife consent.

Some Rabbinic authorities of the 18th and 19th centuries would object to one or another of the above rules, and especially put restrictions upon the use of contraceptives. But we need not expect absolute agreement on questions of Rabbinic law. We must be content

to have good and reliable authority for our decisions, even though other authorities may differ. We have the right to judge for ourselves which view is the sounder and which authorities are more correct. We have found that the arguments of those authorities of the 18th and 19th centuries who would oppose or restrict the use of contraceptives in cases where we would recommend it, are not convincing. With all our respect for these authorities, we may ignore their opinions, just as they in turn have ignored the opinions of other authorities (especially those of R. Solomon Lurya) on our question.

Jacob Z. Lauterbach

Walter Jacob, *American Reform Responsa*, (New York, Central Conference of American Rabbis, 1983), # 156; *Yearbook of the Central Conference of American Rabbis*, Vol. XXXVII, 1927, pp. 369-384.

VASECTOMY
1984

QUESTION: A young couple, with three children and a fourth on the way, has asked about the Jewish view on vasectomy as a means of contraception. They have been married for five years, have tried all other methods, and rejected them either as painful, dangerous or inconvenient. Does Reform Judaism agree with the *halakhic* restrictions on sterilization? (Rabbi B. Lefkowitz, Taunton, Mass.)

ANSWER: As you have stated, the *halakhah* prohibits sterilization based upon the verse in Leviticus (22.24), that was subsequently discussed in the Talmud (San. 70a; Kid. 25b; Hag. 14b, 13; Shab. 110b ff); these sources prohibit the castration of male human beings as well as animals. Vasectomy is somewhat different, but the intent of removing the reproductive capacity permanently is the same. Rabbinic discussions on this matter continue and explicitly prohibit all forms of male sterilization *(Yad* Hil. Issurei Biah 16; *Shulhan Arukh* Even Haezer 5). The more recent commentaries and responsa agree *(Hatam Sofer,* Even Haezer #20; *Noam, Vol. 1, pp.* 257 ff; *Otzar Haposqim* Even Haezer, Vol. 1, #68 ff).

Although we disagree with tradition on matters of temporary birth control and are more permissive than many of the traditional authorities, we would agree with tradition on this prohibition against permanent sterilization. This is an irreversible act and should not be undertaken. There are other methods of birth control that are safe and that are sanctioned by us and also by the more liberal Orthodox authorities.

Walter Jacob

Walter Jacob, *Contemporary American Reform Responsa*, New York, Central Conference of American Rabbis, 1987, # 198.

ABORTION
1957

QUESTION: A young woman has contracted German measles in the third month of her pregnancy. Her doctor says that her sickness creates the possibility that the child, if born, may be deformed in body or mind.Some doctors, however, seem to doubt that this will happen. In other words, there are various opinions as to the probability of the child being born deformed. May she, according to Jewish law, or to Reform interpretation of Jewish law, have an abortion done to terminate the pregnancy?

ANSWER:The *Mishnah* (Oholot VII.6) says that if a woman has great difficulty in giving birth to her child (and if it seems as if she cannot survive), it is permitted to destroy the child to save her life. This permission listo destroy a child to save the life of a mother is cited in all the codes and is finally fixed as law in the *Shulhan Arukh* (Hoshen Mishpat 425.2). This permission to destroy the child is only given in the case where it is necessary to save the mother. The law continues and says that if the child puts out its head or most of its body, it may no longer be killed to save the mother, since we do not "push aside one life for another." Therefore, this legal permission to destroy the child cannot be relevant in the case mentioned, in which the fetus in no way endangers the mother, and, therefore, on the ground of the law in *Hoshen Mishpat* there is no basis as yet to terminate the pregnancy.

However, Rashi to B. Sanhedrin 72b – where the law of the destruction of the child is cited from the *Mishnah Oholot* – feels it necessary to explain why the child must be spared if it puts forth its head and yet may be killed if it does not. His explanation (which is cited in later discussions) is of some relevance to our problem. He says that as long as it does not go forth "into the air of the world" it is not considered a *nefesh* and, therefore, may be slain to save the

mother. From this we might conclude that an unborn fetus or infant is not considered a being, and may, if necessary, be destroyed. Yet even so, in this case, the permission is given only to save the mother.

Still, Rashi by his explanation raises the possibility that we need not be too strict about saving an unborn child. In fact, there is some assistance to this point of view from the law (codified in Hoshen Mishpat 423), that if a man happens to strike a pregnant woman and the child is destroyed, he has to pay *money* damages for the harm to the mother and the loss of the child. But why should he not be guilty of a capital crime, having killed the child? Evidently one would conclude that the unborn child is not a *nefesh* in the sense that killing it would be a capital crime. Joshua Falk (16th-17th century), in his classic commentary *Me-irat Enayim*. to the passage in Hoshen Mishpat 425 (end of his section 8), develops the opinion of Rashi and says clearly, "While the fetus is within the body of the mother it may be destroyed even though it is alive, for every fetus that does not come out or has not come out into the light of the world is not described as a *nefesh*." He proves this from the case of a man who strikes a pregnant woman and destroys her unborn child. The man must pay damages, but is not deemed a murderer, which he would be if the fetus were considered a *nefesh*. Similarly, in Arakhin 7a, if a pregnant woman was condemned to death, she was smitten in the front of her body so that the child should die before she was executed. This, too, would indicate that it is at least no capital crime to slay unborn children. However, the cases mentioned above are mitigated by various arguments given in the literature, and the actual law is that a fetus may not be destroyed, as is seen in the following: The Talmud, in Sanhedrin 57b, gives the opinion of Rabbi Ishmael that a *Ben Noah* (i.e. , a non-idolatrous non-Jew) is forbidden to destroy a fetus. It is a capital crime if he does it. The *Tosafot* to Hulin 33a say that this indicates that a Jew is not to be put to death (as a *Ben Noah* is) if he destroys a fetus; nevertheless, continue the *Tosafot*, while it is not a capital crime for a Jew, it is still not permitted for him to do so.

There is a modern, scientific analysis of the law in this matter by Aptowitzer, in the *Jewish Quarterly Review*, New Series, volume 15, pp. 83ff. However, it is rather remarkable that the whole question of abortion is not discussed very much in actual cases in the traditional law. As a matter of fact, I found at first only three responsa which discuss it fully. There are others which I found later. The first responsum is by a great authority, Yair Chaim Bachrach, of Worms, 17th century. In his responsum *(Havat Ya-ir*, #31) he was asked the following question: A married woman confessed to adultery, and, finding herself pregnant, asked for an abortion. Bachrach was asked whether it is permissible by Jewish law to do so. He discusses most of the material that I have mentioned above, and at first says that it would seem that a fetus is not really a *nefesh* and it might be permitted to destroy it, except that this would encourage immorality. But he continues, from the discussion of the *Tosafot* in Hulin, that a Jew is not permitted (even though he would not be convicted) to destroy a fetus, that it is forbidden for him to do so.

Yet in the next century the opposite opinion is voiced, and also by a great authority, namely Jacob Emden (*She-elat Ya-avetz* 1, 43). He is asked concerning a pregnant adulteress whether she may have an abortion. He decides affirmatively, on the rather curious ground that if we were still under our Sanhedrin and could inflict capital punishment, such a woman would be condemned to death and her child would die with her anyhow. Then he adds boldly (though with some misgivings) that perhaps we may destroy a fetus even to save a mother excessive physical pain.

A much more thorough affirmative opinion is given by Ben Zion Uziel, the late Sephardic Chief Rabbi (*Mishpetei Uzi-el* 111, 46 and 47). He concludes, after a general analysis of the subject, that an unborn fetus is actually not a *nefesh* at all and has no independent life. It is part of its mother, and just as a person may sacrifice a limb to be cured of a worse sickness, so may this fetus be destroyed for the mother's benefit. Of course, he reckons with the statement of the

Tosafot in Hulin 33a that a Jew is not permitted (*la shari*) to destroy a fetus, although such an act is not to be considered murder. Uziel says that, of course, one may not destroy it. One may not destroy anything without purpose. But if there is a worthwhile purpose, it may be done. The specific case before him concerned a woman who was threatened with permanent deafness if she went through with the pregnancy. Uziel decides that since the fetus is not an independent *nefesh* but is only part of the mother,there is'no sin in destroying it for her sake.

In the case which you are discussing, I would, therefore, say that since there is strong preponderance of medical opinion that the child will be born im erfect physically and even mentally, then for the mother's sake (i. e., her mental anguish now and in the future) she may sacrifice this part of herself. This decision thus follows the opinion of Jacob Emden and Ben Zion Uziel against the earlier opinion of Yair Chaim Bachrach.

Solomon B. Freehof

Walter Jacob, *American Reform Responsa*, New York, Central Conference of American Rabbis, 1983, # 171. *Yearbook, Central Conference of American Rabbis, New York*, Vol. LXVIII, 1958, pp. 120-122

WHEN IS ABORTION PERMITTED?
1985

QUESTION: Assuming that abortion is *halakhically* permitted, is there a time span in which abortion may take place according to tradition? (Rabbi A. Klausner, Yonkers, New York)

ANSWER: Let us begin by looking at this assumption. There is currently considerable difference of opinion among Orthodox authorities about the permissibility of abortion as well as circumstances and time when it would be permitted. The laws have been analyzed by a growing number of scholars (V. Aptowitzer in the *Jewish Quarterly Review* [New Series], Vol. 15, pp. 83 ff; David M. Feldman, *Birth Control in Jewish Law;* Robert Kirschner, "The Halakhic Status of the Fetus with Respect to Abortion," *Conservative Judaism, Vol.* 34, No. 6, pp. 3 ff; Solomon B. Freehof, "AbortioW' in W. Jacob *American Reform Responsa,* #171; *Noam, Vols.* 6 and 7, etc.). The fetus is not considered to be a person *(nefesh)* until it is born. Up to that time it is considered a part of the mother's body, although it does possess certain characteristics of a person and some status. During the first forty days after conception, it is considered "mere fluid" (Yeb. 69b; Nid. 3.7, 30b; *M.* Ker. 1. 1).

The Jewish view of the nature of the fetus is based upon a statement in *Exodus* which dealt with a miscarriage caused by men fighting and pushing a pregnant woman. The individual responsible for the miscarriage was fined, but was not tried for murder (Ex. 21.22 f). We learn from the commentaries that payment was made for the loss of the fetus and for any injury done to the woman. Obviously no fatal injury occurred to her. This was the line of reasoning of the various codes *(Yad* Hil. Hovel Umazik 4.1; *Shulhan Arukh* Hoshen Mishpat 423.1; *Sefer Meirat Enayim* Hoshen Mishpat 425.8). If this case had been considered as murder, the biblical and rabbinic penalties for murder would have been invoked.

The second source on the nature of the fetus is found in the *Mishnah,* which stated that it was permissible to kill a fetus if a woman's life is endangered by it during the process of giving birth. However, if a greater part of the fetus had emerged, or if the head had emerged, then the fetus possesses the status of a person and can not be dismembered as one may not take one life in order to save another *(M.* Ohalot 7.6). This view considers the unemerged fetus entirely part of the woman's body; as any of her limbs could be amputated to save her life, so may the fetus be destroyed. The same point of view was taken in another section of the Mishnah, which discussed the execution of a pregnant woman for a crime. The authorities would not wait for her to give birth even if that process had already begun (Arakhin 7a). The statement from Ohalot is contradicted by San. 72b and led to controversy in recent centuries (Akiba Eger and Tos. to *M.* Ohalot 7.6; Epstein, *Aruk Hashulhan* 425.7, etc.)

A *tosefot* to another section simply stated that it was permissible to kill an unborn fetus; this passage, which stands in isolation, is taken seriously by some authorities, while others say that it represents an error (Nid. 44b) and is contradicted elsewhere (San. 59a; Hul. 33a). The Mishnaic statement in Ohalot was based on two Biblical verses. In them the fetus was portrayed "in pursuit" *(rodef)* of the mother, and therefore, has endangered her life (Deut. 25. 11 f; Lev. 19.16; *Yad* Hil. Rotzeah Ushemirat Hanefesh 1.9; *Shulhan Arukh* Hoshen Mishpat 425.2). Maimonides, who did recognize the fetus as possessing some status, and Caro were willing to use either drugs or surgery in order to save the life of the mother.

Modern rabbinic authorities have felt that the variety of attitudes toward the fetus and embryo in the *Talmud* also point to potential restrictions in the matter of abortion. When we review the discussion of fetus and embryo, as it arose in various situations, we see that it was not treated consistently. Different criteria were applied when dealing with slaves, the problems of animal sacrifice and issues of inheritance. No uniform definition from talmudic sources can be

achieved (see Robert Kirschner, op. *cit.* for a full discussion).

Some recent scholars have felt that only the argument of "pursuit" provides the proper basis for abortion when the mother's life is endangered. They reason that although the fetus is not a person *(nefesh),* it still possesses a special status, and therefore, should not be treated as nothing or destroyed for no good reason (Jacob Emden, *Responsa Sheelat Yavetz,* 1.43; Yair Bacharach, *Havat Ya1r,* #31; Eliezer Waldenberg, *Tzitz Eliezer, Vol.* #273, 9; *Noam Vol.* 6, pp. 1 ff). Others have felt a fetus may be aborted whenever there is any danger to a mother, as the status of a newborn child less than full term is in doubt until thirty days have elapsed, although it is, of course, considered a *nefesh* (Maharam Schick, *Rcsponsa* Yoreh Deah #155; David Hoffmann, *Melamed Lehoil* Yoreh Deah #69).

On the other hand, a line of reasoning which dealt with the mother's psychological state has been based on Arakhin 7a; it would permit abortion for such reasons or for the anguish caused to the mother by a child's potential deformity or other problems. So, Ben Zion Uziel permits abortion when deafness is indicated in the fetus *(Mishpetel Uziel,* Hoshen Mishpat, #46). Uziel Weinberg permits it when rubella occurs in early pregnancy *(Seridel Esh* 111, No. 727). Eliezer Waldenberg does so for Tay Sachs disease and other serious abnormalities *(Tzitz Eliezer, Vol.* 9, #236).

Other traditional rabbis have been very reluctant to permit abortion on the grounds that one is not permitted to inflict a wound on one's self (Joseph Trani, *Responsa Maharit* 1.99; Zweig, "*Al Hapalah Melahutit,*" *Noam,* Vol. 7, pp. 36 ff). Rabbi Unterman has argued against abortion as tradition permits the desecration of the *shabbat* in order to save an unborn fetus (Ramban to Nid. 44b); this would prove that the fetus possesses human status. An unborn child, although not yet a human being, is a potential human being, and abortion is "akin to murder"(1. Y Unterman, "*Be-inyan Piquah Nefesh Shel Ubar,"Noam, Vol.* 6, pp. I ff). Others have followed this line of reasoning. Unterman, however, also reluctantly permits

abortion under some circumstances *(Ibid. 52; Shevet Miyehudah, 1,* 29).

In summary, we see that some agree with Rabbi Unterman and reluctantly permit abortion to save the mother's life. Others permit abortion when the mother faces a wider array of life-threatening situations, such as potential suicides, insanity, etc. Both of these groups would permit abortion only for serious lifethreatening dangers.

Those authorities who do not consider abortion "akin to murder" are more lenient, but would not permit an abortion lightly either (Solomon Skola, *Bet Shelomo,* Hoshen Mishpat 132). They would permit it for rape (Yehuda Perlman, *Responsa Or Gadol,* #31) or to avoid undue pain (Jacob Emden, *Sheelat Yavetz,* #43), but not in the case of a woman who seeks an abortion after adultery (Yair Hayim Bachrach, *Havot Yair,* #31). This group also permits abortion when there is serious danger to the mother's mental health (Mordechai Winkler, *Levushei Mordekhai,* Hoshen Mishpat #39), or when serious fetal impairment has been discovered in the first three months (Eliezer Waldenberg, *Tzitz Eliezer, Vol.* 9, #327).

We can see from the recent discussion that there is some hesitancy to permit abortion. A number of authorities readily permit it if the mother's life has been endangered, or if there is potentially serious illness, either physical or psychological. Others are permissive in cases of incest or rape. A lesser number permit it when a seriously impaired fetus is known to exist – not for the sake of the fetus, but due to the anguish felt by the mother.

The Reform Movement has had a long history of liberalism on many social and family matters. We feel that the pattern of tradition, until the most recent generation, has demonstrated a liberal approach to abortion and has definitely permitted it in case of any danger to the life of the mother. That danger may be physical or psychological. When this occurs at any time during the pregnancy, we would not hesitate to permit an abortion. This would also include cases of incest and rape if the mother wishes to have an abortion.

Twentieth-century medicine has brought a greater understanding of the fetus, and it is now possible to discover major problems in the fetus quite early in the pregnancy. Some genetic defects can be discovered shortly after conception and more research will make such techniques widely available. It is, of course, equally true that modern medicine has presented ways of keeping babies with very serious problems alive, frequently in a vegetative state, which brings great misery to the family involved. Such problems, as those caused by Tay Sachs and other degenerative or permanent conditions which seriously endanger the life of the child and potentially the mental health of the mother, are indications for permitting an abortion.

We agree with the traditional authorities that abortions should be approached cautiously throughout the life of the fetus. Most authorities would be least hesitant during the first forty days of the fetus' life (Yeb. 69b; Nid. 30b; *M.* Ker. 1. 1; *Shulhan Arukh* Hoshen Mishpat, 210.2; Solomon Skola, *Bet Shelomo,* Hoshen Mishpat 132; Joseph Trani, *Responsa Maharit, 1.* 99; Weinberg, *Noam,* 9, pp. 213 ff, etc.) Even the strict Unterman permits non-Jews to perform abortions within the forty day periods (Unterman, op. cit., pp. 8 ff).

From forty days until twenty-seven weeks, the fetus possesses some status, but its future remains doubtful *(goses biydei adam;* San.78a; Nid. 44b and commentaries) as we are not sure of its viability. We must, therefore, be more certain of our grounds for abortion, but would still permit it.

It is clear from all of this that traditional authorities would be most lenient with abortions within the first forty days. After that time, there is a difference of opinion. Those who are within the broadest range of permissibility permit abortion at any time before birth, if there is a serious danger to the health of the mother or the child. We would be in agreemnt with that liberal stance. We do not encourage abortion, nor favor it for trivial reasons, or sanction it "on demand."

Walter Jacob

Walter Jacob, *Contemporary American Reform Responsa*, New York, Central Conference of American Rabbis, 1987, # 16.

JEWISH INVOLVEMENT IN GENETIC ENGINEERING
1989

QUESTION: May a Jew genetically alter a mouse or may a Jew use a mouse if it has been genetically engineered by a Gentile? What is the status of animals in Jewish law? (Arthur P. Gershman, Arlington Virginia)

ANSWER: Genetic engineering is a field which is still in its infancy but we can expect major advances in this area in the future. At the moment it is possible to introduce permanent genetic dianges in plants, animals and human beings. There are many questions about the control which needs to be exercised and the dangers which may arise from new, altered, or hitherto unknown, substances formed through these methods. Unusual safeguards have been proposed both by the scientific community, national and international agencies. Such caution is wise and we should proceed carefully even when we are dealing with animals. This responsurn is not intended to discuss genetic engineering in human beings

We will, perhaps, begin with the question of the status of animals in relation to human beings and then turn to genetic engineering.

The Biblical statement in Genesis (2.26) placed people above animals and enabled them to rule them and therefore to use themin any way that seemed appropriate and certainly to save a life (*pikuah nefesh*). So, for example, cattle could be used for foodor for various kinds of work (B. M. 86b; Hag. 3b; Meila 13a; A. Z. 5b, etc). Consumption or sacrifice was limited to those deemed clean (Lev 11.3 ff); the list included both animals, birds, as well as fish.Other animals which were unclean could be used by man in variousways. There were few limits on the manner of catching or housinganimals as long as it was humane so a varieties of means of catching birds was discussed in the Talmud (B. M. 42a; Taanit 22a; Shab. 78b; Ber. 9b; etc.)

Animals which endangered human beings such as wolves and lions could be destroyed (Ber. 13a). This was even more true of pestilent insects such as grasshoppers, mosquitoes or scorpions and ants. Crop eating field mice and rats could also be destroyed (Taanit 19a; 14a; Shab. 121 b; M. K. 6b). The *Midrash* which sought to find a use for some such animals like fleas and mosquitoes stated that they were created in order to plague evil people *(Midrash Rabbah* Vayikra 189).

Animals could be used by man as long as they were treated kindly. It is prohibited to consume a limb from a living animal (B. M. 32b). An animal that is threshing may not be muzzled; it must be permitted to eat as freely as a human being (Deut. 23.25 f, B. M. 87b, 90a; *Yad* Hil Zekirut 13.3; *Shulhan Arukh* Hoshen Mishpat 338). Furthermore, one should not consider acquiring an animal unless one has the means to feed it (J. Ket. 4.8) and a person should then feed his animals before feeding himself (Git. 62a; *Yad* Hil. Avadim 9.8).

Unnecessary pain may not be inflicted on animals (Ex. 23.5; B. M. 32a; *Yad* Hil. Rotzeah 13.9; Solomon ben Aderet *Responsa* #252 #257). Some of the medieval scholars who were concerned with the protection of animals felt that those precautions needed to be stricter than with human beings, as animals do not have the intelligence to care for themselves or to take a longer view of matters *(Yad* Hil. Zekhirut 13.2; David ibn Zimri *Responsa 1* #728; Yair Hayim Bacharach *Havat Yair* #191; *Shulhan Arukh* Hoshen Mishpat 337.2). Biblical law prohibited the killing of a mother with its young (Lev 12.28; Hul. 83a; *Yad* Hil. Shehitah 13; *Shulhan Arukh* Yoreh Deah 16). The later Jewish codes also insisted that a seller inform a buyer of the relationship between any animals sold so that a mother and its offspring would not be slaughtered together on the same day. A similar kind of provision forbade the taking of both a mother and a chick from the same nest. (Deut. 12.6; Hul. 138b *Shulhan Arukh* Yoreh Deah 292).

Kindness to animals included the lightening of the load from an overburdened animal (Ex. 13.5). Domestic animals were required

to rest on *shabbat* as human beings (Ex. 20.10; 23.12; Deut. 5.14). Provisions were made for animal care on *shabbat,* an animal which was normally milked by a non-Jew. If an animal needed to be rescued it was to be done even on *shabbat* (Shab. 128a; *Yad* Hil. Shabbat 25.26;1 *Shulhan Arukh* Orah Hayim 305.19). We should also note that the castration of animals was prohibited and this has always been considered as a form of maiming, which was forbidden *(Shelat Yaabetz* 1.11*)*. We may summarize this by relating that our tradition demands kind treatment of animals. They may be used by human beings but not treated cruelly. We should note that the medieval discussion by some Jewish philosophers about the soul of animals was left as a speculative issue.

Now let us deal with genetically induced changes in mice which are to be used as experimental animals. Systemic genetic dianges are a recent scientific achievement. The only area which approached this field in the'past was controlled breeding. Our tradition had very little to say about breeding animals as long as no attempt was made to do so with unlike species. There was a great interest in maintaining species of both plants and animals separately, based in part on Biblical verses (Lev. 19.19; Deut. 22. 10). An entire section of the Mishnah (*Kilaim*) dealt with the problem of mixing various kinds of seeds together, grafting one plant onto other and interbreeding of animals. This segment of the Mishnah contains eight chapters which dealt with various kinds of mixtures such as the prohibition against interweaving wool and linen and comment and to the best of my knowledge do not use it as an example of animal breeding. There were occasional commentaries like Ramban who stated that human beings should not change nature as that would imply imperfection in God's creation (Ramban to Lev. 19.19) That medieval view was found frequently in church literature. It has not been followed by Jewish thinkers.

Jewish law said nothing about changing the characteristics of a particular species or breed. Throughout the centuries every effort was made to assist nature and to produce animals suited to specific purposes or for special reasons like Jacob and his flock (Gen. 30:29 ff) as well as plants which would yield abundantly. Despite Jewish involvement in

agriculture through the centuries, this matter has not been discussed in the older responsa literature, to the best of my knowledge. In modem times these efforts have been accelerated through selective breeding and an understanding of the genetic process. More recently cloning of plant tissues has been used successfully to produce plants which are absolutely true; this method holds great promise as well as potential dangers.

Genetic engineering of plants or animals within a species poses few old *halakhic* problems though it raises many other issues. Human beings have selective bred plants and animals since the eginning of herding and agriculture in order to adapt them to specific human needs and environments. Genetic engineering will accelerate this process. This may eliminate poverty, famine and disease but may also bring scourges and problems which we can not foresee.

We are standing at the edge of a new scientific era. We certainly wish to utilize the potentials of genetic engineering for the benefit of humanity. That may be partially within our power. It is not within our power to stop the scientific experimentation. The human yearning to understand the divine creation and everything in it as fully as possible cannot be halted, nor can the desire to alleviate the problems of hunger, disease, and poverty.

As we learn more about the nature of genetic engineering we must discuss its moral implications both with regard to animals and human beings. We realize that the line between plants, animals, and human beings is thin and in some ways does not exist at all. So we must proceed with caution. In consort with others we must set limits and provide direction. We have, of course, become especially sensitive to all these issues since the Holocaust and the terrible medical experimentation which occurred during the Holocaust.

We may be ready to accept genetic changes made for medical purposes and experimentation such as *pikuah nefesh* is an overriding consideration (Shab. 132a; Yoma 85b; *Tosefta* Shab. 17 and Alfas; *Shulhan Arukh* Orah Hayim 328. 1; Hatam Sofer *Responsa* Hoshen Mishpat #185). Human life must be saved if it is at all possible and even some pain to animals is permitted for this purpose. Economic reasons, however, could not justify such a course of action. These should always be reviewed carefully.

When dealing with experimental animals we should be quite certain that they are not subjected to pain or used for frivolous reasons as for example cosmetic experimentation.

A mouse engineered genetically for a specific set of experiments, which will eventually help human beings, lies within, the boundaries of utilizing animals for the benefit of human beings. Naturally the humane treatment of the animals in accordance with our tradition must be observed. It would be appropriate for Jews to be involved in this kind of genetic engineering and to use the animals that they themselves have genetically changed.

Walter Jacob

Walter Jacob, *Questions and Reform Jewish Answers - New American Reform Responsa*, New York, 1992, Central Conference of American Rabbis, # 154.

PREDETERMINATION OF SEX
1941

QUESTION: A writer in leading magazines has submitted a question to me. She is preparing a manuscript that will include the attitudes of the various faiths toward predetermination of sex in babies. She says: "As the aim of scientific predetermination is not to limit families in any way, but to increase their happiness through having the sex they most desire, what does your group think on the subject?"

ANSWER: The question posed in the above statement, while avowedly premature, is not impertinent. In fact, the question is not as new as it sounds. The Rabbis of the Talmudic period gave some thought to it. They even sought to prescribe methods whereby nature, in such cases, might be guided to predetermined ends. Those were the days when parents showed undisguised elation over the birth of a male child, and accepted with due resignation the arrival of a female child. Rabbi Chiya Rabba, a Tannaitic teacher of the second century, in animadverting upon this parental preference, spoke rather approvingly of it. "There is need for wheat," he said, "and there is need for barley" (Gen. R. 26.6). Accordingly, some teachers endeavored to advise parents what to do in order to achieve the desired result. Rabbi Eleazar is reported to have recommended generosity to the poor as the best method, Rabbi Joshua, with a keener sense of the relevant, thought that when the husband aimed to predispose his wife for the act of cohabitation, male progeny would ensue: "M*ah ya-esh adam veyihyu lo banim zekharim? Rabbi Eliezer omer: Yefazer me-otav la-aniyim. Rabbi Yehoshua omer: Yesamah ishto lidvar mitzvah.*"

Other teachers thought that by the mere process of retarded ejaculation on the part of the husband, thus inducing the wife to reach the climax first, the birth of a male child would be ensured. Thus, a Babylonian Amora of the third century, Rabbi Kattina, boldly asserted that he had mastered the art of coition that would yield him only male

children (Nid. 31b, *Vehainu de-amar Rav Katina: 'acholni la-asot kol benai zekharim.*)

Informed by the same impression or conviction, another Babylonian Amora, Rava, declared that the immediate repetition of the act of coition, tending to retard the ejaculation of the male, could not but produce male children (ibid., *amar rav harotse la-asot kol banav zecharim, yiv-ol veyishneh*).

Various other methods, we find, were suggested. Thus, Rabbi fsaac is reported to have said that when the bedstead extended in a northerly-southerly direction the sex of the offspring would be male (Ber. 5b, *kol hanoten mitato bein tsafon ledarom, havyin leih banim zecharim*.).

And so, too, is Rabbi Johanan reported to have held that abstention from intercourse immediately before the menstrual period, would result in male issue (Shev. 18b, *kol haporesh me-ishto samuch levistah, havyin lo banim zecharim*). And, as if to disown the implication of the psychological basis for his statement, he proceeds to add that the scrupulous use of wine in the *havdala* ceremony will produce the same wished-for effect (ibid., *kol hamavdil al hayayin bemotsa-ei shabbat havyin lo banim zecharim*).

There is also the citation of an anonymous authority, which would make the determination of the sex of the offspring conditioned by the moral and social fitness of the union, as well as by the spirit in which the act of cohabitation is performed (Nida 70a, *"Amar lahem 'Yisa isha hahogenet lo viykadesh atsmo bish-at tashmish'"*).

Of course, all these suggestions partake more of the nature of magic than of pure science. But whatever the value of the methods suggested; they are certainly "moral, simple and safe," even though not quite effective. Above all, they clearly indicate the rabbinic attitude toward the question raised The desire of parents to predetermine, if possible, the sex of their progeny, is not a reprehensible desire. The objective sought is a legitimate objective. The issue then resolves itself into this: Will the absolutely reliable

method anticipated, though not too hopefully, by the author of the question, be as moral, as simple, and as safe as those projected by the early rabbinic authorities? Judaism, it is well to state here emphatically, is not a religion that teaches the doctrine that the end justifies the means. In this case, therefore, if the means, yet to be discovered, will prove scientifically sound and morally unassailable, the Jewish teachers of that far-off day will find ample basis for their endorsement of the enterprise in the thought and tradition of their past.

Israel Bettan and Committee

Walter Jacob, *American Reform Responsa*, (New York, Central Conference of American Rabbis, 1983), # 160; *Yearbook of the Central Conference of American Rabbis*, Vol. LI, 1941, pp. 97-100.

SEXUALITY OF A MATURING CHILD
(1979)

QUESTION: How does Jewish tradition treat the sexuality of a child maturing toward adulthood? When is a child considered an adult in sexual matters? (CCAR Family Life Committee)

ANSWER: According to the Halacha, a boy is a minor until he has reached the age of thirteen years and one day. If two hairs have then a peared in the pubic region, he is considered adult (*ish*) . If this has not occurred, then the change of status is delayed until the physical evidence has become visible. In any case, both the age of thirteen, plus the physical signs, are necessary (Nida 6.11, 46a; Maimonides, *Yad*, Hil. Ishut 2.10). Matters are somewhat different in the case of a girl, though there also the appearance of pubic hair was one requirement. If this has occurred, then she ceases being a child at the age of twelve and one day (Nida 6.11, 46a; *Yad*, Hil. Ishut 2.1). Here, however, a dual change of status is involved. For the next six months she is considered a *Na-arah* and at the end of that period, she goes through another change of status and becomes a woman (*bogeret*) (Ket. 39a; Kid. 79a; Nida. 65a; *Yad*, Hil. Ishut 2.2). In other words, in the case of a girl, there are two steps involved in becoming a woman. In addition, we should note that there is some disagreement in the rabbinic tradition about the varied outward signs of maturity in a female, but all agree on the necessity for pubic hair (*Tosefta*, Nida 6.4; *M.* Nida 5.7ff; *Yad,* Hil. Ishut 2.8).

Bernard Bamberger dealt with these distinctions at some length and has come to the tentative conclusion that the rabbinic provision of stages for maturity in the case of girls was an effort on the part of the rabbis to restrict harsh punishment of all problems connected with virginity and seduction (Deut. 22:13, to end of chapter), which were, in any case, difficult to enforce. This would have been in keeping with other efforts on the part of the rabbis to limit the effect of biblical laws (Bernard Bamberger, "*Quetanah, Na'rah, Bogereth*," *Hebrew Union College Annual*, vol. XXXII, 1961, pp. 281-294).

We can be quite certain, therefore that concern with active sexuality began at age twelve and one day for girls and thirteen and one

day for boys. However there was some concern also expressed earlier.

If the physical signs of maturity were absent from a man or a woman, they were not considered adults until they had reached the age of twenty, according to Beit Shammai (Nid. 5.9, 47b; Yev. 96b; *Shulhan Arukh*, Even Ha-ezer 155.12). If a eunuch shows the normal physical signs of maturity, then he becomes an adult at thirteen. Nowadays, any male is presumed to have reached his majority at thirteen, a process that began in gaonic times (*She-iltot*, Behukotai 116; Akiva Eger, *Shulhan Arukh*, Orah Hayim 615.2).

In addition to sexuality at the time of maturity, the Talmud also concerned itself with the beginnings of sexuality at a much earlier age, for it felt that a girl attained an initial degree of sexuality at age three, and a boy at nine. For these reasons various laws which dealt with sexual relationships were in force for minors. Such a young girl could, for example, be acquired as a wife through sexual relations; if she was sexually violated at this early age by an adult, the normal punishments were in effect. The sexual acts of males nine years old and above were also considered as those of an adult (Nida 5.5ff). A girl could also be betrothed at this early age, and there was a special simplified form of separation (*me-un* – refusal) which would be exercised to annul such an early betrothal or that she could use to refuse such a marriage. Before the age of ten *me-un* might be used for annulment, but was not strictly necessary (Yev. 107ab; Yad, Gerushin XI.3; *Shulhan Arukh*, Even Haezer 155.3). The father possessed the right to give his minor daughter in marriage with or without her consent (Ket. 46b; Kid. 41a). There was some debate whether a girl in this stage of *na-arah* could contract her own marriage, as she was completely subject to her father (Kid. 43b and 44a); but it is quite certain that once she had reached the stage of *bogeret*, she was independent and could contract her own obligations (Nida 5.7). In the Middle Ages, strong protests against child marriages were raised (Judah Mintz, Responsa, #13; Isserles to *Shulhan Arukh*, Even Ha-ezer, who quotes Jacob Pollock, etc.).

This decision and the considerable detail provided by the Talmud on early sexuality before betrothal, weddings, seduction, and rape, show that these laws are far from theoretical, but representative of an actual concern on the part of the rabbinic tradition. They are discussed to a

greater or lesser extent during succeeding centuries in the responsa literature, reflecting standards of the time.

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Walter Jacob, *American Reform Responsa*, New York, Central Conference of American Rabbis, 1983, # 155.