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The fetus and fertility

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THE PATERNITY OF AN INFERTILE MALE

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THE PATERNITY OF AN INFERTILE MALE

Moshe Zemer

One of the earliest studies of fertility in Jewish Law relates to the *seris hamah*, literally a "sun eunuch," one who was sterile from the first time he appeared in the sun, i.e., a congenital eunuch.¹ This phenomenon has been debated in the *halakhic* literature from the *Mishnah* through the responsa.

Sages of the *Mishnaic* period (*Tannaim*) state that a person of twenty years of age who has not produced two pubic hairs is a congenital eunuch. If he produces them after this age, he is still considered a *saris*. The *Talmud* gives a specific list of characteristics: "He has no beard, his hair is straight, and his skin is smooth. Rabbi Simion b. Gamliel said in the name of R. Judah b. Jair: Any person whose urine produces no froth; some say: He who urinates without producing an arch; some say: He whose semen is watery; others say: He whose urine does not ferment. Still others say: He whose body does not steam when bathing in the winter. R. Simeon b. Eleazar said: One whose voice is abnormal so that you cannot distinguish whether it is that of a man or of a woman." An *Amoraic*² dispute ensues whether one or all of these characteristics must be present to establish his capability of procreation.³

Rashi in his commentary to this passage interprets the characteristics of this *saris*: "his hair is straight" means that it is lank and smooth; his skin is as smooth as a woman's in contrast with a man's hairy skin; "he does not urinate in an arch," namely, he does not form a long stream that reaches afar; "his semen is watery" rather than thick and is as clear as water; "his urine ferments" means that it smells when left in a container.⁴

We may note that the sages record only the secondary characteristics of the *saris* and the results of his infirmity. Nowhere do they present a specific definition of the congenital eunuch or an explicit description of the abnormality of his genitalia.

An interesting medical issue is mentioned in a *Mishnaic* controversy whether a eunuch may participate in *halizah* (the ceremony of releasing his sister-in-law from levirate marriage) and the eunuch's brothers may submit to *halizah* from his wife. Rabbi Akiba contended that this is the case with a *saris*

adam ("a man made eunuch" emasculated by human action) because there was a time when he was potent, while the *saris hamah* was never potent. Rabbi Eliezer stated that this ruling does apply to the congenital eunuch *since he may be healed*, while a man-made eunuch may never be cured.⁵

The *halakhah* is according to R. Akiba's view on formal grounds, since the *Talmud* has determined that his view is normative in a controversy with any of his contemporaries and specifically with his teacher, Rabbi Eliezer ben Hyrcanus.⁶ Interestingly enough, no commentary has been found to substantiate or contravene R. Eliezer's opinion that a *saris hamah* may be healed. Furthermore, R. Eliezer (known as R. Eliezer the Great) brings evidence that this is possible because cases of such nature are cured in Alexandria in Egypt.⁷

The rabbinic sages reveal the sexual and reproductive functioning of the *saris* as part of the discussion of *halizah* and this phenomenon. Firstly, we learn that a *saris* is able to engage in sexual intercourse which has legal consequences.⁸

Even though the congenital eunuch can copulate, he is incapable of procreating. The rabbinic sages interpreted the Scriptural texts relating to the *halizah* ceremony. "My brother-in-law refuses to perpetuate his brother's name in Israel" (Deuteronomy 25:7), this excludes the *saris*, because if he wanted to perpetuate he is incapable of this accomplishment. Furthermore, the verse: "That his name not be blotted out of Israel" (*ibid* 25:6) is interpreted as excepting the *saris*, whose name is in any event blotted out.⁹

In spite of his disabilities, the congenital eunuch is permitted by *halakhah* to marry a Jewish woman and "enter the Congregation of the Lord." Both the Babylonian and Jerusalem *Talmud* state that he is not under the *Torah* prohibition: "He whose testicles are crushed or whose male member is cut off shall not enter the assembly of the Lord" (*ibid* 23:1). The *Torah* forbids marriage only with one whose testicles were emasculated or crushed, or whose penis is cut off.¹⁰

Maimonides codified this precept: "A physical disqualification for marriage applies only when it is not of natural causes (literally, "by the hand of Heaven")...but if he were born in this way or became ill, he is fit to enter the Congregation because it was by the hand of Heaven". Therefore, the congenital eunuch is not excluded from marriage.¹¹

There is a *Talmudic* attempt to discover the etiology of the congenital eunuch disorder: "What are the causes? (During her pregnancy) the child's mother baked at noon and drank strong (or diluted) beer." The reasoning here seems to be that the heat of the oven combined with the heat of high noon and drinking beer might have affected the generative organs of the embryo.¹²

Various medical questions regarding the congenital eunuch are left unresolved in the *Talmud*. May he indeed be healed. What is the meaning of the above mentioned "capability of procreation"? Does it refer to his sterility, his impotence, or both? We shall explore these questions in the relation to the following case discussed in the responsa literature of the nineteenth century which became a *cause célèbre*.¹³

THE SON OF A EUNUCH

A *seris hamah*, named Abraham Nahum, was born in 1838 in a village near Ismir (Smyrna), Turkey. When he grew up, his skin was smooth like that of a woman and he had no trace of a beard. No objection was raised when he married a young Jewish girl in his late adolescence because he was not unlike his peers who had fathered children.¹⁴ Since he was only a *bahur*, an adolescent, no one was suspicious.

Two years later, his wife admitted having had adulterous relations with her husband's brother, Meir Nahum, and with other men. The local *bet-din*, assumed that Abraham was a *сарis* without verifying his condition and forced him to divorce his wife. They declared her son Jacob a *mamzer*, because he was presumed to be the issue of adultery and, perhaps, of incest as well. Abraham Nahum took a second wife, and he died a few years later. Jacob was warned by the Jewish community that he could not marry in their midst.

THE PATERNITY OF AN INFERTILE MALE

He went to another place where he found a Jewish bride and fathered two sons, who in turn were declared *mamzerim*. When the community found that he had married, he was put under a severe ban and even imprisoned.

Eventually, Rabbi Abraham ben Haim Palache, the Chief Rabbi of Ismir, was brought into the picture. He issued a verdict which received the endorsement of the foremost rabbis of that day, including the future Chief Rabbi of Jerusalem, Yaakov Shaul Elyashar, and Rabbi Shalom Moshe Hai Gagin, also of the Holy City. The three rabbis wrote separate responsa revealing each sage's perspective of the symptomatic and *halakhic* aspects of the case.¹⁵

At first sight it appeared to Palache that in a case like this, one could not say: *Rov habe'ilot ahar ha-baal* -- "Most acts of sexual intercourse are attributed to the husband."¹⁶ He tried to resolve the following two questions: Was Abraham Nahum indeed a born eunuch (*seris hamah*)? If so, was he cured? The following *halakhic* process was used to deal with these problems:

1) A village woman had seen him naked at the age of four and described his genital organs to the villagers, claiming that the child's penis was the size of a "piñon," a pine seed or pinion in *Ladino* (Judeo-Spanish).¹⁷ Since that event, he was held to be a born eunuch. He had never been checked by an expert, so it would be impossible to determine whether Abraham had actually been a eunuch. Therefore, his status as a *seris hamah* was doubtful.

2) R. Palache quoted Rabbi Eliezer's *mishnaic* minority ruling that a born eunuch may be healed in contrast with a castrated man for whom there is no cure.¹⁸ Here is a second doubt - the man under study may have been healed. The investigating *bet din* interviewed the late Abraham Nahum's second wife, Estrella, who testified that her husband had had normal sexual relations, including ejaculation of semen. Moreover, she was a virgin when she married Nahum and, according to her testimony, she was deflowered by her husband.

Thus, the rabbinical court revealed the double doubtfulness of his status as a congenital eunuch. As a result of these doubts, which were buttressed by other arguments supported by relevant *halakhic* precedents, R. Palach and his *bet din* declared that the presumed congenital eunuch, Abraham Nahum, was the father of Jacob! The rabbinic judges propounded an alternative solution that Jacob's mother might have become pregnant from a gentile when she was sleeping around during the first years of her marriage to Abraham.¹⁹ In either event, Jacob and his sons were completely cleansed of the taint of *mamzerut*.

At first sight it would seem that the rabbinic court's attribution of the fatherhood of Jacob to a *seris hamah* is another instance of the use of a legal fiction in order to save children from declared *mamzerim*. There are a number of such precedents of the use of this technique to help such unfortunate persons:

The *Talmud* relates that Rabba Tosfaah, a seventh generation Babylonian *Amora*, promulgated the legal fiction that a fetus may remain in its mother's womb for twelve months. Therefore, if a woman gave birth within a year of her husband's departure, we may attribute the paternity of the child to her spouse.²⁰

Decisors of the 19th and 20th centuries used the legal fiction of reassigning paternity in a manner similar to that of R. Palache in the case of Abraham Nahum. The respondent, usually supported by a *bet din*, decided that the husband of the mother (or a gentile) is the father of the child, whose legitimacy is thereby established. This *halakhic* technique was employed retroactively in purifying four generations of *mamzerim* on the island of Corfu by Chief Rabbi Elyashar and, in a similar fashion, by other scholars such as Rabbi Jacob Moshe Toledano of Alexandria.²¹

As we have noted, the *Talmud* neither records a specific definition of the congenital eunuch nor presents an explicit description of the abnormality of his genitalia. It does, however, ascribe to him certain secondary characteristics some of which are explicable by modern medical science. A

THE PATERNITY OF AN INFERTILE MALE

modern scientific definition of the *seris hamah*, requires reference to present day hormonal and fertility research.

When I was on Sabbatical in Oxford, I met with Dr. Julian Barth, of the Department of Chemical Pathology at the University of Leeds Old Medical School. We collaborated on a *halakhic*-medical study of this phenomenon. On the basis of the *halakhic* sources, Dr. Barth defined a born eunuch as a child with indeterminate sex. He examined four syndromes of such disorders due to abnormal genitalia, which reflect the symptomology described by the sages.²² We attempted to establish whether any of these categories of indeterminate sex may be attributed to the congenital eunuch.

It was determined that some of the characteristics of the *seris hamah* described in the *Talmud* (*Yevamot* 80b), "He has no beard," "His skin is smooth," "He urinates without producing an arch":(due to lack of developed male phallus or deformity): may be the result of hormonal malfunctioning known as receptor deficiency or 17 beta HSD or 5 Testosterone alpha-reductase deficiency:

POTENCY, FERTILITY AND HEALING

Abraham Nahum, the *seris hamah*, of Turkey may serve as a test case to determine whether the above mentioned infirmity may yield the scientific explanation of this phenomenon.

Can modern medical research shed new light on this case and answer the following four questions:

1. Does the fact that a village woman reported that Abraham Nahum's penis at the age of four was the size of a pine seed indicate that he was a congenital eunuch when he was married in his late adolescence?

2. Is it possible that such a person may have sufficient potency to have sexual intercourse as testified by Abraham's second wife?

3. Could he have been fertile and able to father a child?
4. Is it probable that a *seris hamah* could be healed in accordance with Rabbi Eliezer's teaching in the Mishnah?

One of the categories of hormone malfunctioning explained above appears to fit this case as well as the Talmudic description of the *seris hamah*. We have seen above that a person suffering from 17 beta-HSD or 5 alpha-reductase deficiency would appear to fit Nahum's case history:

1. In this disorder, children are born with a micro-phallus and may or may not have visible testes. They are often thought to be female at birth, however, at puberty, they develop the characteristics of unaffected males: a deep voice, pubic and axillary hair, and male sexual identity. Their penis is enlarged to child-size after puberty, while their skin remains relatively smooth and childlike without a beard.

Abraham Nahum was reported to have had a micro phallus as a small child which is a symptom of this disorder, although it is not listed in the Talmud as a characteristic of a *seris hamah*. We have noted that Talmudic sages gave no description of his genitalia, but Nahum's condition was considered by the community to have been that of a *saris*. The responsa mention that he had skin as smooth as a woman's and no trace of a beard. This might have indicated his being a *seris hamah*, but we have no report, one way or the other, of the above mentioned secondary sexual characteristics, such as pubic hair and a male voice, which might well have been contraindicative. R. Palache and his *bet din* noted that no examination was made by an expert. We, too, cannot determine without any reported evidence whether or not he may have developed the other characteristics of 17 beta-HSD or 5 alpha-reductase deficiency.

We have noted that village authorities had no objection to Nahum marrying, because he was still an adolescent and not dissimilar to others of his age who had married and fathered children. Since we do not have sufficient empirical evidence, we must agree with R. Palache that it would be impossible

THE PATERNITY OF AN INFERTILE MALE

to determine his status on the basis of the village woman's evidence or the fact that he was married as an adolescent.

2. A key issue in this case is whether Nahum, as a young married man, was able to engage in normal sexual intercourse. His second wife, Estrella, testified that he did indeed fulfill his conjugal obligations. As we have seen, a man suffering from 17 beta- HSD or 5 alpha - reductase deficiency usually has a micro phallus at birth which enlarges sufficiently at puberty to enable him to insert semen into his wife's vagina. The literature on penile enlargement suggests enlargement of a phallus to a length of four to eight centimeters. Males with this disorder are capable of inseminating their mates/wives.²³ Therefore the testimony of Nahum's widow may be accepted.

3. If, indeed, as the evidence seems to indicate, Abraham had 17 beta-HSD or 5 alpha-reductase deficiency, then he may very well have been fertile. We must further note that Estrella bore witness that Abraham always ejaculated sperm during coitus. It would have been proper for the *bet din* to apply the *halakhic* principle, *Rov habe'ilot ahar ha-baal*: "Most acts of sexual intercourse are attributed to the husband."²⁴ Therefore, it is entirely within reason, in light of modern medical research, that Abraham Nahum was indeed the biological father of Jacob, thereby purifying him and his descendants of the stain of *mamzerut*.

Of course, Rabbi Abraham Palache and his colleagues of the rabbinical court could not have known the revelations of modern medical science regarding Abraham Nahum's medical condition. We cannot determine whether they believed that he had fathered Jacob or were engaged in a legal fiction. In any event, the court did hedge by using the back-up argument (which, indeed, is a legal fiction) that Jacob might have been fathered by a gentile.

The fact that the responsa do not mention whether Nahum had children with his second spouse is not relevant to the issue of his probable fertility with his first wife. There may have been many reasons for infertility either on his part or that of his wife. There is no validity in such an

argumentum ex silentio. The essential point is that it is definitely within medical reason that such a person who was considered a congenital eunuch was most likely fertile and could have fathered the offspring in question.

4. We may, therefore, conclude that the statement of Rabbi Eliezer, who lived about 1900 years ago, that a *seris hamah* may be healed has been verified by modern medical research. The symptoms of a man considered by his community to be a congenital eunuch in view of having been born with a minuscule membrum and bearing the typical secondary characteristics in his childhood may indeed be changed at puberty and afterwards. As we have seen, both in the research of the phenomenon of Testosterone 5 alpha-reductase deficiency and observing the case of Abraham Nahum, a micro phallus at birth may be sufficiently enlarged at puberty to enable him to engage in sexual intercourse and to father children. He was not only able to engage in sexual intercourse, as noted in the Talmud, but appears to have been capable of procreation, which was considered halakhically impossible.²⁵ If the pre-pubescent condition is considered sick and abnormal, then indeed after puberty one may declare that the *seris hamah* has been healed!

* * *

We have attempted to understand the ancient *halakhic* phenomenon of *seris hamah* in light of modern medical research. Studies such as this have certain limitations. Among them is the difficulty in relating scientific significance to non-medical terminology in an ancient literature. Furthermore, there may be insufficient empirical evidence to diagnose fully the illness and its progress.²⁶

Nevertheless, it would appear that we have isolated the medical syndrome that fits the Talmudic description of the congenital eunuch. Furthermore, the combined efforts of research in *halakhah* and medicine have discovered a viable solution to the difficult problem of a congenital eunuch in the responsa literature of the last century.

Finally, we have shown that the astute observation of a rabbinic scholar, who lived in the late first and early second centuries C.E., about the

THE PATERNITY OF AN INFERTILE MALE

curability of a congenital eunuch may indeed reflect modern medical conclusions. This paper has demonstrated that this individual, who was thought to be seriously underdeveloped or deformed in his genitalia, impotent and infertile, may be capable of procreation. It would, therefore, appear that this study has rehabilitated this *halakhic* teaching of the great Rabbi Eliezer which has been disregarded for nineteen centuries.

Notes

1. b. *Yevamot* 79b - 80a; j. *Yevamot* 8:6. There is a later interpretation where *hamah* is rendered *kadahat* (fever). A *seris hamah* is therefore considered to be a "fever eunuch" with a condition resulting from a post natal illness contracted any time after birth. See R. Nathan Yehiel (Rome, 1035-1106). *Arukh Complentum*, ed. Alexander Kohut, New York, (undated) volume 3, p 426. The mumps is the best recognized viral infection of the testes, which may, infrequently, be followed by permanent infertility.
2. Referring to the *Talmudic* sages, *Amoraim*, expounders of the *Mishnah* in the third to the fifth centuries C.E.
3. b. *Yevamot* 80b. See also *Tosefta* 10:6. We shall note a medical explanation for the smooth, beardless skin and for urinating without an arch.
4. Rashi *ad loc.*
5. M. *Yevamot* 8:4. See *infra* p. 3 and pp. 10-13 for the application of this minority *halakhic* opinion to a specific case.
6. See HaMeiri, *Beit Habehirah*, (ed. H. Albeck), New York, 1947, *Yevamot* 79b, p. 289. The *Tur* and the *Shulhan Arukh*, *Even Haezer* 172:1 codify in this manner. See Ezra Zion Melamed, *Eshnav Hatalmud, Kiryat Sefer*, Jerusalem, 1960, p. 85. Others say that R. Eliezer contradicted himself by claiming in M. *Niddah* 5:9, that the *halakhah* regarding a saris is according to Beit Hillel, whose position is supported by R. Akiba. See Shlomo Adani ben Bezalel Ashkenazi, *Melekheth Shlomo*, in *Mishnah* with fifty-one Commentaries, *Torah La-Am*, Jerusalem, 1960, p. 5b.
7. b. *Yevamot* 80a. In view of the fact that this *baraita* agrees with M. *Yevamot* 8:4 and also gives proof based on actual experience, it is assumed that R. Eliezer maintained the view recorded in this *mishnah* and withdrew from the other view attributed to him in M. *Niddah* 5:9. See Rashi b. *Yevamot* 80a, *s.v. ta shema*.
8. M. *Yevamot* 8:5; J. *Yevamot* 8:5 *baraita*. If a eunuch cohabitated with his deceased brother's wife, he disqualifies her for marriage with a priest since such sexual intercourse is of the nature of fornication. It constitutes an incestuous relationship with his brother's wife, not for fulfillment of the mitzvah of levirate marriage.

9. *Sifrei*, Deuteronomy par. #289; b. *Yevamot* 79b; *ibid.* 24a. See also Maimonides, *Hilkhot Yibbum ve-Halizah* 6:2.
10. b. *Yevamot* 75a; j. *Yevamot* 8:2; *Korban Edah ad loc.*; *Ibid.*, 23:1).
11. Laws of Forbidden Marriages 16:9. See also *Shulhan Arukh, Even Haezer* 5:10, which quotes this opinion along with the differin views of R. Asher and Rashi.
12. b. *Yevamot* 80a. See Julius Preuss, *Biblical and Talmudic Medicine*, (translated and edited by Fred Rosner), New York-London, 1978, p. 224. Preuss, who died in 1913, records this cause without comment. It would appear quite doubtful that there is any relevance of the exposure of a pregnant woman to heat and beer in the genesis of the destruction of gonads *in utero*.
13. See Moshe Zemer, "Purifying Mamzerim," in *Jewish Law Annual*, vol. X, 1992, pp. 99ff. Gratitude is hereby expressed to the Trustees of Boston University for permission to publish parts of the essay in this article.
14. As we have seen, *supra* notes 10 and 11, the *saris hama* is permitted to marry. However, it may be conjectured that if the family of the bride had suspected his condition, the match might have been refused. Furthermore, as we shall see, Abraham Nahum married a second time.
15. Haim Palache, *Sefer Einei Kol Hai*, Ismir, 1962, pp. 135b-151a (which include responsa of his son, Abraham); Yaakov Shaul Elyashar, *Responsa Simha La'ish* Jerusalem 1888, E.H. resp. 2; Shalom Moshe Hai Gagin, *Responsa Yismah Lev*, Jerusalem, 1878, resp. 13.
16. b. *Sukkah* 27a.
17. Cf. *New World Spanish-English and English-Spanish Dictionary*, New York, 1968, p. 392.
18. See *supra* note 5.
19. Both biological parents must be Jewish for a child to be declared a *mamzer*.
20. The *gemara* in b. *Yevamot* 80b states that the *halakhah* is in accordance with Rabbi Tosfaah.
21. See Moshe Zemer, *supra* note 13, pp. 100-112, for an exposition of these legal fictions.
22. Another form of genital malformation which might have been considered to fit our subject is that of undescended testes, as suggested by Preuss *ad loc.*, *supra*, note 12. However, men with this condition are essentially complete males, although they may be infertile, especially if the testes remain in the abdomen rather than in the groin, just above the scrotum. It is only the sperm producing cells and not the hormone

THE PATERNITY OF AN INFERTILE MALE

producing cells that are destroyed by body heat. Therefore, men with undescended testes will undergo normal puberty even if the testes remain in the abdominal cavity into adult life. It is unlikely that undescended testes that have not appeared by the age of two years will spontaneously appear and descend into the scrotal sac. An individual with this disorder usually has a normal penis and masculine secondary characteristics and would not have been considered by the sages as a *seris hamah*.

23. Impotency, i.e. an inability to have a penile erection, is not a cause for infertility. The cases of testosterone 5 alpha-reductase deficiency essentially have a penis of insignificant size. They are, nevertheless, able to lay their sperm at the entrance of the vagina, which can then "swim" up the female genital tract to fertilize the ovum. See M.M. Grumbach, F.A. Conte, "Disorders of sex differentiation", in J.D. Wilson, D.W. Foster (eds.) *Williams' Textbook of Endocrinology*, 8th edition, 1992: 853-951.

24. See *supra* note 16.

25. See *supra* notes 8 and 9.

26. We have seen that one suffering from Testosterone 5 alpha-reductase deficiency may later acquire some of the normal masculine characteristics, such as public hair and a male voice, which are essential in the *halakhah* in determining that one is a normal male. Unfortunately, for Abraham Nahum and his family, as well as for the modern researcher, he was not examined by the first *bet din*, which may well have discovered these characteristics. This probably would have changed the lives of the entire family. See J. Barth and M. Zemer, "Jewish Medical Ethics," *Assia*, Vol II no. 2, 1995. See J. Barth and M. Zemer, "The Congenital Eunuch" in *Jewish Medical Ethics (Assia)*, Vol. II, no. 2, 1995.