The fetus and fertility

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SELECTED REFORM RESPONSA

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ARTIFICIAL INSEMINATION

Solomon B. Freehof

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 (*zera levatala*)? 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 beambatei*) (cf. B. *Hagiga* 15a, top).

2. Joel Sirkes (1561-1640), in *Bah* to *Tur, Yoreh Deah* 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 Hilhot 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 Shemuel* to *Shulhan Arukh*, *Even Haezer* 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 Hayim Fischel Epstein in his *Teshuvah Shelema (Even Haezer*, #4), and by Ben Zion Uziel of Tel Aviv, the chief Sephardic rabbi of Palestine, in his *Mishpetei Uziel,* part II, *Even Haezer*, section 19.

Epstein - because of the danger that the child may one 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 Shemuel* - 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.

*Walter Jacob, *American Reform Responsa*, New York, 1983, #157.

ARTIFICIAL INSEMINATION

Alexander Guttmann

QUESTION: Is artificial insemination permitted by Jewish Law?

ANSWER: Talmudic and Rabbinic sources do not discuss, nor even mention, artificial insemination as understood (and practiced) in our day. Artificial insemination, with which we are concerned, is premeditated, planned. he 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 matter in order to find a solution that would be 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 her which possess (or are believed to possess) real significance for the issue:

1. In Talmud *Bavli (Hagiga* 14b), the question is raised whether a virgin who became pregnant is allowed to be married by the High Priest (in view of Leviticus 21:13-14, *Ishah bivtuleiha*). Subsequently (14b-15a) the possibilities of a virgin's becoming pregnant ar 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 Yehuda Lima) on *Shulhan Arukh*, *Even Haezer* 1, note 8, raise 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, an 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 bat insemination (yet no blemish is attached to him).

3. *Beit Shemuel* (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 *Bah* (Joel Sirkes) on *Tur, Yoreh Deah* 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 Hanida* (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 Shemuel* 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, Hilhot Ishut XV.4, besides citing *Likutei Maharil, Helkat Mehokek, Hagahot Semak* (see above), remarks: *ein safek dela ne-esra leva-alah mishum deein 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 *hotsaat zera levatala* (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 Uziel* (Tel Aviv, 1938), part II, *Even Haezer 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 whatever for permitting it. Uziel's concluding words are that the matter belongs to the category of the *halakhot* which bear the designation *halakhah veein morin kach*, i.e., *halakhah* which must not be translated into practice (cf. Michael Guttmann, *Zur Einleitung in die Halacha* II, p. 91) .

Haim F. Epstein, in his *Teshuvah Shelema* (St. Louis, 1941), vol. II, *Even Haezer, 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 *hotsaat zera levatala* (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 accident." 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 Agada. 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 *Yevamot* 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.

*Walter Jacob, *American Reform Responsa*, New York, 1983, #158.

THE FERTILITY PILL

Solomon B. Freehof

QUESTION: In recent years doctors have discovered a medicine in the form of a pill which is given to childless women and helps them to achieve fertility and even multiple births. Is such a pill, which seems to change the physical nature of the woman, permitted by Jewish tradition? (Rabbi Jonathan Brown, Harrisburg, Pennsylvania.)*

ANSWER: The talmudic literature has clear mention of medicines to prevent childbirth. They speak of "the drink of sterility" (*kos shel ikrin; Even Haezer* 5: 12), but I do not remember anywhere in the literature where there is mention of a medicine of the opposite effect, namely, a spur to fertility. Clearly such a medicine was not known to the ancients, since it is based on modern studies of glands and hormones, etc.

As to the general aim of these fertility pills, it is obvious that their purpose is in harmony with one of the central attitudes of Scripture. If there is any one blessing which God promises all through Scripture, it is the blessing of having many children. In Genesis (1:22) even animal nature, the fishes and the birds, are blessed by the Creator and mandated to "increase and multiply and fill the earth." And when Adam and Eve were created (1: 28), they received the same blessing that animal nature had received, to "increase and multiply." The same blessing was given to Noah after the Flood. And when Abraham enters the land of Canaan, God's blessing to him is that his descendants will be numerous as the stars in heaven and the sands on the seashore (Genesis 22:17). When Jacob leaves home, his father, Isaac, gives him a similar blessing (28:3). In Leviticus 26:9, the awesome chapters of blessings and curses, the people of Israel is promised, if they obey God's commandment: "I will make thee fruitful and multiply thee."

Of course, it may be argued that these blessings had great meaning in the *early* days, when our earth was largely empty, but today, with the threat of overpopulation and relatively insufficient food supplies, the old

blessing to "increase and multiply" might be deemed to be no blessing at all. This may well be so, but as far as the Jewish people is concerned, the situation is somewhat different than with the world population taken as a whole. Within our own lifetime, we have lost, through mass murder, six million of our brethren, almost half the Jewish population in the world. We are again a people that is "few in number" (Psalm 105:12). To us nowadays, every Jewish child is doubly precious. For us, surely, the Biblical blessing is still a blessing. For that matter, among all peoples and all religions, there are numerous families that have been unable to have children and long for children of their own. To them, in spite of the threat of world overpopulation, the Biblical blessing is a longed-for blessing, and the modern fertility pill can be the pathway to it.

All this is clear enough from the point of view of sociology, but from the point of view of *halakhah,* there is much to consider in the matter of the fertility pill. The commandment to "increase and multiply" is the first commandment given in Scripture. It is the first of the *mitzvot.* But strange as it may seem, it is a commandment incumbent upon men and not upon women (*M. Yevamot 6:6; Yevamot 65b; Shulhan Arukh, Even Haezer* 1:13). This means that it is a sin for a man to remain unmarried. It is his duty to provide children. But it is no sin if a woman remains unmarried. A woman may, under certain circumstances, use preventatives against conception *(Nedarim* 35b). But it is almost impossible to permit a man to prevent his seed from being fruitful (cf. *Even Haezer* 5:12). If a man has begotten a son and a daughter, he is considered to have fulfilled his obligation "to increase and multiply." However, even so, it is considered a sin for him not to continue to have children if he can afford to do so and is able to do so *(Yevamot* 62b and *Even Haezer* 1:8). But what if a woman is not fruitful? Generally the custom was, after ten years of childless marriage, for the man to divorce her and marry another *(Even Haezer* 1: 3 Isserles and *Even Haezer* 1:14). This was indeed the custom, but it certainly was a source of sorrow. Why should efforts not be made to heal the barrenness of a woman, so that she can continue with her husband? We notice in Scripture that barren wives did not accept their fate calmly, but prayed that God would make them fruitful.

On this question as to whether a woman may resort to medical aid to become fruitful, there is some interesting discussion in recent law. Eliezer Wildenberg, in his responsa *Tzitz Eliezer* (Vol. 11, pp. 105b ff.), has a long debate on this question. He cites the opinion of Menachem Mendel Panet in his *Shaare Tzedek*, who says that barrenness is not a sickness involving physical pain, etc., for which she must seek medical aid. If a woman is barren, that is God's decree. It is part of her nature. But Wildenberg refutes this opinion (which is rather an exceptional one) and says, first of all, that it is an established custom in all the generations that even the leaders of the community sought the help of doctors to cure the barrenness of their wives so that they might live together and fulfill the commandment. Wildenberg cites the great Spanish scholar Solomon ben Aderet, who tells of his teacher, the physician Nachmanides, who cured Gentile women of their barrenness. It is clear that to seek a cure for barrenness (even though it is not necessarily a disease involving physical pain, etc.) is well within the approval of Jewish tradition and custom.

However, the very fact that the duty to "increase and multiply" is incumbent specifically upon the man may nevertheless make a difference in the possible permissibility of the fertility pill. Let us assume, for the sake of discussion, that there is some danger to the general system in the taking of the pill. Now if a fertility medicine were given to the man, one could say that since it is his *duty* in Jewish law to "increase and multiply," then he is justified in accepting some physical risk in order to fulfill the commandment. But since the woman is not at all mandated to "increase and multiply," why should she assume any risk at all to her general health to fulfill that which she is not commanded to fulfill?

As to the above question of danger involved, I have consulted Dr. Harold Cohen, Clinical Professor of Obstetrics and Gynecology at the University of Pittsburgh. From him I have learned the following: There is no such thing as a fertility pill given to the man (who by Jewish law is mandated to "increase and multiply"). The pill is given only to the woman (who by Jewish law has no such mandate). Furthermore, as a matter of fact, there *is* a physical danger to the woman that may be created by the fertility pill. Her

ovaries may be enlarged, and there is later danger of the necessity for surgery. Therefore physicians, in every individual case, will need to balance the physical danger against the family benefit. So, too, there will be considerable discussion in the Jewish legal literature, balancing the danger against the benefits.

So far I have found only one mention of the use of this pill. In Vol. 16 of *Noam,* published by Menachem Kasher (p. 43 in *Kuntros Harefuah*), there is mention of a *kadur heroyon*, i.e., a fertility pill. The authority discussing this pill is concerned only with the question whether or not it may be taken on the Sabbath. On the Sabbath, sickness involving pain or danger may receive all necessary healing. But fertility pills, as also vitamin pills, do not involve physical pain which requires a doctor's immediate attention - hence the discussion of whether the fertility pill may be taken on the Sabbath. But the very fact that the only question asked about the fertility pill was whether or not it may be taken on the Sabbath is an indication that for the present there is no general objection to it. On principle there could hardly be any objection to it. The idea of quadruplets or quintuplets was, at least on one occasion, looked upon as a blessing. When Scripture says (Exodus 1:7) that in Egypt "the Children of Israel were fruitful and multiplied," the Midrash (cited by Rashi to the verse, of *Exodus Rabbah* 1:8, also *Yalkut Shimoni* ad loc.) relates that "they gave birth to six infants in one womb."

As the pill becomes more widely known, and the discussion concerning the dangers that might be involved is dealt with, the dangers will be weighed against the blessing the children may bring to family life. In consideration of the fact that to "increase and multiply" is one of the premier blessings of Scripture, and that the commandment to "increase and multiply" is a man's primary *mitzvah*, it would seem that, although the Talmud knows

only of sterility medicine, the use of the new fertility pill may win general, if grudging, approval in the law. Of course, if the medicine is someday so improved that it no longer has any harmful side effects, then it would be acceptable to the *halakhah* without any objection.

*Solomon B. Freehof, *Reform Responsa for Our Time*, Hebrew Union College Press, 1977, #44.

TEST TUBE BABY

Walter Jacob

QUESTION: Recently an embryo was successfully formed from an egg fertilized by her husband's sperm. It was then implanted in the wife's womb and developed into a full-term baby. Is this form of insemination permissible for Jewish parents who otherwise could not have children? Is it permissible to fertilize several such eggs, store the embryos and implant them in others? (S. M. L., Pittsburgh, PA)*

ANSWER: It is clear that these techniques are now available. Although some refinements still need to be made before they can be widely practiced, it is possible to fertilize an egg under laboratory conditions and implant it in the mother's womb. It is also possible to freeze the embryos of livestock and keep them over long periods of time. On subsequent implantation, they develop into full-fledged, normal animals. This has been done regularly with livestock and could, presumably, be done with human beings. Various aspects of these questions will be discussed separately.

Jewish authorities have favored the principle that every individual at least reproduce himself, and so a couple should have a minimum of two children *(Yeb.* 62b; *Yad Hil. Ishut* 15.16; *Shulhan Arukh Even Haezer* 1.8). This was Hillel's interpretation of *peru urvu.* Parents have been encouraged to have at least two children. This remains high on the Jewish agenda despite the general mood of birth control, as we remain a very small endangered minority.

In keeping with this principle, it has always been considered a sin to emit sperm for an act other than procreation (*San.* 108b; *Nidah* 13a; R. H. 12a; *Yad Hil. Issurei Biah* 21). This has led Orthodox authorities to prohibit various methods of birth control. Here, however, we are not dealing with the misuse of the sperm, but simply the fertilization outside of the normal

channels. This matter has been discussed and approved by Mosheh Feinstein *(Igrot Mosheh Even Haezer* #10) if the sperm utilized was that of the husband, while he and most others would prohibit using the sperm of a donor. Solomon B. Freehof would permit it in either case, while Alexander Guttmann would exercise great caution with donor sperm (W. Jacob, *American Reform Responsa,* #157, 158) As we are dealing with the husband's sperm, all the cautions cited are irrelevant. There would be nothing which would prohibit the actual fertilization of the egg taking place in a test tube and its implantation in the wife's womb. It would enable some childless Jewish couples to have children and should be encouraged when available.

The second part of the question deals with the freezing of embryos (fertilized eggs) and keeping them indefinitely. This, of course, raises an entirely different set of problems. If it is the intent to preserve the embryos for this couple only, and insert them into the wife at a later time, perhaps if the first pregnancy fails or to create subsequent children, no objection could be raised. However, adequate safeguards must be assured with, perhaps, a time limit for the preservation. Such frozen embryos should not be used for genetic experimentation or engineering. Both of these areas need much careful further study.

*Walter Jacob, *Contemporary American Reform Responsa*, New York, 1987, #18.

IN VITRO FERTILIZATION WITH COUSIN'S OVA

Walter Jacob

QUESTION: A couple is unable to have children. The wife's first cousin had agreed to donate *ova* for *in vitro* fertilization with the husband's sperm. It will be subsequently implanted into the wife's womb. Is there a question of incest? (Rabbi H. Silver, West Hartford, CN)*

ANSWER: The question of artificial insemination has been dealt with in two responsa by Solomon B. Freehof and Alexander Guttman in 1952 (W. Jacob, *American Reform Responsa,* #157, 158). There are, however, two substantial differences between the question raised here and these responsa. In that instance the sperm of a stranger was used to fertilize the *ova* of the wife; the situation here is reversed as the husband's sperm will be used and the *ova* will be that of another person. Secondly, in the previous responsa the donor was not known while here the *ova* of the cousin will be used. As the source of the ova is known, one of the traditional objections to artificial insemination is removed. Orthodox authorities fear that the youngster produced by such insemination might inadvertently marry incestuously. In this case, as he would know his ancestry, that could not occur.

Now we must ask whether it is possible to use the *ova* of the wife's first cousin. It is clear that in the days of bigamy or other forms of multiple marriage like concubinage, it was possible for a first cousin to marry the same husband. The details of concubinage are discussed in a separate responsum (W. Jacob, *American Reform Responsa,* # 133). Polygamy has, of course, been prohibited for Ashkenazic Jews since the decree of Rabenu Gershom in the eleventh century. If it were still permitted offsprings of such a marriage would be considered *kasher*. In this instance no marriage will take place; the *ovum* will be fertilized *in vitro* and then placed in the womb of the wife.

We must carefully consider some other potential problems,

however. As the source of the *ovum* will be known to both the parents and possibly the child, this may cause psychological difficulties. In case of normal family strife, will this situation aggravate matters? Are any pressures for donation being applied to the cousin? These and other issues must be carefully discussed with competent experts and a good deal of counselling must occur with the couple and also with the prospective donor. As the current divorce rate is high it would be wise to discuss this possibility and its ramifications also, painful though it may be. The possibility of a defective child should also be discussed.

Peru ur'vu is of course a major *mitzvah* and children are mentioned as an essential element of marriage many times by the traditional sources *(M. Yeb.* 6.6; *Nidah* 13b; *Ket.* 8a; *Yeb.* 61b; *Yad Hil. Ishut* 15.6; *Tur* and *Shulhan Arukh Even Haezer* 1.5) and lack of children was considered grounds for divorce *(Shulhan Arukh Even Haezer* 1.3 f, 154.10) although others disagreed. The *mitzvah* may, of course, be fulfilled through adoption ("Adoption and Adopted Children," W. Jacob, *American Reform Responsa,* # 63); this couple has chosen a different route. We would give reluctant permission to use *in vitro* fertilization in the manner you have described. The potential problems are numerous and should lead to great caution.

*Walter Jacob, *Contemporary American Reform Responsa*, New York, 1987, #19.

A RABBINIC BAN ON SPERM DONATION

Moshe Zemer

QUESTION: The Israel Chief Rabbinate Council published warning notices in several national newspapers which forbade Jewish men to donate semen to hospital sperm banks and prohibited Jewish women to accept medical treatment which includes artificial insemination of sperm from a donor (A.I.D.). No specific mention is made of artificial insemination from a husband (A.I.H.). Does the *Halakhah* permit a man to give sperm for the artificial impregnation of his wife?*

ANSWER: The Chief Rabbinate's ban does not relate to the question nor does it substantiate any of its prohibitions with halakhic sources. It is widely assumed that Jewish Law permits A.I.H., but this has not always been the case. There were rabbis who opposed or limited the husband's participation in this treatment. Rabbi Malkiel Zvi Tennenbaum stated that it is forbidden for a man to donate sperm to artificially inseminate his wife: "Even ejaculating sperm into a tube must be considered prohibited, because he is wasting his seed at the moment of the act (*Responsa Divrei Malkiel*, vol. 4,107). Rabbi Ovadia Hadaya, a member of the Chief Rabbinate Council, until his death, wrote a responsum in 1957 that it is forbidden for a husband to take part in this treatment because "this is infested with the prohibition of corrupting one's seed" (*Responsa Yaskil Avdi*, 1939, vol.5, *Even Haezer*, 10).

In contrast to these negators, other decisors permit the husband to donate his sperm for this treatment which is not considered wasting seed. This is the approach of R. Aharon Walkin of Pinsk: "This is not considered spilling seed, because eventually the sperm is put into the uterus for the purpose of impregnating his wife. He is doing this in accordance with the command of the physicians and to fulfill a mitzvah" (*Responsa Zeqan Aharon*, 1951, vol. 2, *Even Haezer*, 97). Rabbi Isaac Jacob Weiss gave judgment that it is not just the deed which determines whether or not the treatment is permitted, but the man's *intention*. Therefore, he determined that when the husband intends to become a father, it is permitted for him to undergo the treatment "because his intention is to impregnate and therefore he

fulfills the *mitzvah* of propagation" (*Responsa Minhat Yitzhaq* vol. 1, 50). Another controversy arose concerning the period of time a couple must wait before trying A.I.H. Rabbi Shalom Mordecai Shwadron allowed the treatment only under the most stringent conditions: "I permit this only when the couple has waited ten years, she has not borne a child, and they are on the brink of divorce" (*Responsa Maharsham*, vol. 3, 268).

Rabbi Eliezer Judah Waldenburg, currently a member of the Rabbinic High Court in Jerusalem, claims that there are decisors who permit a woman to undergo this treatment in less than ten years on the condition that dependable physicians are convinced that it would be impossible for her to become pregnant from her husband in the natural way (*Responsa Tzitz Eliezer*, 1945, vol. 9, 51).

Although there is some controversy on the issue of artificial insemination from a husband in keeping with the pluralistic nature of the *halakhah*, the vast majority of respondents not only permit, but encourage A.I.H. in fulfillment of the *mitzvah* "be fruitful and multiply."

*Moshe Zemer, *Halakhah Shefuyah*, Tel Aviv, 1993, pp. 283-285.

SURROGATE MOTHER

Walter Jacob

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. (J.Z., New York City)

ANSWER: We must inquire about the *halakhah* 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 Deah* 195).

Here we have instances of conception through an unknown outside source, and this was not considered to cause any halakhic 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 (as Rachel) or reject (as Sarah) it. 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," W. Jacob, *American Reform Responsa,* #133). 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; *Nidah* 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 *qrayot* does not arise.

We should look at the halakhic 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 Haezer,* #19; Walkin, *Zekan Aharon, Even Haezer* 2, #97; Feinstein, *Igerot Mosheh, Even Haezer*, #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," W. Jacob, *American Reform Responsa,* #157), but Guttmann was cautious (W. Jacob, *American Reform Responsa,* #158).

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 *(ibid.*, #157-158), 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, *American Reform Responsa*, New York, 1983, #159.

PREDETERMINATION OF SEX

Israel Bettan

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 Hiya 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, while 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: *Ma yaesh adam veyihyu lo banim zeharim? Rabbi Eli-ezer omer: Yefazer meotav 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 assured. Thus, a Babylonian Amora of the third century, Rabbi Kattina, boldly asserted that he had mastered the art of coition which would yield him only male children *(Nidah* 31b, *Vehainu deamar Rav Katina: Yaholni laasot kol banai 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 rava 'harotzeh laasot banav zekharim, yivol veyishneh'"*).

Various other methods, we find, were suggested. Thus, Rabbi Isaac 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 tzafon ledarom, havyin leih banim zekharim.*").

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 meishto samuh levistah, havyin lo banim zekharim.*"). 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 *havdalah* ceremony will produce the same wished-for effect (*ibid.*, "*Kol hamavdil al hayayin bemotsaei Shabbat, havyin lo banim zecharim*").

There is also the citation of an anonymous authority, which would make the determination of the ex 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 *(Nidah* 70a, "Amar lahem: *Yisa isha hahogenet lo viykadesh atzmo bishat 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.

*Walter Jacob, *American Reform Responsa*, New York, 1983, #160.

BIRTH CONTROL

Jacob Z. Lauterbach

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, "*Hotsa-at shihvat 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" *(Yer., Hagiga* I.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 *agadah* 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 *halakhah*.

Secondly, it is absolutely wrong to consider cohabitation with one's wife under conditions which might result in procreation as an act of "*Hotsa-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 *halakhah* teaches about the various forms of birth control and ignore what the *agadah* 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 *akara*, sterile, or an *ailonit*, that is, a wombless woman (*Tosafot* and *Mordecai,* quoted by Isserles in *Shulhan Arukh, Even Haezer* 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 (*akara*) or an old woman (*zekena*) (Isaac b. Sheshet, quoted by Isserles, *op. cit.*, I.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 levatala*), 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 shihvat 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 *halakhah* - 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 *halakhah*, 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 keYochanan ben Dahavai, ela kol ma she-adam rotseh la-aso be-ishto, oseh'"*).

This *halakhah* of R. Johanan b. Nappaha, supported b the

decisions of Judah Hanasi and Abba Areka and reported in the Talmud *(ibid., l.c.)*, 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 Haezer* 25; and Isserles on *Shulhan Arukh, Even Haezer* 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: *"Delo chashuv kema-aseh er ve-onan, ela keshemitkaven lehashhit 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, *l.c.*).

From the fact that they permit *shelo kedarkah* even when it necessarily results in *hotsa-at shihvat zera levatala* we need not, however, necessarily conclude that these authorities would also permit such practices of *shelo kedarkah* as are performed *mimakoo aher* or *shelo bamakom zara* (see Rashi to *Yevamot* 34b, s.v. *shelo kedarkah*; 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 Luhot 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 hashulhan*, 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 mithapehet, kedei shelo tit-aber (Yevamot* 35a; also *Tur, Even Haezer* 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 aher*. 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 ve-arba-a hodesh dash mibifnim vezoreh mibahutz, divrei rav Eliezer. 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*]. 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 *Yahid verabim - halakhah 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-akhi*, 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 positioning 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 nahman: Shalosh nashim meshameshot bemokh - 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 ehad; pahot mikan veyoter al ken meshameshet kedarkah veholehet. Divrei rabbi me-ir. Vahakhamim omerim: Ahat zo ve-ahat zo meshameshet kedarkah veholecket, umin hashamayim yerahamu, mishum shene-emar Shomer peta-im Adonai.*

Before we proceed to interpret this *baraita,* we must ascertain the correct meaning of the phrase *Meshameshot bemokh*, 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 bemokh*. Likewise, according to Rashi, the use of other contraceptives on the part of the woman would be the same as *meshameshot bemokh*. 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 derekh tashmish bekhakh, vaharei hu metil zera al ha-etzim veha-avanim keshemetil al hamokh*") - 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 bemokh* means *mutarot leiten mokh be-oto makom, shelo yit-aberu*, that is, that in these three conditions women are allowed to use this contraceptive. This would imply that other women who do not expose themselves or their children to danger by another pregnancy are forbidden to do so. According to R. Tam (*Tosafot Ketubot* 39a, s.v. *shalosh nashim*), Asheri and R. Nissim (on Nedarim 35b) the phrase *meshameshot bemokh* means *tzerihot* or as R. Nissim puts it "*chayavot*," that is, that these three women - because of the danger of possible harm which might result from pregnancy - are *obliged* to use this precaution. If we interpret the phrase in this sense, it would imply that other women - not threatened by any danger from pregnancy - are merely not obliged to use this precaution against conception, but are not forbidden to do so. It would also follow from this interpretation that if the other teachers differ from R. Meir, they differ only in so far as they do not consider it *obligatory* upon these three women (or, to be more correct, upon the *ketana*) to take this precaution; but as to *permitting* these three women (or any other woman) to use a contraceptive, there is no difference of opinion between R. Meir and the other teachers. R. Solomon Luria (1510-1573), in his *Yam Shel Shelomo* to *Yevamot*, ch. I, no. 8 (Altona, 1739), pp. 4b,c has indeed so interpreted our baraita. He points out that from the Talmud (Nida 3a) it is evident that Rashi's interpretation of *meshameshot bemokh* as meaning "putting in the absorbent before cohabitation takes place," is correct. As to R. Tam's objection, Luria correctly states that such a practice is not to be compared to *metil al etzim.* For, after all, it is a normal manner of having sexual intercourse, and the two bodies derive pleasure from one another and experience gratification of their desire. It is, therefore, not different from any other normal sexual intercourse with a woman who is incapable of having children: *ve-ein zeh kemetil al etzim, desof sof derekh tashmish bekhakh, veguf neheneh min haguf.*

Luria further points out that since from Nida 3a it is also evident

that all women are permitted to use this contraceptive, the meaning of the phrase *meshameshot bemokh* in our baraita must therefore be that these three women *must* use this precaution - which implies that all other women may use it. From this, argues Luria, we must conclude that even if we should decide that the law (*halakhah*) follows the *Hakhamim* who differ from R. Meir, it would only mean that we would not make it obligatory for these three women to use this precaution. But these three women, like all other women, are permitted to use it if they so desire. This is in essence the opinion of Luria.

It seems to me that a correct analysis of the baraita will show that Luria did not go far enough in his conclusions, and that there is no difference of opinion 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. Comp. saying of Rabba b. Livai in *Yevamot* 12b and *Tosafot ad loc.*, s.v. *shema tit-aber*; also saying in *Yer., Pesahim,* 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 Luria correctly points out, that in all three cases we decide the *halakhah* according to the *Hakhamim* 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 to 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 (*haisha rashait 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 Luria (*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 Luria, 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 holekhin bederekh 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 *Shulhan Arukh, Even Haezer* 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 deems it advisable in his particular case not to have more than the two that the law commands him to have.

But even in the case of one who has not yet fulfilled the duty of propagation of the race (*mitzvat periya ureviya*) it might, under certain conditions, be permitted to practice birth control, if it is done not for selfish purposes but for the sake of some higher ideal or worthy moral purpose. For the rabbinic law permits a man to delay his marrying and having children or even to remain all his life unmarried (like Ben Azzai), if he is engaged in study and fears that having a family to take care of would interfere with his work and hinder in the pursuit of his studies (*Kiddushin* 29b; Maimonides, *Yad, Hil. Ishut*, XV.2-3; *Shulhan Arukh, Even Haezer*, I.3-4)

Since, as we have seen, the act of having intercourse with one's

wife in a manner not resulting in conception is in itself not against the law, there can be no difference between the failure to fulfill the commandment of propagation of the race by abstaining altogether from marriage and the failure to fulfill the commandment by practicing birth control. The considerations that permit the one permit also the other. It would even seem that the other - i.e., the practice of birth control - should be preferred to the one of total abstention. For. in granting permission to practice the latter, the Rabbis make the proviso that the man be so constituted, or so deeply engrossed in his work, as not to be troubled by his sexual desires or to be strong enough to withstand temptation (*vehu shelo yehe yitsro mitgaber alav*, Maimonides and *Shulhan Arukh*, l.c.). Now, if a man is so constituted that he is troubled by his desires and suffers from the lack of their gratification, and yet is engaged in some noble and moral pursuit (like the study of the Torah) which hinders him from taking on the responsibilities of a family, he may marry and avoid having children. He may say with Ben Azzai, "I am very much attached to my work and cannot afford to have a family to take care of. The propagation of the race can and will be carried on by others" (*efshar laolam sheyitkayem al yedei acherim, Yevamot* 36b; *Tosefta, ibid.*, VIII, end). For the Rabbis also teach that "it is better to marry," even if not for the sake of having children, than "to burn" with passion and ungratified desires. And, as we have seen above, the rabbinic law permits marriage even when it must result in failure to fulfill the commandment "Be fruitful and multiply," as when a young man marries an old or sterile woman. The Rabbis did not teach total abstention. They did not agree with Paul that "It is good for a man not to touch a woman" (I Corinthians VII:1). While the institution of marriage may have for its main purpose 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 not - God is with them and their home is a place for the *shekhina,* 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 il 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 *hotza-at shikhvat zera levatala.* They came to regard any discharge of semen which might have resulted in conception but did not, almost like *hotza-at shikhvat 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 Luria 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 *Hemdat Shelomo* (quoted in *Pithei Teshuvah to Even Haezer* 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 *hashatat 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 bemokh kedei shelo titaber*), 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. 51b-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 *Hatam Sofer* (Pressburg, 1860), *Yoreh Deah*, no. 172, pp. 67b-68a, likewise permits it only when used after cohabitation. R. Abraham Danzig in his *Hokhmat Adam* and *Binat Adam* (Warsaw, 1914), *Shaar 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 *Shoel 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-etzim veal haavanim.* 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 Luria 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 - *pikuah nefesh* or even *safeq pikuah 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 Luria) on our question.

*Walter Jacob, *American Reform Responsa*, New York, 1983, #156.

ABORTION

Solomon B. Freehof

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 to 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 *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 *Meirat Einayim* 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 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 Noach* is) if he destroys a fetus; nevertheless, continue the *Tosafot*, while it is 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 Haim Bachrach, of Worms, 17th century. In his responsum (*Havat Yair*, #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 (*Yaavetz* I, 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 (in *Mishpetei Uziel* III, 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 (lo 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 imperfect 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 Haim Bachrach.

*Walter Jacob, *American Reform Responsa*, New York, 1983, #171.

WHEN IS ABORTION PERMITTED?

Walter Jacob

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, NY)*

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, "Abortion" 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 (*Arackh*. 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 Yair*, #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, *Responsa 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 (*Mishpetei Uziel, Hoshen Mishpat*, #46). Uziel Weinberg permits it when rubella occurs in early pregnancy (*Seridei Esh* III, 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"(I. Y. Unterman, "*Be-inyan Piquah Nefesh Shel Ubar*", *Noam*, Vol. 6, pp. 1 ff). Others have followed this line of reasoning. Unterman, however, also reluctantly permits abortion under some circumstances (*Ibid. 52; Shevet Miyehudah*, I, 29).

In summary, we see that there are some who 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 life-threatening 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, *Havat 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 agreement with that liberal stance. We do not encourage abortion, nor favor it for trivial reasons, or sanction it "on demand."

*Walter Jacob, *Contemporary American Reform Responsa*, New York, 1987, #16.

THE ABORTION OF AN ANENCEPHALIC FETUS

Walter Jacob

QUESTION: Can an anencephalic fetus be aborted? (Rabbi Lane Steinger, Oak Park, MI)*

ANSWER: An anencephalic fetus may be aborted under certain circumstances. The principal consideration, however, should be the condition of the mother and any danger, psychological or physical, which this fetus may pose. Some mothers may opt to carry the fetus to full term as they may not feel that the diagnosis is absolutely reliable although it is generally considered so. Our feeling about when abortion is permitted is summarized in a fairly full responsum (W. Jacob, *Contemporary American Reform Responsa*, #16). We are willing to permit abortion in the first trimester along with traditional authorities and would permit it later for serious reasons.

If the fetus is brought to term it would be considered a person. This status is attained as soon as the child has left the womb (*M. Oholot* 7.6; *Shulhan Arukh, Hoshen Mishpat* 425.2; *Yad Hil. Rotzeah Ushemirat Hanefesh* 1.1). Such an infant possesses all the rights of a human being although its life span may be doubtful. That has been the traditional attitude toward all newborn infants.

An anencephalic infant cannot survive for long. After it is clinically dead, vital organs may be taken for transplantation provided, of course, that the parents agree to this and that the other legal procedures have been followed. The human dignity of this child must be preserved as of any other infant.

*Walter Jacob, *Questions and Reform Jewish Answers - New American Reform Responsa*, New York, 1992, #155.

ABORTION AND LIVE FETUS STUDY

Solomon B. Freehof

QUESTION: Since the Supreme Court recently made a decision with regard to abortion, and since, also, there is legislation pending on the question, the Central Conference is considering issuing a statement on this question, as other religious bodies have already done. Specifically, two questions need to be answered: Is there any relation between Jewish tradition on this question and the Supreme Court decision, which makes a distinction between the first three months of pregnancy, the second trimester and the third? Second, what is the attitude of Jewish tradition as to the rights of the fetus if it has been extracted from the womb in a living state? (Rabbi Paul Gorin, Canton, Ohio.)*

ANSWER: The question of abortion has been discussed twice before the Conference, once by Jacob Z. Lauterbach, and the second time by myself. Lauterbach's responsum is, I think, in the *Yearbook.* My responsum is in *Recent Reform Responsa,* #41. However, although the matter has already been discussed twice for the Conference, new social conditions have developed, and new governmental decisions have and will be issued. Therefore, there is some need for a rediscussion of the question.

As for the permissibility of abortion, the question revolves around the status of the unborn fetus. Is it a *person,* as, for example, the Catholic Church would insist, or is it just a part of the mother's body? The almost complete consensus of the classic Jewish tradition is that the unborn fetus is not a person *(nefesh).* This conclusion is based mainly upon two situations in the law. First, the law of Scripture (Exodus 21:22) that if a man strikes a pregnant woman and thus destroys the child, he must pay damages to the husband. But has he not killed the fetus? Is this not murder? How, then, can the law let him off merely with paying a fine? Clearly, then, the unborn child is not deemed to be a person (*nefesh).* This law is codified in *Shulhan Arukh, Hoshen Mishpat* 423; and in the classic commentary to *Hoshen Mishpat* 425, Joshua Falk, in his *Meiras Enayim* (end of his sec. 8), says

simply: "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 into the light of the world is not to be described as a *nefesh*."

The second basis for this principle in the law is based on the Mishnah, *Oholot* 7: 6, and codified in the *Shulhan Arukh, Hoshen Mishpat* 425:2, namely, that if the birth is difficult and the mother seems likely to die, one may destroy the child in order to save the mother. Of course, if the child puts out from the mother's body as much as its forehead, it is already a *nefesh*, and the law is that one may not set aside *(dohin)* one nefesh in favor of another.

Since, therefore, the child is not a *nefesh*, abortion becomes basically permissible. Of course one may not destroy the unborn child without adequate reason, such as the health of the mother. But just as the mother, to save her life, may, if need be, sacrifice a finger or an arm or a leg, so she may sacrifice the unborn fetus if her health requires it, since the fetus is called "the leg or the thigh of the mother" *(uber yerekh imo; Hullin* 58a)

The situation was summed up best by the late Sephardic Chief Rabbi of Israel, Ben Zion Uziel, in his *Mishp'tei Uziel,* III, 46 and 47. I quote his statement from *Recent Reform Responsa,* p. 193. Uziel concluded as follows: "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 Uziel reckons with the statement of the *Tosfot* to *Hullin* 33a that a Jew is not permitted (*lo shari)* to destroy a fetus, although such an act is not to be considered murder. He says that one may not destroy it. One may not destroy anything without a reason. 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 decided that since the fetus is not an independent *nefesh*, but is only a part of the mother, there is no sin in destroying it for her sake.

It must be stated that there are some authorities who are reluctant to permit abortion unless it is extremely necessary. This reluctance is due, often, to the fear that the operation itself might be harmful to the mother.

So far we have discussed the general question of abortion much as it has been discussed in the two previous responsa mentioned. Now, specifically, as to the relationship of Jewish tradition to the trimester rule set down by the Supreme Court of the United States, namely, that abortion should be most readily permitted in the first three months, less readily in the second three months, etc.:

Jewish tradition makes no time division within the period of the nine months of pregnancy, except for the following: The first forty days of pregnancy are deemed the least important. The fetus is considered hardly to have developed, to have any form at all. This is based upon the Mishnah in *Niddah,* 3: 7, namely, that a woman who has a miscarriage within the forty days of her pregnancy does not need the period of purification that is needed after the birth of a child. For the whole remainder of the period of pregnancy the child is still not a *nefesh,* even up to the time of giving birth. This can be seen from the fact that until the child actually puts out its forehead, it may still be destroyed to save the life of the mother.

The second question is with regard to whether scientific experiments may be made upon a fetus that is delivered from its mother's body alive. The status of the fetus *(nefel)* is discussed considerably in the law, but the discussion deals almost exclusively with the question of burial and mourning. Does this fetus need all the burial and mourning rites? The answer is no, as far as mourning is concerned, though burial is, of course, required when it dies. But while it is alive it certainly may not be put to death, as can be seen from the law that if it so much as puts its forehead out, then even if it endangers its mother's life at birth, we may not put it to death. How much the more must it be spared if it has not endangered its mother's life at its birth. Of

course there are ways of studying the fetus today, even while it is in the mother's womb. These studies, chemical and x ray, that do not hurt child or mother and can be of great benefit to both are permitted, but anything that would destroy the life of the fetus after it is born and is no longer a danger to the mother would, of course, be prohibited.

* Solomon B. Freehof, *Reform Responsa for Our Time*, Hebrew Union College Press, 1977, #55.

CAESAREAN ON A DEAD MOTHER

Solomon B. Freehof

QUESTION: A mother eight months pregnant has died. Does Jewish law permit a Caesarean to be performed on her body to save the child? Or, perhaps even more: Does Jewish tradition recommend or urge such an operation? (Asked by Dr Thomas H Redding through Rabbi Leonard S. Zoll, Cleveland, Ohio). *

ANSWER: The question of cutting open the body of a mother who has died in order to remove and thus save the child is discussed as far back as the Talmud itself in *Arakhin* 7a (cf. also *B.B.* 142b and *Niddah* 44a). The discussion is based upon the Mishanaic law dealing with a pregnant woman who is condemned to death. Do we delay execution of the sentence until she has given birth or not? In the development of that discussion, Rabbi Samuel (*Arakhin*) extends the discussion, Rabbi Samuel (*Arakhin*) extends the discussion from that of a convicted criminal to any woman who dies when she is near to giving birth ("a woman on the *mashber*, the birth-stool, who dies"). In such circumstances, Rabbi Samuel says that we may bring a knife even on the Sabbath (bringing a knife in the Sabbath is forbidden generally), and we may cut open her body to save the child. The discussion there in the Talmud involves the question of whether the child is alive or not and the opinion is expressed that generally the child dies immediately (or even before) the mother, and therefore the Sabbath would be violated (by bringing the instruments) in vain, since the child is already dead. But Rashi says: Even in the case of the "doubtful saving of life," we may violate the Sabbath; and therefore, on the chance that the child may be alive, we bring the knife and perform the operation.

It is exactly in this form that the law is recorded by the great legalist and physician, Moses Maimonides, in his *Hilhot Shabbat* 2.15. He says: We perform the Operation even on the Sabbath, for even when there is doubt whether we are saving a life, we may violate the Sabbath (cf. also *Tur*, *ibid.*, and Ephraim Margolis, *Yad Efrayim* to *Orah Hayim* 320).

A new ground for doubt arises, however, in the *Shulhan Arukh* (besides the doubt of violating the Sabbath in vain if the child is already dead). In *Orah Hayim* 330.4, Joseph Caro gives the law according to the Talmud and Maimonides; but Moses Isserles (Poland 16th century) says: We do not do this operation nowadays because we are no longer skilled in determining precisely whether the mother is dead or not; perhaps she is alive (that is, in coma) and may give birth to the child naturally. However, Isserles himself in his *Responsa* does not seem concerned with this doubt (that the mother may still be alive), and in his responsum #40 he answers in the affirmative--that is, that the operation should be performed.

As for the later authorities, they all are practically unanimous in favor of permitting the operation (even on the Sabbath), and certainly on weekdays). What concerns these later authorities is whether or not the permission to perform this operation after the mother is dead may not imply the larger permission for autopsy in general, which Jewish law forbids, except under special circumstances. Generally speaking, it is not permitted to mutilate (*lenavel*) the body of the dead. Therefore, in a discussion between Moses Schick of Ofen and Jacob Ettlinger of Hamburg (both in the first half of the 19th century), this matter is debated (see Responsa of Ettlinger, *Binyan Tziyon* 1.171). Moses Schick said in this discussion (in his *Responsa Yoreh De-a* 347) that we may mutilate the body of a woman to save her child, and Ettlinger says that this permission does not justify general mutilation (as in autopsy) because this operation (that is, the Caesarean) is not really a disfiguring of the body of the woman.

Moses Kunitz (of Budapest, d. 1837) gives almost the exact case discussed here in answer to a question asked of him by Abraham Oppenheimer. The woman was eight months pregnant when she died. A skilled doctor said that she is definitely dead and that the baby is alive. Accepting the opinion of the skilled physician, both doubts mentioned above are canceled. The woman is definitely dead, so the doubt mentioned by Issereles that we have not the skill to be sure when a person is dead is now obviated; and the physician says that the child is definitely alive, so the doubt discussed by Rashi and the Talmud that we may be violating the Sabbath (if

this occurred on the Sabbath) for an unnecessary purpose (since the child may be dead) is also obviated. Therefore, Moses Kunitz said that the physician should operate and does not even need to ask permission of the Jewish ecclesiastical court. Moses Kunitz here actually uses the word "Caesarean," and gives the origin of the term (namely, that Julius Caesar was born by such an operation).

Jacob Reischer, Rabbi of Metz two centuries ago, in his Responsa (*Shevut Ya-akov* 1.13, at the end), not only gives permission for such an operation but ends his responsum by saying that he who performs it *must* be praised for doing so and his reward will be great. See also Abraham of Buczacz (*Eshel Avraham* to *Orah Hayim* 330), who cites an authority who praises the physician for prompt action to save the child.

There is, of course, a possible complication somewhat related to this question. Since the child will die unless the operation is performed very quickly, I was asked a number of years ago by a physician whether--if the mother is not quite dead, but is definitely dying (for example, of cancer)--we may not make sure to save the child by performing the operation before the mother is dead, although it is certain that the operation itself will definitely put an end to the mother's life. See the discussion of this special question in *Reform Responsa*, pp. 214ff.

But this is a special form of the question and does not apply directly here, where the physician assures us that the mother is dead. See further discussion of the matter in Eliezer Spiro (*der Muncaczer*) in his *Minchat Eli-ezer* IV.28, and Greenwald in *Kol Bo Al Avelut*, p. 49, section 18, and pp. 43ff.

To sum up: if it is certain that the mother is dead and that the child is alive, there is no question that the Caesarean operation not only may be performed, but must be performed, and is indeed deemed praiseworthy.

*Walter Jacob, *American Reform Responsa*, #80, New York 1983

FETUS USED FOR EXPERIMENTATION

Walter Jacob

QUESTION: Under what circumstances, if any, would it be permissible to conduct medical research involving an aborted fetus? A member of a congregation is doing research in Alzheimer's Disease which requires live brain tissue otherwise unavailable. (Rabbi H. Jaffe, Minneapolis, MN)

ANSWER: Jewish tradition looks upon the fetus in a manner similar to that of a severed limb. In other words, it has some special status and is considered part of a human being, but it does not possess a soul of its own and is not considered a separate human being in its own right until it has reached a certain age. Even then there is some disagreement. A fetus, therefore, needs to be treated with reverence, but not in the same manner as a deceased person.

A fetus which is less than forty days old does not possess human status (Shab. 135b; Solomon Skola, *Bet Shelomo Hoshen Mishpat* #139). Even when the fetus is older than forty days, it is not considered as a living soul by most traditional authorities *(San.* 72b; Rashi to *San.* 72b; Joshua Falk, *Meirat Enayim* to *Shulhan Arukh Hoshen Mishpat* 425; Ben Zion Uziel, *Mishpetei Uziel*, III, #46, 47). There is, therefore, no formal obligation to bury the fetus. It is treated as a severed limb. In Talmudic times, limbs and organs severed from the human body, and fetuses, were disposed of informally and needed no formal burial (*Ket.* 20b; *Tur Yoreh Deah* 266; *Shulhan Arukh Yoreh Deah* 266). A few recent authorities disagree and feel that a fetus must be buried (David Cohn, *Kol Torah Adar, Sivan,* 5730). Moses Feinstein *(Igrot Mosheh Yoreh Deah* I #231) also stipulates that all segments of the body must be buried as a matter of law.

Severed limbs and fetuses are generally buried for two reasons; first in order to assure their dignified disposal as a part of a human body, and second, in order to prevent the ritual uncleanliness of priests who might come in contact with them *(Yad Hil. Tumat Okhlin* 16.8; *Shevut Yaaqov,* II, #10; *Ket.* 20b).

As there is no mandate to bury a fetus, and as it has not been

viewed as a human being with its own soul, there is no objection to its use for medical experimentation. This has been the general view expressed by some traditional authorities *(Noda Biyehudah* II *Yoreh Deah* #209; Eliezer Waldenberg, *Tzitz Eliezer,* X, #25, Chapt. 8).

We should mention one additional negative argument which might be raised, i.e., not benefiting from the dead *(asur behana-ah*). This, however, is not involved in our case, as this referred only to a deceased "person," a status which the fetus has not attained *(Shulhan Arukh Yoreh Deah* 364.1). The experimentation, which this scientist intends to conduct is, therefore, in keeping with Jewish tradition as well as with our interpretation of it.

*Walter Jacob, *Contemporary American Reform Responsa*, New York, 1987, #21.

FETUS KEPT ALIVE AS A SOURCE FOR ORGANS

Walter Jacob

QUESTION: When an infant possesses only a brain stem and no other functionary brain, may it be kept alive by machines, etc., as a source for future organ transplants? (Walter Jaslow, Beechwood, OH)*

ANSWER: A fetus which possesses life of its own is considered a human being; that status is reached as soon as the child has been born or a major part off it has left the womb *(M. Oholot* 7:6; *Shulhan Arukh Hoshen Mishpat* 425.2; *Yad Hil. Rotzeah Ushemirat Hanefesh* 1.1). This child, therefore, possesses all the rights of any human being. In this instance it is clear that the child can not survive without artificial means and can never have any independent life as it lacks vital organs. We should, therefore, permit the child to die peacefully and possibly allow the machinery to maintain normal bodily functions for a short period necessary to transfer the organs, which will be transplanted and used to help others. Such a short period of artificial life will not impinge upon the human dignity of this infant nor will it cause undue additional suffering to the mourning parents. It would be inappropriate to keep this infant alive for a longer period of time.

*Walter Jacob, *Questions and Reform JewishAnswers - New American Reform Responsa*, New York, 1992, #163.

BURIAL OF MISCARRIAGES, STILLBORN AND INFANTS

Walter Jacob

QUESTION: What is the traditional approach to burial for miscarriages,stillborn children and infants who die shortly after birth? What burial procedure and mourning customs are appropriate in the Reform Movement in this matter? (Rabbi R. J . Orkand, Westport, CT)*

ANSWER: Jewish law is quite clear on the status of an infant who dies before reaching the age of thirty days. After that time, formal burial is required; before that time it is not. The child who dies before that time is considered a *nefel* and for such a child (strictly speaking considered stillborn if he does not survive thirty days), no burial and no mourning rites are required (Ket. 20b; Shab. 135b; *Evel Rabati* l; *Shulhan Arukh* Yoreh Deah 266; Ettlinger, *Binyan Zion* #133; Jacob Reischer, *Shevut Yaaqov* Vol. II, #10). A further statement by the *Shulhan Arukh* gives us some idea of the attitude to the death of children in our tradition. The question asked whether a eulogy (*hesped*) can be given for a young child, and the conclusion is for the children of the poor it may be done from age of five and onward, and for the children of the rich, six and onward (M. K. 24b; *Shulhan Arukh* 344.4). All of this indicates that relatively little was made of infant deaths or abortions. They occurred frequently and the communities would have been in a constant state of mourning if rites had been required.

A *nefel* was, therefore, treated in the same way as amputated limbs and buried in the general section of the cemetery (Ket. 20.b) . This was done to avoid ritual uncleanliness for the priests (M. Edut 6.3; *Yad* Hil. Tumat Hamet 2.3; *Pahad Yitzhaq*, Ever). Strictly speaking, it was not necessary to bury amputated limbs (Jacob Reischer, *Shevut Yaaqov* II, #10; Ezekiel Landau, *Noda Biyehudah* II, *Shulhan Arukh* Yoreh Deah #209; J. Greenwald *Kol Bo Al Avelut*, p. 184).

In our time, matters have, however, changed and most families have very few children, so all the events in a child's life have become

significant and magnified. That, of course, includes the tragic death of a young child, a stillbirth, or miscarriage. We would, therefore, suggest that there be a simple burial of a stillborn infant or a child who dies at an early age. This will provide a way for the family to overcome its grief. A miscarriage may, however, be disposed of by the hospital or clinic in accordance with its usual procedures. No burial is necessary but it is also not prohibited; we would suggest it for infants and possibly for stillbirths.

*Walter Jacob, *Contemporary American Reform Responsa*, #106, New York, 1987

HYSTERECTOMY

Solomon B. Freehof

QUESTION: A young woman has had a hysterectomy and cannot bear children. Her husband refuses to have intercourse with her because this would be "spilling seed," prohibited in the Torah. Can this actually be justified within *halakhah?* (Rabbi Daniel Syme, New York.)*

ANSWER: The young man is entirely mistaken as to the law in this matter. First of all, while the general purpose of marriage is to have children, nevertheless it is no longer prohibited to a man to marry a woman who cannot have children. See the clear statement of Isserles in *Even Haezer* 1:3. Now it would stand to reason that if a man may marry a barren woman, it is understood that he would have intercourse with her, and that the intercourse in which the seed will be unproductive cannot be deemed sinful.

But we do not need to rely upon this inference, logical as it is. There is a clear statement in the law, first found in the *Mordecai #3* to the sixth chapter of *Yevamot,* and stated with unmistakable clarity in the *Shulhan Arukh*, in the section of "spilling of seed" (*Even Haezer* 23:5), as follows: It is permitted to have intercourse with a woman who cannot bear children (and it is not considered wasting seed) since the intercourse is conducted in the normal way. As long as the intercourse is normal, and there is no artificial barrier inserted into the womb before intercourse, there is no committing of the sin of "seed spilling."

There can be no doubt that the opinion of Isserles in *Even Haezer* 23:5, which we have cited, applies clearly in the case of hysterectomy. This is confirmed by the chief Orthodox authority in America today, Moses Feinstein (in his responsa *Igrot Mosheh, Even Haezer #3).* Rabbi Feinstein had received a request from a Chicago rabbi to endorse a permission by the Jewish court *(maaseh bet din)* allowing a certain man to marry another wife (without a *get* to his present wife). Rabbi Feinstein endorses the document for one of the various reasons given but rejects two of the reasons as irrelevant or

invalid. One of the reasons which he rejects is that the wife has had a hysterectomy. Feinstein declares that this fact is no reason to void the marriage; and he cites precisely what we, have cited from *Even Haezer* 23: 5 as proof that a man may continue to have sexual intercourse with his wife even after she has had a hysterectomy.

I cite Moses Feinstein not only because he is a prime Orthodox authority and has applied, as I did, the permission in *Even Haezer* 23:5 to hysterectomies, but because he also gives two strong Talmudic proofs of the permission to remain married and have intercourse with a woman who has had a hysterectomy. His two proofs are as follows: The first is from the Talmud in *Yevamot* 42b. There the discussion is over the rule that a woman must wait three months after being divorced or widowed from one husband before she may marry a second. The purpose of this three-month wait is to distinguish *(havhana)* between a child of the first husband and a child of the second - in other words, to make sure of the paternity of the child. If she had waited only two months and given birth seven months after her second marriage, it would be uncertain whether the child is a nine-month infant from the previous husband or a seven-month baby of her second husband. Therefore she must wait three months between the two marriages. The discussion in the Talmud is whether or not she needs to wait the three months if she is barren. Rashi explains the word "barren" here as meaning if she has had a hysterectomy. Thus it is clear that a woman who has had a hysterectomy may (or may not) have to wait three months, but in either case, she may be married and live a normal sexual life.

The second proof cited by Moses Feinstein is also from Rashi. It is in *Ketubot* 60b. There the discussion is about the rule that a woman who is nursing a child may not remarry for twenty-four months (the period of lactation). Then a similar debate arises in the Talmud as in *Yevamot,* whether a woman who is barren must wait the twenty-four months. Rashi, evidently facing the unasked question as to how a woman who is barren can have a child and now be nursing him, explains the word "barren" as meaning that she had hysterectomy. Therefore, whether or not she has to wait the twenty-four months, she may be married and live a normal life. Thus Rashi to the Talmud

makes it clear that a hysterectomy must not prevent normal sexual relationships because in Jewish law a wife has the *right* not to be ignored in this regard.

Let me explain further the statement above that as long as the intercourse is normal, and there is no artificial barrier inserted into the womb before intercourse, there is no committing of the sin of "seed spilling." Even the rule in *this* matter offers some additional support to our conclusion with regard to a hysterectomy. Normally the law would prohibit the insertion of an obstacle (such as a diaphragm) before intercourse because that would result in what would be deemed "spilling the seed." But the law cited in a number of places (especially in *Yevamot* 12b) is that three classes of women - a minor, a nursing mother, and a woman already pregnant - *may* insert such obstacles before intercourse. In fact, Rabbenu Tam goes further than Rashi and says that these three women not only may use the obstacle, they *should* do so (cf. *Tosfot* ad loc.). So it is evident that there are many cases in which, during normal intercourse, the so-called spilling of seed is ignored. This applies clearly in a case of hysterectomy.

*Solomon B. Freehof, *Reform Responsa for Our Time*, Hebrew Union College Press, 1977, #45.

VASECTOMY

Walter Jacob

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, MA)*

ANSWER: As you have stated, the *halakhah* prohibits sterilization based upon the verse in Leviticus (22.24), which 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).

While 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 which are safe and which are sanctioned by us and also by the more liberal Orthodox authorities.

*Walter Jacob, *Contemporary American Reform Responsa*, New York, 1987, #198.