



# BIO-ETHICS

PROGRAM/CASE STUDY

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*Program Guide I*

*A Time To Be Born*

*Fall, 1988*

*Developed by*

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## Foreword

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Dear Friends:

The complex challenges brought on by advances in medical technology have become an ongoing fact of life. Regularly, we are confronted with an expanding array of breakthroughs which impact upon us by creating opportunities for the enhancement of life; and greater dilemmas covering the variety of choices emerging from those same breakthroughs.

At the 1987 UAHC Biennial Convention in Chicago, a sub-committee of the Union's Caring Community Committee was created with the purpose of examining these new medical-ethical issues from the vantage point of Reform Judaism. The Committee on Bio-Ethics decided that one meaningful method of examining the material would be to provide congregations, several times a year, a case-study. The educational program packet would contain an actual case supplemented with representative approaches drawn from our tradition, and a programmatic application for congregational use.

We are please to present the first Bio-Ethics program packet. The case deals with Steve and Debra and their choices regarding having an additional child. The case was developed by Dr. George Honig, Head of Pediatrics at the University of Illinois, College of Medicine at Chicago, and formed the heart of the committee's initial workshop presentation at the Chicago convention.

The committee is in the process of developing a file on cases. We encourage rabbis and health professionals to submit appropriate materials. We request that you limit the case to one page and include the key ethical issues that were faced and the resolution of these issues. Your own understanding of why choices were made would be appreciated. Additional scholarly opinion will be solicited from current and past members of the CCAR Committee on Responsa.

Please send any case study material to me at the address below.

B'Shalom,

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## What this Program Packet Contains

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This packet is organized around a specific case study. The case is broken into three separate components. After each section of the case, you will find a selection of Responsa literature drawn from the body of Reform Jewish Responsa<sup>1</sup> that apply to points raised within the appropriate section. In addition, there is a discussion starter question that can serve, if desired, as the opening to a discussion group based upon the specific section.

These three sections can serve as three separate programs or one larger one, as was done at the National Biennial. Following the case study there will be a sample bibliography that lists a variety of Jewish and general references in case you wish to begin building up your congregation's library. In addition, it is suggested that you contact the appropriate medical and health care professionals in your congregation and community to consult on the application of the case to your congregation's program.

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<sup>1</sup> *Responsa* and *Resolutions* reprinted with the permission of the Central Conference of American Rabbis.

## ***Suggested Ways of Making Use of the Program Packet***

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- I. The Goals of the Program:
  - a. To raise issues of emerging medical technology and their application and relevance to Jewish tradition.
  - b. To educate people as to how Jewish tradition has responded to the issues raised.
  - c. To educate people regarding ways Jewish ethics can serve as a guide to making decisions in the areas of emerging medical technology.
  - d. To raise additional questions as to the impact of technology on Mitzvot and Jewish life.
  - e. To stimulate the desire for additional congregational programming.
- II. Suggested Format:
  - a. Set up room with round tables and seat the group around these tables.
  - b. A podium may be set up where the program leader can introduce the sections of the case and, if desired, comments on the medical and Jewish aspects of the case can be made by appropriate individuals.
  - c. Each table is assigned a discussion leader who would be briefed on the material well before the program. On each table are envelopes filled with the case and Responsa material, one for each participant.
  - d. After appropriate introductions, program leader reads part one of the case describing the medical material as needed. At the conclusion of this introduction the program leader asks the group to open their envelopes for part one. The discussion leader then reviews the case and goes over the Responsa material summarizing the main points made by the Responsa. The option now exists to open the discussion with the discussion starter question if no one from the group begins.
    - Prior to the program, if you follow this format, the discussion leaders should meet with the rabbi and program leader to gain an understanding of the Responsa as well as medical material.
  - e. After 20 or 30 minutes of discussion, program leader moves on to part two of the case. The same format is followed for part three.
  - f. Following the conclusion of part three summary of choices that were discussed are reviewed from both the Jewish and medical point of view.
- III. Programmatic Application:
  - a. Depending on the congregation, resources, etc., the above program can be broken into three separate events. This may be more desirable if time is a factor. Ideally, this would be one longer program of at least two hours in length.
  - b. Proper preparation of the discussion leaders is essential as is the desire to involve medical and other health care professionals in the planning and execution of the program.
  - c. The program can easily be used with all types of adult education as well as confirmation type programs. It could obviously be expanded into a camp program during a retreat setting or, given proper development, modified for use at one of our summer camps.

## Case Study I

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Debra and Steven S. have been married for 12 years. Both of them have full-time, demanding occupations—Debra as a corporate attorney, and Steven as a chemical engineer. Debra is 37 years old and Steven is 38. The couple very much want another child, but Debra has had difficulty becoming pregnant, and has had three miscarriages. Scott, their first child, was born after five years of marriage. He was small and frail at birth, and required hospitalization with intensive care for the first six weeks of his life because of complications of a severe congenital heart defect. Scott was hospitalized four additional times during his first year, and during this period needed to have two cardiac catheterizations and two heart surgery procedures to improve the blood flow to his heart and lungs. When he was three years old, surgery was undertaken to correct his cardiac defect, but tragically, he died during the surgery. Sara, who was born when Scott was 2, is a normal, healthy child.

The couple consulted a clinical geneticist, and were told that Scott's conditions probably represented a recessive genetic trait. If this interpretation is correct, both Debra and Steven are genetic carriers of the disorder, and each subsequent pregnancy would carry a 1 in 4 risk of the fetus being affected. Among the options that they considered are: a) having no further children; b) adoption; c) having further children of their own and assuming the risk of having another affected child; d) having prenatal testing with the option of abortion if the fetus is affected; e) artificial insemination using semen from an unrelated donor; and f) other possible options such as employing a surrogate mother.

**Question:** To what extent should Reform Judaism sanction the use of technology in order to fulfill the commandment, "*Be Fruitful and Multiply*"?

## **Adoption and Adopted Children**

American Reform Responsa<sup>2</sup>

Central Conference of American Rabbis

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**QUESTION:** What is the status of adoption and adopted children in Judaism? What steps are necessary for a conversion if such children are Gentile? If the children are converted, should they bear the name *ben Abraham* or *bat Sarah*? Should there be a special ritual for adoptions either for the naming of such children or for bringing these children into the covenant of Judaism? (Rabbi Michael M. Remson, Family Life Committee)

**ANSWER:** There is nothing in the legal section of the Talmud about adoption, although the Talmud does present agadot which discuss the status of Moses's relationship to Pharaoh's daughter and Naomi's to her grandchild (*Talmud*, Meg. 13a and San. 19b). These discussions led to the statement, "Whoever rears an orphan in his house is considered as if he had begotten that child." In addition, on the same page we find the statement, "He who teaches his neighbor's son Torah, is as if he had begotten him." Exodus Rabba 45 interpreted the verse of Isaiah 64:8, "You, O God, are our Father," as meaning that "Anyone who raised a child is called father, not the one who has begotten it." These are not halachic statements, but they indicate a climate of opinion which definitely favored adoption.

The problem with adoption is knowing the biological background of the adoptive child. If there is conclusive evidence that the child was the offspring of parents who could, under Jewish law, have contracted a lawful marriage, then the child is deemed Jewish and there is no bar to adoption or any later participation in Jewish life, except that the child could not share in the traditional privileges of the Aaronite priesthood. Further, if the child is the child of a Jewish mother and a non-Jewish father, no bar to the adoption in terms of Jewish status of the child obtains. Even if the child were a foundling (an extremely rare situation) and the circumstances of the discovery point to a desire on the part of the natural parent(s) to insure that the baby would be found and taken in by a family to be raised, the Jewish presumption is that such a child is rightfully to be considered Jewish.

Situations of doubt have always been rare, as Jewish law did everything possible to avoid them. For example, in the case of an unmarried Jewish mother, her statement about paternity was accepted; if she could not establish paternity, then the child was presumed kosher (*Mishna*, Kid. 4:2; *Talmud*, Kid. 73a; *Yad. Hil. Isurei Bi-a* 15.30, 31; *Shulchan Aruch*, Even Ha-ezer 4.30, 32). The sources make a distinction between two categories of children of whom nothing was known: Shetuki--children about whose paternity the mother was unwilling to say anything, and Asufi--foundlings with nothing known about mother or father. Some doubt was expressed about the acceptability of foundlings as suspicion of Mamzerot (a child born of an adulterous or incestuous relationship) existed, but the Talmud (Kid. 73a) surrounded this category with so many hedges that it would fall into the former category.

A considerable amount of modern discussion of these matters has been undertaken by Ezekiel Landau (*Noda BiYehuda*, Vol. I, Even Ha-ezer #7), and Benjamin Weiss (*Even Yakara* 2.5). Both of these individuals discussed whether children with an unmarried Jewish mother and with doubtful paternity could be accepted. They concluded that the children were welcome even if the father was not Jewish. We can see from both ancient and more recent authorities that the main obstacle standing in the way of possible objection of Jewish children was successfully removed. Once they had entered

the household, they were to be considered completely like children of the house and in no way different from natural children. This is in accordance with the Agadic statement previously mentioned, and which was re-emphasized by Meir in Responsum #242, in which he dealt with a question about a note (shetar) and an adopted orphan raised in the household. The orphan was considered legally part of the household. This thought was then embodied in the Jewish legal tradition (Isserles to *Shulchan Aruch*, Chosen Mishpat 42:15). It is reasonable today to rely on reputable adoption agents of agencies that should be in a position to provide information on the adoptive child's origin, not necessarily with specific names, etc., but with an accurate statement on the background of the anonymous (to the adoptive parents) natural parents.

If a child beyond the age of infancy is adopted--as, for instance, in the case of a stepfather adopting the child of his wife, where the child was born to the wife's first marriage--there is no problem whatsoever in clarifying the child's origins. If a couple adopts an older child who may remember a mother or a father, there is an obligation on the part of the adoptive parents to find out the child's origins in order to be forewarned of any possible problem in the child's future full participation in Jewish life, particularly in the area of marriage. All adopted children should be told at an appropriate time that they have been adopted.

Lastly, a child who is definitely non-Jewish may, indeed, be adopted and converted. There is no question at all about the acceptability of non-Jewish children as candidates for adoption. Their background does not matter; even people once prohibited entry into the family of Israel, such as the Ammonites, Moabites, etc., (*Deut.* 23:4), were no longer forbidden by Mishnaic times (*Tosefta*, Kid. 5.9; *Yad*, Isurei Bi-a 12.25). It should be pointed out that such conversion, while full and complete ritually and legally, obligates the adoptive parents to provide Jewish training, etc., for the child. When the child reaches the age of Bar (Bat) Mitzvah, there is a traditional mechanism by which the converted child could reject Judaism without prejudice (*Sh.A.*, Yoreh De-a 268.7). In earlier days, a formal process of rejection was required because of the rigidity of Jewish-Gentile relationships. Nowadays, no such rejection mechanism is necessary, because belonging to the Jewish people and faith are essentially voluntary. It is important, however, that the adopted child be informed at an opportune time that he/she was adopted. In other words, the Jewishness of the child matures along with the child himself. Theoretically, the child could reject Judaism upon becoming an adult, but that matter is moot for us, and the conversion matures along with the child and becomes irrevocable. This places a special duty upon adoptive parents to see to it that an adopted child receives an adequate Jewish education so that the child's sense of being Jewish would not ever come into question.

It is clear that nothing formal should be done in this regard until permanent jurisdiction over the child has been obtained. This is proper from two points of view; first of all, it would be morally wrong, and probably illegal, to convert a child to Judaism as long as the possibility of having to return it to its non-Jewish parents remains; if that should occur, the child would be raised as a non-Jew. Secondly, it avoids the problem of public embarrassment if a child so placed has to be returned to its natural parent(s). Although this situation rarely arises, it does occur, and that painful experience should not be aggravated.

When such a child has been legally adopted, then he or she should be named in the synagogue. The name to be provided would be ben- or bat-, and then the name of the adopting parents. Thenceforth, those parents are fully his/her parents and that should be indicated through the name. This should be stressed rather than the fact of conversion. The designations *ben Avraham* or *bat Sarah* were created for the purpose of providing a full name to individuals whose parents remained non-Jews. They also helped the convert, as this was a constant reminder of conversion to Judaism from another religion. In our case, both adoptive parents are Jewish and the child has never known any other religion, so it needs no reminder nor a special parental name (Moshe Feinstein, *Igerot Mosheh*, Yoreh De-a 161). Linking the Hebrew name of the child with his/her parents will provide an



additional firm bond between them, which may be of special significance during the teenage years when this child will become Bar or Bat Mitzvah and question his or her real origin.

The naming of such a child should occur in the same manner as with any other child. This procedure should also be followed if the adopted child is older and may be capable of understanding the process. In most Reform congregations this would be considered sufficient ritual conversion for girls and also for a large number of boys. This act, along with Jewish education, would bring the child into the covenant of Judaism in the same manner as any natural child.

In the case of boys who are not circumcised, there should be a circumcision done precisely in the same manner with the same ritual as a circumcision for natural children. It would, of course, usually occur at a more advanced age. If a child was already circumcised, some parents may want to undertake *tipat dam*, but that remains optional. In addition, some more traditional parents may also want to have the adopted boy or girl undergo *Tevila*. It is quite clear from tradition that if such a child at any later time undergoes *Tevila*, even though not specifically for the purpose of conversion, it would be considered the same as if he had undergone it for that purpose (*Shulchan Aruch*, Yoreh De-a, 268.3). The Talmud debated the need for both circumcision and ritual bath. R. Eliezer (*Talmud*, Yev. 46a) indicated that a proselyte who was circumcised and did not take the ritual bath, was considered fully Jewish. The decision went against him. Both Orthodox and Conservative rabbis in our day require it. A good case for having *Tevila* optional can be made. *Tevila* should, therefore, be considered optional, as it is with adult converts nowadays. In some cities *Tevila* has become frequent; in many other cities it is not practiced at all.

Finally, let us turn to the possibility of a new ritual for adoption. When an adopted child enters the family, the parents will probably feel quite at ease with that child and will, from the beginning, be able to treat it as if it were a natural child. Such an attitude will develop only slowly among grandparents and other relatives, who must be shown that this child is to be considered the complete equal of a natural child. For this reason, all procedures should follow the pattern taken with natural children. This will help the acceptance of such adopted children. For this reason, we would not favor adding any new ritual for adopted children. They should be treated like any other child in every way, be brought up into to covenant, and raised as Jewish children.

Walter Jacob, Chairman  
Stephen M. Passamaneck  
W. Gunther Plaut  
Harry A. Roth  
Rav. A. Soloff  
Bernard Zlotowitz

See Also:

S.B. Freehof, "Baptism of Child Before Adoption by Jewish Couple," *Recent Reform Responsa*, pp. 97ff; "Adoption of Children of Mixed Race," *Current Reform Responsa*, pp. 196ff; "Adoption by Cohanim," *Contemporary Reform Responsa*, pp. 145ff.

## 157 Artificial Insemination<sup>3</sup>

Solomon B. Freehof

American Reform Responsa

Central Conference of American Rabbis

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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 be-ambatei") (cf. B., Chagiga 15a, top).

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

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

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

5. In modern times, since the development of the technique of artificial insemination, the subject has been discussed by Chayim Fischel Epstein in his *Teshuva Shelema* (Even Ha-ezer, #4), and by Ben Zion Uziel of Tel Aviv, the chief Sephardic rabbi of Palestine, in his *Mishpetei Uziel*, part II, Even Ha-ezer, section 19.

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

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<sup>3</sup> Vol. LXII, 1952, #157, pp. 123-125

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.

Solomon B. Freehof

## 158 Artificial Insemination<sup>4</sup>

Alexander Guttman

American Reform Responsa

Central Conference of American Rabbis

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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, preplanned. The physician performs it upon request by the parents, applying either the husband's sperm or that of a stranger. In the latter case, the identity of the donor must not be revealed to the parents (nor to the resulting child, of course).

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

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

1. In Talmud Bavli (Chagiga 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, "*Isha bivtuleiha*"). Subsequently, (14b-15a) the possibilities of a virgin's becoming pregnant are discussed. One of the possibilities suggested is that she was impregnated in a bath (from seed deposited there by a man).

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

2. *Chelkat Mechokek* (Moses ben Isaac Jehudah Lima) on *Shulchan Aruch*, Even Ha-ezer 1, note 8, raises the question (in connection with the *Mamzer*) whether the father fulfilled the commandment of *Periya Ureviya* (procreation) if his wife was impregnated in the bath, and whether the resulting child is his child in every respect. Instead of giving a clear answer, *Chelkat Mechokek* cites an incident from *Likutei Maharil*. According to this incident, Ben Sira was the result of a bath insemination (yet no blemish is attached to him).

3. *Beit Shemu-el* (Samuel ben Uri Phoebus), *ibid.*, note 10, cites *Chelkat Mechokek's* question and answers it by referring in brief to *Hagahot Semak*, a note by Perez (ben Elijah) on *Semak* (Isaac ben Joseph of Corbeil). This note is related fully in *Bach* (Joel Sirkes) on *Tur*, Yoreh De-a 195, and tells us the following: A menstruous woman may lie on the sheet of her husband but not on that of a stranger lest she become pregnant from the seed of a stranger

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<sup>4</sup> Vol. LXII, 1952, #158, pp. 125-128.

(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 Shemu-el* concludes from this note that the child resulting from such an insemination is that of the emitter of the seed in every respect.

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

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

What *Mishneh Lamelech* clarifies is that accidental insemination in a bath or on a sheet (i.e., without direct contact with a man) cannot be considered as adultery, which would make her prohibited to her husband (rape of a Kohen's wife would have the same result). For our problem, this does not reveal any clue, since we are not trying to solve the question of accidental insemination. Planned artificial insemination involves some problems which do not exist at all with regard to accidental insemination. One of these problems is whether or not the emitting of seed for artificial insemination would be *Hotsa-at zera 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 Uzi-el* (Tel Aviv, 1938), part II, Even Ha-ezer Responsum 19, pp. 46-69, by Ben Zion Uziel. Uziel equates, basically, artificial insemination with accidental (bath, sheet) insemination. But, as to the emitting of seed for bath or artificial insemination, he can see no way whatever for permitting it. Uziel's concluding words are that the matter belongs to the category of the Halachot which bear the designation "*Halacha ve-ein morin kach*," i.e., Halacha which must not be translated into practice (cf. Michael Guttmann, *Zur Einleitung in die Halacha II*, p. 91).

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

Epstein's argument as to the necessity of limiting of the concept *Hotsa-at zera 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.

See also:

S.B. Freehof, "Artificial Insemination," *Reform Responsa*, pp. 212ff.

## 18 Test Tube Baby

Walter Jacob

Contemporary American Reform Responsa

August 1978

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**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 15.15; *Shulchan 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 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 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.

## 19 *In Vitro* Fertilization With Cousin's Ova

Contemporary American Reform Responsa

November 1986

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**QUESTION:** A couple is unable to have children. The wife's 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 offspring 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 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 counseling 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. Ye. 6.6; Nidda 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.

November 1986



## 159 Surrogate Mother<sup>5</sup>

American Reform Responsa

Central Conference of American Rabbis

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**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 Halacha and the use of surrogate mothers, as well as the status of the child. The Talmud and later Rabbinic literature seem to have dealt with a subject akin to the question of a surrogate mother when they discussed pregnancies which were not caused by intercourse. The Rabbis felt that a girl could conceive by taking a bath in water into which male semen has been discharged (Chag. 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, *Aruch Laner* to Yev. 12b). The medieval author *Hagshot Semak*, Perez ben Elijah of Corbeil, felt that a woman should be careful and not lie upon linen on which a man had slept so that she might not become impregnated by his sperm (Joel Sirkes to *Tur*, Yoreh De-a 195).

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

A Biblical parallel seems to exist in the tales of the Patriarchs (*birkayim*, Gen. 30:3, 50:23) as Hagar was given to Abraham by Sarah so that there would be a child. Similarly, Rachel gave Bilhah to Jacob. In both instances the primary wife reckoned the child as her own and was able to accept (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 situation of a concubine, whether of a temporary or permanent nature (see the responsum "Concubinage," 133 above). These women bore the children of a man who usually was already married to another woman as his primary wife, but the concubines raised the children themselves.

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

We would, therefore, have to treat the use of a surrogate mother as a new medical way of relieving the childlessness of a couple and enabling them to fulfill the *mitzvah* of procreation. It should cause us no more problems than modern adoptions which occur frequently. There, too, the arrangement to adopt is often made far in advance of birth, with the complete consent of one or both biological parents. Here we have the additional psychological advantage of the couple knowing that

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part of the genetic background of the child which they will raise as their own. This may prove helpful to the adoptive parents and, at a later stage, to the child.

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

We should look at the halachic view of artificial insemination with a mixture of sperm as is common practice. The majority of the traditional authorities consider such children legitimate (Nathanson, *Sho-el Umeshiv*, part 3, vol. 3, #132; Uziel, *Mishpetei Uziel*, Even Ha-ezer, #19; Walkin, *Zekan Aharon*, Even Ha-ezer #2, #97; Feinstein, *Igerot Mosheh*, Even Ha-ezer #10). Waldenberg (*Tsits Eliezer*, vol. 9, no. 51.4) considered such children to be *Mamzerim*. Additional discussion of the different authorities may be found in vol. 1 of *Noam* (1958). S.B. Freehof also considered them legitimate ("Artificial Insemination," #157 above), but Guttman was cautious (see #158 above).

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

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

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

Walter Jacob, Chairman  
Leonard Kravitz  
Isaac Newman  
Harry Roth  
Rav Soloff  
Bernard Zlotowitz

## 197 Child Born Through Artificial Insemination

Walter Jacob

### Contemporary American Reform Responsa

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**QUESTION:** Should a parent whose child has been born through artificial insemination tell the child that the child has been conceived in this fashion? If the semen used in the process of artificial insemination is a mixture of that of the father and of a volunteer, is the husband to be considered the actual father of the child? Is it permissible to use a donor in the case of artificial insemination? (Rabbi S. Ezring, Elkins Park, PA)

**ANSWER:** Let me begin with your second question which deals with the status of the father. In many instances artificial insemination merely uses the semen of the husband. Then there is absolutely no question. If, as you indicated, a mixture has been used, there would also be no question about the father. In accordance with Jewish law, the husband is presumed to be the father unless there is proof that this is not so (Hul. 11b; Sotah 27a; *Shulhan Arukh* Even Haezer 4.13ff and commentaries). The husband would be presumed to be the father even if there was some suspicion that the woman had intercourse with someone else, or that the child was the result of rape. In this case, as there was no other intercourse, and a mixture of semen was used, the husband is definitely considered as the father.

The only reason for not using a Jewish donor for artificial insemination lies in the possibility that the child may marry incestuously without realizing it (C.F. Epstein, *Teshuvah Shelemah*, Even Haezer #4). In our very large, widely dispersed American Jewish community, this likelihood is minimal and for that reason both Jewish and non-Jewish donors may be used.

There is no reason to tell the child that he is the result of artificial insemination. After all, such a child is in every way part of the family from gestation and is genetically part of the family. Such knowledge can not benefit the child or its relationship with the parents. Such a discussion would be as absurd as telling a child conceived naturally that he may have been the result of intercourse in anger, or under other unusual circumstances. Conception is a private matter between the parents and the child has no right to that information. The child, therefore, should not be told about his conception through artificial insemination.

March 1986

## Case Study II

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The couple finally elected to have another child of their own, and after a few months they were happy to learn that Debra was again pregnant. In the course of her subsequent medical care, Debra's obstetrician performed an ultrasound examination, and found unmistakable evidence that the fetus had a serious cardiac malformation, apparently similar to what was present in their son, Scott. They discussed this further with a cardiologist, and learned that surgical procedures for these types of abnormalities had improved considerably since Scott's surgery. They were also informed that heart transplants are now being done successfully for infants with uncorrectable heart defects.

With this information Debra and Steven were faced with the decision of whether to abort the fetus, or, considering in part their relatively advanced ages and Debra's history of reproductive difficulties, to carry the fetus to term but to have another seriously handicapped child.

**Question:** Where do you stand with regard to Reform Judaism's position on Abortion and why?

## 86 Surgical Transplants<sup>6</sup>

Solomon B. Freehof

American Reform Responsa

Central Conference of American Rabbis

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**QUESTION:** What is the attitude of the Jewish legal tradition to the growing surgical practice of transplanting parts of a dead body into that of a living person?

**ANSWER:** It should go without saying that Jewish tradition and feeling would be absolutely opposed to hastening the death of a potential donor by even one second, in order that the organ to be transplanted into another body be in good condition. Nothing must be done to hasten the death of the dying. This scrupulousness about preserving the last few moments of life is also the concern of modern medicine. There are serious discussions today among doctors—especially with regard to obtaining organs for transplanting without delay—as to exactly when the potential donor is to be considered actually dead. At first the rule was: when the heart has stopped beating. Now they are considering a further test: when the brain stops functioning. As the discussion in medical circles continues, they will devise more, and even stricter tests.

As far as deciding when the potential donor is actually dead, modern scientific opinions are much stricter than Jewish tradition. The controversy arose a century ago as to whether Jewish laws of immediate burial was too hasty an action or not. Various governments in central Europe decreed that there must be a delay of three days before the burial. The great Hungarian authority, Moses Sofer, defended the Jewish custom of immediate burial (on the same day) and said that our traditional judgment, embodied in the knowledge of the *Chevra Kadisha*, was sufficient proof of death (see his responsum in *Chatam Sofer*, Yoreh De-a 338). Let us therefore say at the outset that—at least according to the spirit of Jewish law—the stricter the test as to the time of death which physicians will arrive at, the better it is. We therefore agree with the strict judgments of modern medicine that it must be absolutely clear that the patient is dead.

But it is from this point on that the real problem begins. Is it morally or legally permissible to take away parts of the body of the dead, and is it further permissible to insert such parts into a living body? The problem is difficult, first of all, because transplanting of organs is an entirely new surgical procedure, and, therefore, there could be no direct parallel or discussion of such a procedure in the older literature. Whatever opinion is arrived at on this matter must be derived as the underlying ethical principle behind related discussions in the literature.

There is a second and more direct difficulty in analyzing this question. When we begin to study the ethical implications of related ideas in the Talmud and in the writings of later scholars, we discover that the relevant basic principles seem to be mutually contradictory. Since this fact constitutes an initial difficulty, let us consider it first.

There is a general principle as to healing and the materials used for healing which, on the face of it, is so general as to make all further discussion of the problem unnecessary. The Talmud says (Pesachim 25a): "We may use any material for healing except that which is connected with idolatry, immorality, and bloodshed." These are the three cardinal sins which a person must avoid, even if it would lead to martyrdom. But aside from three such sources of healing methods or material, any material or any method would be permitted. Maimonides, himself a great physician, makes this

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Talmudic statement even clearer. He says (Hilchot Yesodei Torah 5.6): "He who is sick and in danger of death, and the physician tells him that he can be cured by a certain object or material which is forbidden by the Torah, must obey the physician and be cured." This is codified as a law in the *Shulchan Aruch*, Yoreh De-a 155.3.

Considering this general permission to use anything we need, no further discussion would seem to be necessary, except for the fact that the body of the dead has a special sacredness in Jewish law. There is a general principle that the body of the dead may not be used for the benefit of the living ("*Met asur bahana-a*," based on Sanhedrin 47b). If the two principles are taken together, the general permissiveness would then need to be restated as follows: We may use all materials except those involved in the three cardinal sins mentioned above and except, also, the body of the dead.

But this apparent prohibition of using parts of the body of the dead depends upon a closer definition of the word *hana-a* (benefit). Later scholars understand the word *hana-a* to mean not "general benefit," but rather "satisfaction" (in the sense chiefly of the satisfaction derived from food). Therefore, they speak of materials taken into the body in ways different from the way of eating, and they call such absorption of material (other than eating) "not in the way of benefit, or satisfaction" ("*Lo kederech n' hana-ato*"). For example, the eating of blood is forbidden, but taking a blood infusion by means of the veins is described as not by the way of *hana-a*, or satisfaction, and therefore, is permitted. Thus, the question of getting *hana-a* (satisfaction) from the body of the dead depends now on whether it is taken as medicine or by way of food. If the parts of the body of the dead are taken "not by the way of satisfaction" (*derech hana-a*) but inserted into the body in another way, the law forbidding "benefit" from the dead is usually much more permissively interpreted.

There is another aspect of the principle that the dead may not be used for the benefit or satisfaction of the living. That has to do with the distinction between Jewish dead and Gentile dead. In general, we are in duty bound to heal the sick, bury the dead, comfort the mourners of Gentiles, just as we do with the bodies of Jewish dead (B. Gittin 60a). But with regard to the Jewish dead, Jewish law adds certain special regulations. For example, a Kohen may not be in the same building with the Jewish dead because he may not defile himself except for his own relatives. There are detailed burial requirements as to washing, shrouds, etc., which are required for the Jewish dead. These extra requirements do not apply to the Gentile dead. We are, of course, in duty bound to bury and console, but neither Gentiles nor Jews are required to obey these additional minutiae of Jewish burial laws in the case of Gentile dead. It is sufficient if Gentile dead are respectfully buried and their mourners consoled.

So there is a debate in the law as to whether the body of the Gentile dead may or may not be used for the benefit of the living. The *Shulchan Aruch*, Yoreh De-a 349, is inclined to the belief that the body of the Gentile dead may not be so used, but the majority of opinion inclines to the opinion that such bodies may be used for the benefit of the living (see the authorities marshaled by Moses Feinstein, *Igerot Mosheh*, #229 and #230). Since, therefore, the majority of the available bodies as sources of organs for transplant are Gentile bodies, this doubt as to whether "benefit for the living" may come from the body of the dead does not have heavy weight.

There is, of course, a third consideration, and that is the duty of burying the whole body of the dead. This duty is the source of the basic objection of Orthodox authorities to autopsy. Therefore, the question now is whether a part of a body which is inserted into a living body is still to be considered part of the dead (which must be buried), or is it now to be considered a part of a living body.

All, or almost all, of these rather complex contradictions which needed to be harmonized are discussed in the Talmud and by its early commentators, but of course they have no definite statement about the actual consuming or using the body of the dead for the healing of the living. The discussion of such methods of healing begins to appear in the literature in later centuries.

One of the strangest discussions concerning the medical use of the dead for healing the living is found in the responsa of David ibn Zimri (Egypt, 1479-1589). He is asked a question which seems bizarre to us, who are no longer aware of medieval popular medical superstitions. It seems that mummies from the ancient Egyptian tombs were in David ibn Zimri's time a regular article of commerce. They were sold for medical purposes. People would actually eat those mummies to heal certain diseases. He is asked whether it is permitted to get benefit (*hana-a*) or satisfaction from these bodies of the dead (*Responsa Radbaz III*, 548). He states the general principle that one may not have *hana-a* from the flesh of the dead (based on Avoda Zara 29b). Then he says that these bodies, embalmed so long ago with various chemicals, are no longer human flesh but are now another product. The ancient embalming preserved merely the outlines of the features but transformed the flesh into something else entirely. Furthermore, he says, these were once the bodies of the ancient Egyptians, and, of course, the law is less strict than the laws about "benefit" from the Jewish dead.

As far as I am aware, there is no other discussion in the responsa literature of the use of a dead body for healing. There are referenced to the use of tanned skin, but that was not for medical purposes. But in our time there are two detailed discussions of precisely our problem. They are by Moses Feinstein of New York, who may well be considered the prime Orthodox author of responsa (although, indeed some extreme Chasidim recently denounced him for an allegedly liberal opinion with regard to artificial insemination). Feinstein, in his *Igerot Mosheh* (volume Yoreh De-a) has two successive responsa on the subject (#229 and #230). These responsa, although only four or five years old, do not yet know of heart and liver transplants, but the author already knows of bone transplants, and that is sufficient for him to marshal all the relevant opinions.

He discusses—as was indicated above—the exact definition of the term *hana-a* (benefit) and explains it as literally meaning "satisfaction of food." Hence, that which is taken into the body not by way of food (i.e., not by mouth) is to be considered more leniently. Furthermore, he speaks of the fact that most bodies available for organ transplants are Gentile, and therefore the stricter prohibitions do not apply to them. Finally, he comes to a conclusion which is vital to the whole discussion, i.e., that when a part of a body is taken by a surgeon and put into a living body, it becomes part of a living body; its status as part of the dead which needs to be buried is now void (*batei*).

There is a confirmation of the permissive opinion of Feinstein in the responsa of Nahum Kormmehl, published in 1966 in New York, *Tif-eret Tsevi*, #75. His explanation is really charming. He says with regard to the prohibition of *hana-a* from the dead in transplants that when the operation occurs there is certainly no *hana-a* for the patient, only misery for days. The *hana-a* comes when the transplant comes to life and becomes part of his body. But now it is alive, and therefore this has nothing to do with benefit from the dead.

To sum up the discussion: The exceptional nature and rights of the dead body do not stand in the way of the use of parts of the body for the healing of another body. The part used is not taken into the living body as food, hence it is not considered *derech hana-a*. The part becomes integrated into a living body and therefore the requirement of its burial has lapsed. Therefore, the general principle stated first remains unimpugned, i.e., that "we may heal with any of the prohibited materials mentioned in Scripture." This is especially true, as Maimonides indicates, because the patients about to receive these implants are actually in danger of death, and for such patients any possible help is permitted by Jewish tradition.

## 171 Abortion<sup>7</sup>

Solomon B. Freehof

American Reform Responsa

Central Conference of American Rabbis

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**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 Mishna (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 *Shulchan Aruch* (Chosen 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 Chosen Mishpat there is no basis as yet to terminate the pregnancy.

However, Rashi to B. Sanhedrin 72b--where the law of the destruction of the child is cited from the Mishna 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 Chosen 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 same sense that killing it would be a capital crime. Joshua Falk (16th-17th century), in his classic commentary *Me-irat Einayim* to the passage in Chosen 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 Arachin 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

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<sup>7</sup> Vol. LXVII, 1958, pp. 120-122.



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 Noach* (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 Chulin 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 a capital crime for a Jew, it is still not permitted for him to do so,

There is a modern, scientific analysis of the law in this matter by Aptowitz, 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 to actual cases in the traditional law. As a matter of fact, I found at first only three responsa which discuss it fully. There are others which I found later. The first responsum is by a great authority, Yair Chaim Bachrach of Worms, 17th century. In his responsum (*Chavat Ya-ir*, #131 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 Chulin, 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 (*Ya-avets 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 without her anyhow. Then he add 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 Uzi-el 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 Chulin 33a that a Jew is not permitted (*la shari*) to destroy a fetus, although such an act is not to be considered murder. Uziel says that, of course, one may not destroy it. One may not destroy anything without purpose. But if there is a worthwhile purpose, it may be done. The specific case before him concerned a woman who was threatened with permanent deafness if she went through with the pregnancy. Uziel decides that since the fetus is not an independent nefesh but is only part of the mother, there is no sin in destroying it for her sake.

In the case which you are discussing, I would, therefore, say that since there is strong preponderance of medical opinion that the child will be born 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 Chaim Bachrach.

## 16 When Is Abortion Permitted?

Walter Jacob

### Contemporary American Reform Responsa

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**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. Aptowitz in the *Jewish Quarterly Review* [New Series], Vol. 15, pp. 83ff; David 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. 3ff; 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. 21.22f). 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 the life of 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 *Sa. 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. 25.11f; 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 restriction 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 problem of animal sacrifice and issues of inheritance. No uniform definition from Talmudic sources can be achieved (see Robert Kirscher, *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.1ff). 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 early in 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. 36ff). Rabbi Unterman has argued against abortion as tradition permits the desecration of the Shabbat in order to save an unborn fetus (Rambam 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. 1ff). 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 a 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 seeds 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

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 a 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. 213ff, etc.). Even the strict Unterman permits non-Jews to perform abortions within the forty day periods (Unterman, *op. cit.*, pp. 8ff).

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 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 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."

January 1985

## Case Study III

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After much discussion and reflection, the couple elected to allow the pregnancy to proceed to term, and to prepare themselves to deal as effectively as possible with whatever problems the infant might have. At seven months into the pregnancy, Debra went into precipitous premature labor. The infant was limp and blue at delivery, and required surgery in the first hours of life because of complications related to her heart malformation. Because of poor oxygenation of the brain during the early hours of life, the parents were informed that the infant had developed severe and apparently permanent neurological damage. They were further told that she would require very intensive medical care to assure her survival, and in any case would be severely handicapped.

**QUESTION:** Do you agree with the position, in the CCAR Resolution, that the ultimate authority for the welfare and treatment of the newborn reside with the parents? Why?

## ***Newborn Infants Unable to Live Without Massive Medical Intervention***

CCAR<sup>8</sup>

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WHEREAS Judaism cherishes newborn life and believes that every newborn is a *nefesh*, a human being created in the image of God, and possesses certain fundamental rights, including the right to adequate nourishment, appropriate health care, and humane medical treatment, and

WHEREAS new medical and surgical techniques, drugs, and technology make it possible to prolong the live of newborn infants whose medical problems would once have meant certain death, and

WHEREAS such developments offer to Jews, for whom the preservation of life is a supreme mitzvah, tools for the sacred task of *pikuach nefesh*, and

WHEREAS the measure of life is not merely quantitative, but is also qualitative, and thus, in deciding whether to render life-prolonging medical treatment to a severely defective infant, the quality of life that the child would experience after treatment must be taken into account, and

WHEREAS in all cases, decisions concerning the care of a seriously deformed infant must be based solely on the *child's* best interest, and

WHEREAS given Jewish tradition's extraordinary emphasis on the saving of human life, the decision to withhold life-prolonging medical treatment from an infant can be justified only when there exists a moral certainty that either no rational person could conceivably prefer life in the condition that the infant will attain after treatment to death OR the infant is totally and permanently devoid of all higher functions characteristic of humanity, and

WHEREAS even when the withholding of life-prolonging care is justified, the infant is entitled to palliative care and must not be abandoned. The Jewish tradition's prohibition of positive action to hasten death remains in force and must be respected, and

WHEREAS one special aspect of cases involving infants is the patients' inability to participate in decisions concerning their own care, as Jewish tradition and American law entrust minor children to their parents and empower parents to make decisions on their children's behalf, and

WHEREAS the Justice Department has intruded into rights viewed as parental prerogatives,

THEREFORE BE IT RESOLVED that the Central Conference of American Rabbis affirms that

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<sup>8</sup> CCAR Resolution, CCAR Yearbook XCVI, pp. 225-226.

1. Decisions concerning providing or withholding medical care to infants are the right and responsibility of parents, to be made in accordance with the highest values of their faith, and in consultation with physicians and clergy.
2. It is the responsibility of medical personnel to be certain that parents are aware that a range of options exists, from that of providing life-prolonging treatment followed by institutionalization or adoption to that of providing only palliative care at home.
3. It is not the business of government agencies to intrude upon the confidential relationship of a family with its physicians and clergy or to interfere with parental decisions concerning an infant's treatment.
4. It is the right of parents to make decisions about the care of their minor children, and it is their responsibility free of government interference, except in cases of obvious parental neglect or willful misconduct.

## Genetic Engineering 20

Walter Jacob

### Contemporary American Reform Responsa

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**QUESTION:** Would a person produced through genetic engineering rather than natural reproduction possess a soul? Does a clone have a soul? (Z. Shtohryn, St. Joseph, MO)

**ANSWER:** We should divide this question into two segments. First we must deal with the question of when a soul enters the human body. There are a number of *midrashic* and *halakhic* responses to this, but the practical *halakhic* implication is that a baby becomes a person only at the moment of birth. Therefore, if a woman in labor can not give birth, and her life is endangered, it is permissible to destroy the child as long as its head has not come out of the womb. Until that time, it is considered as integral part of the woman, and so may be treated like any other limb of the body rather than a separate human being (*M. Ohalot* 7.6, *Shulhan Arukh Hoshen Mishpat* 425.2). Many safeguards have been built around this statement by the rabbinic tradition to assure that it would not be misused for broad scale abortions. This practical decision developed independently from the Talmudic conceptions of the soul.

The rabbis of the *Talmud* developed several doctrines of the soul, but they have not been systemized. A prayer from this period taken into the liturgy expresses a leading motif. It states: "My God, the soul which You have given me came pure from You,;" (*Shab.* 152b). A dualism between body and soul was assumed by many scholars of the period (*Ber.* 10a; *Shab.* 113b; *Yoma* 30b; etc.). There is considerable discussion among the rabbis about the moment at which the soul enters the body. Is it at the instant of conception, of embryonic formation, or of birth (*San.* 91b; *Gen. Rabbah* 34.10)? All three were possible for those rabbis who followed the Neo-Platonic three-fold division of the soul. An additional element of the soul would then have been added at each of the above mentioned stages.

In the Middle Ages, when Jewish philosophy was influenced by Greek thought transmitted by Arab scholars, other ideas of the soul developed and many thinkers divided the soul into three forms in accordance with Islamic Neo-Platonists. The first was equated with man's active intellect, while the other two were connected with lower forms of life (Saadiyah, Bakhya Ibn Paquada, Ibn Gabirol and Maimonides). Maimonides and some others considered the three forms of the soul to be animal, vegetable, and human, and so felt that the lower forms of life also contained souls.

The *Zohar*, the leading mystical work of medieval Judaism, also divided the soul into three elements. The first was rational, the second moral and the third vital. All three were then connected to the *Sefirot*, which link God and man. There is a considerable amount of speculative literature about the nature of the soul, and many different philosophical patters have appeared in Jewish thought. Anything produced asexually like a clone would be akin to a plant, would also be considered to have at least a lower form of the soul. The soul in its human form, according to the *halakhic* tradition, however, enters a *body* only at the time of birth as the references above have indicated.

The only references in traditional literature to man-made creatures are the legends of the *Golem*. These stories arose in the middle ages and are akin to those found in other folk mythologies. The *Golem* was thought to be a clay or wooden figure brought to life by its master



through the insertion of the divine name in its mouth, or the placement of the name on its forehead. *Golems* were sometimes considered dangerous and had to be restrained through removal of one of the letters of God's name, otherwise they could become destructive (Gershom Scholem, *The Kabbala and Its Symbolism*, 1965, pp. 185-204; A.D. Eisenstein, "Golem," *The Jewish Encyclopedia*, Vol. 6, p. 36f). The *Golems* which appear in various legends were completely controlled by their master or maker. They, therefore, were akin to modern robots which can perform tasks upon command, but are controlled by a human master. No one would consider a computer to possess a soul. When Zvi Ashkenazi and Jacob Emden were asked whether a Golem could be counted as part of a minyan they responded that it could not (*Hakham Zevi* #93).

We are, however, concerned with an entirely new being which might conceivably begin its life in a test tube from a fertilized *ovum* or a variety of genetic material and would be capable of sexual reproduction itself. We shall not discuss the desirability of such an undertaking, but at some time in the future it will, undoubtedly, occur with or without approval. We could well consider such a being to have a soul. It will have been formed from human material despite all genetic alterations. Its development will have taken place in an artificial environment rather than the womb, but at some point it will emerge as a human being. Hopefully, it will then not be enslaved to its maker or master, but will develop independently as other human beings. Unless such possibilities of independent intellectual and moral development are genetically removed, this would be a human being.

We must add that these conclusions remain speculative as knowledge in the field remains limited. The parameters and possible consequences of genetic engineering remain to be explored; until this has been done, only preliminary guidance can be provided.

February 1978

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