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CONTRACEPTION IN JEWISH LAW

INTRODUCTION

Controversy surrounding the problems associated with contraception is by no means on the decline. On the contrary, a veritable recent flood of books and articles in the medical and lay press, as well as innumerable programs on the mass communication media devoted to family planning, contraceptive practice and birth control, attest to the widespread and increasing interest in this subject. Introduction of the pill in the early 1960's revolutionized many people's thinking toward birth control and has had a major impact on the overall picture of world population limitation.

It is beyond the scope of this essay to provide the reader with a comprehensive discussion of the various contraceptive methods, their effectiveness or lack thereof, the physiological mechanisms involved and the possible side effects that may be encountered. For such information the reader is referred to the standard textbooks of obstetrics and gynecology. Suffice it simply to enumerate the major methods employed: the condom, coitus interruptus, the diaphragm and cervical caps, chemical contraceptives, the safe period or rhythm method, oral contraceptives and the intrauterine devices. Sterilization and abortion should also be mentioned, as well as a variety of minor methods, such as douching, sponges and tampons, scrotal hyperthermia and coitus reservatus and saxonicus.

MORAL ASPECTS OF CONTRACEPTION

The morality (or immorality) of contraception boils down to a two-sided argument. On the one hand, many people claim that there is no moral difference between preventing the natural process of conception by contraception and preventing the natural process of obesity by diet or pills. On the other hand, traditional Judaic-Christian teaching maintains that by the mind and will of God there is an objective standard of right and wrong in the universe, and that men are possessed with the rational faculty to choose one or the other. Thus, if the Torah considers any interference with the act of procreation as morally wrong, then such interference is legally prohibited in Jewish law. The commandment of *be fruitful and multiply* (Genesis I:28) interdicts the indiscriminate use of contraceptives.

The argument that contraceptive chemicals may kill a fertilized ovum (i.e., a potential person) is more germane to a treatise on abortion and will not be discussed here. Furthermore, such an argument is not applicable to most modern methods of contraception including the pill and intrauterine devices. The problem of eugenics and population control is as much a moral dilemma as it is a matter of social ethics.

The economic argument for contraception emphasizes that parents should only have the number of children they can support in an adequate fashion. This argument possesses its greatest strength and appeal when it is applied to large families with below-average income. That some good may be derived from contraception employed for economical reasons does not, however, make such a practice morally right. In order that all children in a family be provided with adequate food, clothing, shelter and education, contraception may be no more morally justified than robbery by the parents to provide for the needs of the children. Robbery and contraception are both immoral, although both might achieve a desirable outcome. The solution to the economic argument for contraception is a better organization of society, with sufficient work and distribution of wealth for all.

Medical indications for the use of contraceptive devices and methods are many and include diseases wherein pregnancy would result in a marked deterioration of the mother's health or even threaten her life. Such conditions are rheumatic heart disease, tuberculosis, certain kidney diseases, severe diabetes and others. However, to masquerade behind a medical indication, particularly psychiatric illness, where none exists, or where the risks are minimal, is certainly immoral.

It is sometimes asserted that the stability, or even the preservation, of a marriage depends upon the practice of contraception. Reasons may include the desire of a wife to continue working after marriage, the lure of a professional career, unwillingness to give up an active social life and reluctance to financially drain the marriage by having children. Such reasons, purely of convenience, for the use of contraceptives, are certainly immoral.

CATHOLIC ATTITUDE TOWARD CONTRACEPTION

The most thorough, scholarly, objective analysis of Catholic doctrine on birth control throughout history is the recently published work of John T. Noonan, Jr.¹ This book traces the development of the Church's position on contraception, and analyzes the historical situations that influenced various church decisions over the centuries from the year 50 C.E. until 1965.

The traditional Catholic viewpoint is to prohibit all forms of contraception, except the rhythm method. This position is based upon the doctrine that the primary purpose of marriage is procreation, not companionship. Any method of birth control which violates the "natural law" is thus prohibited. Birth control by natural means, that is using the rhythm method or abstinence, is not considered a violation of the "natural law."

Recent pronouncements by several Popes have reaffirmed the traditional Catholic teaching on this matter. In his famous 1930 Encyclical *Casti Connubii* (On Christian Marriage), Pope Pius XI solemnly restated the condemnation of contraception, but gave his approval to the rhythm method. This approval was repeated by Pope Pius XII in 1951 when he said:

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We affirm the legitimacy and, at the same time, the limits — in truth very wide — of a regulation of offspring which, unlike so-called “birth control,” is compatible with the law of God. One may even hope that science will succeed in providing this licit (rhythm) method with a sufficiently secure basis.²

In a second address in 1951 the Pope elaborated on the conditions under which Catholics may use the rhythm method and be exempt from the duty of procreation and parenthood. Examples are “serious reasons, such as those often provided in the so-called indications of the medical, eugenical, economic and social order.”³ In an address to hematologists in 1958, Pope Pius XII approved the use of oral contraceptives for the treatment of disease, but condemned their use for birth control.

In 1966, a papal commission, appointed two years earlier to re-examine the church’s position on marriage and the family, submitted its report to Pope Paul VI. There were both minority and majority reports. The former recommended continued adherence to the traditional beliefs, whereas the latter urged changes in past teachings to allow chemical and mechanical contraceptives. In July 1968, in his Encyclical *Humane Vitae*, the Pope rejected the majority report and condemned the use of techniques other than abstinence or the rhythm method. Dissent within the Catholic hierarchy was considerable with progressive views being voiced by Catholic theologians and laymen alike.

PROTESTANT VIEWS ON CONTRACEPTION

Protestant churches are virtually unanimous in their endorsement of birth control as enunciated in the 1961 statement of the National Council of Churches, the federation of 32 major Protestant denominations. Such an endorsement stems from the view that the basic purposes of marriage include not only procreation but also the “nourishment of the mutual love and companionship of husband and wife and their service to society.”⁴

JEWISH ATTITUDE TOWARD CONTRACEPTION

The most extensive study of the principles of Judaism concerning contraception, based on a wealth of primary sources, is that of David Feldman.⁵ In his book, Rabbi Feldman examines the relevant precepts of the Talmud, Codes, Commentaries and Rabbinic Responsa. Feldman's work is so exhaustive that recent articles on the subject add very little to the overall picture.

A brief discussion of the Biblical commandment *be fruitful and multiply* as decreed first to Adam and Eve (Gen. 1:28) and later to Noah and his sons (Gen. 9:1 and 7) and to Jacob (Gen. 35:11) seems appropriate. The importance of this commandment is stated in the Babylonian Talmud (*Yevamot* 63b):

Rabbi Eliezer stated: He who does not engage in propagation of the race is as though he sheds blood; for it is said, "Who so sheddeth man's blood by man shall his blood be shed" (Gen. 9:6); and this is immediately followed by the text "And you, be ye fruitful and multiply" (Gen. 9:7). Rabbi Jacob said: As though he has diminished the Divine Image; since it is said, "For in the image of God made He man" (Gen. 9:6), and this is immediately followed by "And you, be ye fruitful and multiply" (Gen. 9:7). Ben 'Azzai said: As though he sheds blood *and* diminishes the Divine Image . . .

The explanation of the commandment is provided by the *Mishnah* (*Yevamot* 6:6) where it states:

A man shall not abstain from the performance of the duty of the propagation of the race unless he already has children. (As to the number), Bet Shammai ruled: two males, and Bet Hillel ruled: A male and a female, as it is written (Gen. 1:27 and 5:2); "*male and female* created He them."

It is beyond the scope of the present essay to delve in depth into the Rabbinic ramifications of the commandment of procreation. Suffice it to say that "the moral obligation, if not the commandment of propagating the race still rests upon the husband when he already has two children." The role of the

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woman in procreation is described by Feldman and summarized in a quote from the fourteenth century Talmudic Commentary of Rabbi Nissim (*Chiddushei Ran to Kiddushin 41a*):

. . . even though she is not personally commanded concerning procreation, she performs a *mitzvah* (meritorious act) in getting married because she thereby assists her husband in the fulfillment of his *mitzvah* (religious duty) of *be fruitful and multiply*.

In a Jewish marriage, over and above the question of procreation, there exist the conjugal rights of the wife, technically termed *onah*. Thus, non-procreative intercourse such as occurs if the wife is too young to bear children, or is barren, or is pregnant, or post menopausal, or following a hysterectomy, is not only allowed but required. Improper emission of seed (*hashchatat zera*) is not involved, or is cancelled out so long as the intercourse is in the manner of procreation. Not only are such sexual activities permitted, but they are in fact required by Biblical law based on Exodus 21:10. "Marriage and marital relations are both independent of procreation, achieving the many desiderata spoken of in Talmudic, Responsa and Mystic literatures."⁶ Such goals include fulfilling the wife's desire, physical release of the husband's sexual pressures, and the maintenance of marital harmony and domestic peace.

A lengthy chapter in Feldman's book is devoted to a discussion of the legitimacy of sexual pleasure in Judaism. He quotes Nachmanides who said that

Sexual intercourse is holy and pure when carried on properly, in the proper time and with the proper intentions. No one should claim that it is ugly or unseemly. God forbid! . . .

In a similar vein, Rabbi Jacob Emden is cited as having said:

. . . to us the sexual act is worthy, good and beneficial even to the soul. No other human activity compares with it; when performed with pure and clean intention it is certainly holy. There is nothing impure or defective about it, rather much exaltation . . .

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Thus, whereas Christian teaching promulgates that procreation is the sole purpose of marriage and sexual intercourse, Judaism requires that not only need procreation result from sex, but mutual pleasure is sufficient reason for the sex act.

There are at least six methods of contraception mentioned in the Bible and Talmud. The first of these is "coitus interruptus" which is unequivocally prohibited as stated by Maimonides (*Mishneh Torah, Hilchot Issurei Bi'ah* 21:18):

It is forbidden to expend semen to no purpose. Consequently, a man should not thresh within and ejaculate without . . . As for masturbators, not only do they commit a strictly forbidden act, but they are also excommunicated. Concerning them it is written, "Your hands are full of blood" (Isaiah 1:15), and it is regarded as equivalent to killing a human being.

A similar prohibition is found in Asheri, known as *Rosh* (*T'shuvot HaRosh* 33:3) and in Karo's *Shulkhan Arukh* (*Even Ha'ezer* 23:5) as well as in other Codes of Jewish Law.

The Scriptural source upon which is based the prohibition of improper emission of seed is not clear, although many consider the act of Er and Onan (Gen. 38:7-10) to be the classic case of coitus interruptus. The Talmud, however, (*Yevamot* 34b) views the act of Er and Onan as unnatural intercourse. Er wanted to preserve his wife's beauty by preventing her from becoming pregnant, and Onan sought to frustrate the Levirate law. Therefore, argues Feldman, if this was Onan's sin, no clear Biblical prohibition of improper emission of seed can be derived from the story of Onan, because the circumstances of the Levirate marriage are special, and allow for no more than an intimation (*remez*) of the evil of this method of contraception.

Other possible Biblical sources outlawing emission of seed for naught have been suggested. The Decalogue's commandment against adultery is said to have wider application, perhaps to immorality in general. The Generation destroyed by the great flood is thought to have been liquidated because of the sin of improper emission of seed. Others say that this cardinal sin is implied in the commandment of *be fruitful*

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and multiply. Finally, states Feldman, the injunction (in Leviticus 18:6) against incest, literally, "immorality with one's own flesh" (*ish ish el kol sh'er b'saro*) includes improper emission of seed.

Whether this offense is considered homicide or only immoral as self-defilement is also a matter of argumentation. The *Zohar* apparently espouses both reasons. Bringing forth semen in vain would also be prohibited if a man were to use a condom during intercourse, even if the sex act were performed in the natural way. Procurement of sperm for medical reasons (i.e., not in vain) is permitted under certain circumstances, such as sterility testing. Abstinence as a contraceptive method is prohibited as a double destruction of seed. Not only is the seed prevented from fulfilling its function of procreation, but it also fails to fulfill the commandment of *Onah*, one of the wife's conjugal rights.

Since the commandment of procreation in Judaism rests primarily on the man, any contraceptive method employed by him such as coitus interruptus, the condom or abstinence, would be strictly prohibited because of the Onanite nature of these methods. Even in situations where contraception is permitted by Jewish law, such as for situations in which pregnancy might endanger the life of the mother, these methods are not allowable.

The Talmud discusses four methods and techniques employed by the woman to prevent conception: The safe period, twisting movements following cohabitation, an oral contraceptive, and the use of an absorbent material during intercourse.

The period of fertility of a woman is mentioned in the Talmud (*Niddah* 31b) as follows:

Rabbi Isaac . . . stated: A woman conceives only immediately before her menstrual period, for it is said "Behold, I was brought forth in iniquity" (Psalms 51:7). But Rabbi Yochanan stated: a woman conceives only immediately after her ritual immersion for it is said "And in cleansing did my mother conceive me" (Psalms 51:7) . . .

Feldman cites rabbinic Responsa that call attention to cycles of fertility and sterility as a possible method of contraception.

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He concludes that there is no impropriety in the use of this method when birth control is required, such as in situations of hazard to the mother. However, by its use, the commandment of procreation and the wife's conjugal rights (*Onah*) are both frustrated. Furthermore, the unreliability of this method makes it unacceptable in cases of danger to life.

An ancient method of contraception is when the woman makes violent and twisting movements following cohabitation in order to spill her husband's seed. This method is described in the Talmud (*Kethubot* 37a) by Rabbi Jose who is of the opinion that "a woman who plays harlot turns over in order to prevent conception." The Talmud (*ibid* 72a) further entitles a woman to receive her marriage settlement (*Ketubah*) if the husband imposes a vow on her to produce violent movements immediately after intercourse to avoid conception.

Throughout the centuries, numerous recipes have been recommended for oral contraception, from Pliny the Elder's parsley and mint, to Dioscorides' willow leaves in water; from Soranes' opapanix, with cyrenaiac sap, to the marjoram, parsley and thyme of medieval Germany. In the Talmud, there are at least two discussions of a "cup of roots" or sterility potion. In *Yevamot* 65b we find the following:

. . . Judith, the wife of Rabbi Hiyya, having suffered agonizing pains of childbirth, changed her clothes [on recovery] and appeared [in her disguise] before Rabbi Hiyya. She asked "Is a woman commanded to propagate the race?" He replied, "no." And relying on this decision [literally: she went], she drank a sterilizing potion . . .

Elsewhere the Talmud states (*Shabbat* 109b-110b) that a potion of roots may be imbibed on the Sabbath because it is a cure for jaundice and gonorrhoea. However, the imbiber may become impotent thereby. Thus, a woman may drink a sterilizing (i.e., contraceptive) potion as a cure for jaundice. A smaller dose recommended to treat gonorrhoea does not produce permanent sterility. The ingredients of this "cup of roots" are enumerated by Rabbi Yochanan (*ibid* 110a) and include Alexandrian gum, liquid alum, and garden crocus, powdered and mixed with beer (for jaundice) or wine (for gonorrhoea). The

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Tosefta in Tractate *Yevamot* 8:2 specifically states that a man is not allowed to drink any potion in order not to be fertile, because he is commanded to propagate the race, whereas a woman is permitted to drink the potion in order not to conceive.

The latter ruling is codified by both Maimonides (*Hilkhoth Issurei Biyah* 12:12) and (Karo *Shulchan Arukh, Even Ha'ezer* 5:12) unconditionally. Later Rabbis, however, stipulate that there must be some medical indication as in the case of Rabbi Chiyya's wife (*vide supra*) to allow the use of the potion of roots. Furthermore, as pointed out by Feldman, "the bulk of the legal discussion surrounding the cup of roots is based on the crucial assumption that the sterilizing effect of this potion is permanent," thus raising the problem of castration, an act prohibited by Jewish law.⁷

The oral contraceptive pill of today seems to embody within itself the Talmudic "cup of roots." It allows intercourse to proceed in a natural and unimpeded manner, thus allowing fulfillment of the wife's conjugal rights. Furthermore, whereas the effect of the "cup of roots" is permanent, the effect of the pill is temporary, thereby setting aside the question of castration. No improper emission of seeds is involved in the use of the pill.⁸ However, without medical indication it appears as if the oral contraceptives should not be employed prior to the fulfillment of the commandment of procreation (i.e., at least two children). Furthermore, the question of the safety of the pill is both of medical and Jewish legal concern. Certainly, women in whom medical contraindications make the use of oral contraceptives dangerous, would be prohibited by Jewish law from taking them. Other deleterious side effects must also be taken into consideration. However, at the moment, the pill seems to be the least objectionable method of birth control in Jewish law.

Virtually all rabbinic rulings on the subject of contraception are based upon a key Talmudic statement which has been called "The *Beraita* of the Three Women" (*Yevamot* 12b).

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Rabbi Bebai recited before Rabbi Nachman: Three [categories of] women may [or must] use an absorbent [Hebrew: *moch*] in their marital intercourse [to prevent conception]: a minor, a pregnant woman and a nursing woman. The minor, because [otherwise] she might become pregnant and as a result might die. A pregnant woman because [otherwise] she might cause her fetus to become a *sandal* [a flat fish-shaped abortion due to superfetation]. A nursing woman, because [otherwise] she might have to wean her child prematurely [owing to her second conception], and he would die. And what is a minor? From the age of eleven years and one day until the age of twelve years and one day. One who is under or over this age [when conception is not possible or where pregnancy involves no fatal outcome, respectively] carries on her marital intercourse in the usual manner. This is the opinion of Rabbi Meir. But the Sages say: The one as well as the other carries on her marital intercourse in the usual manner, and mercy be vouchsafed from Heaven [to save her from danger], for Scripture says "The Lord preserveth the simple" (Psalms 116:6) . . .

The nature and the status of the absorbent (or *moch*) in Talmudic law is explored in an entire chapter of Feldman's book. Subsequent chapters are devoted to in an in depth consideration of the three categories of women in the *beraita*, the many levels of debate concerning the meaning of the *beraita*.

Does the *beraita* allow or require the three women to use the absorbent? Rashi states that Rabbi Meir means "may use" and the Sages mean "may not," whereas Rabbenu Tam reports that Rabbi Meir means "must" and the Sages mean "must not but may." A second level of debate is concerned with whether the absorbent is to be used before (i.e., during) or after coitus? The outcome of the argumentation in the interpretation of the *beraita* is summarized by Immanuel Jakobovits, as follows:^{8a}

. . . several authorities assume that this dispute applies only to these particular cases (i.e., three women) where the danger of a conception is in any event rather remote; hence, they infer that, in cases of a more definite threat to the mother's life arising from a pregnancy, there would be no objection at all to the use of contraceptives. Others hold that the three women are mentioned to illustrate the attitude to cases of resultant danger to life in general; while yet others regard the entire sanction as limited to these three women only.

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Jakobovits, Feldman and others express surprise at the omission of reference to the pivotal *beraita* by the major codes of Jewish law, Maimonides and Karo. Even the Codes which mention the *beraita* (Asheri and Alfasi) only relay it verbatim without deriving any legal ruling therefrom. To perhaps compensate for this silence, there is available an enormous rabbinic Responsa literature dealing with contraception. The most lenient or permissive view is that of 16th century Rabbi Solomon Luria⁹ who allows the wife to apply a tampon before intercourse, if a conception and pregnancy would prove dangerous. Many subsequent writers including Rabbis Solomon Zalman of Posen,¹⁰ Simchah Bunem Sofer,¹¹ Mordechai Horowitz,¹² Chayim Ozer Grodzinsky,¹³ Sholem Mordechai Schwadron,¹⁴ David Hoffmann¹⁵ and others agree with Luria. On the other hand, there is a school of non-permissivists who do not allow any impediment to natural intercourse. The chief proponents of this school are Rabbis Akiba Eger,¹⁶ Jacob Ettlinger,¹⁷ and Moses Schreiber.¹⁸

For situations of pregnancy hazard, the pessary or diaphragm is allowed by numerous authorities including Rabbis Joshua Baumol,¹⁹ Sholem Mordechai Schwadron,²⁰ Chayim Sofer,²¹ and Mosheh Feinstein.²² The reason is that the normal coital act is not interfered with. This is not the case with the condom which constitutes an improper interference and is strictly prohibited. Chemical spermicides and douches are other contraceptive methods which leave the sex act alone and are thus permitted by many responsa writers but only in a case of danger to the mother from pregnancy. Whether spermicides are preferable to the use of a diaphragm or vice versa is a matter of debate. On the one hand, the occlusive diaphragm does in fact constitute a mechanical barrier. On the other hand, "spermicides destroy the seed immediately upon its entry into the canal."²³

As to the intrauterine contraceptive devices, recent medical evidence seems to indicate that these produce contraception by inhibiting proper implantation of the fertilized ovum in the wall of the uterus. If this is so, then their abortifacient action would prohibit their use, as it is akin to abortion.

CONCLUSION

The Jewish attitude toward contraception by any method is a non-permissive one if no medical or psychiatric threat to the mother or child exists. The duty of procreation, which is primarily a commandment on men, coupled with the wife's conjugal rights in Jewish law, mitigates against the use of the condom, coitus interruptus or abstinence under any circumstances. Where pregnancy hazard exists, and where Rabbinic sanction for the use of birth control is obtained, a hierarchy of acceptability emerges from the Talmudic and Rabbinic sources. Most acceptable are contraceptive means that least interfere with the natural sex act and least interfere with the full mobility of the sperm and its natural course. "Oral contraception by pill enjoys preferred status as the least objectionable method of birth control."²⁴ Since many different factors must be brought to bear on the final decision, it is suggested that competent Rabbinic opinion be sought to adjudicate any given case, such opinion to be based upon expert medical testimony.

NOTES

1. Noonan, J. T., Jr., *Contraception—A History of its Treatment by the Catholic Theologians and Canonists*, 1966, Cambridge, Mass., Harvard Univ. Press, 1966, pp. 561.

2. Guttmacher, A., *Birth Control and Love*, London, McMillan Co., 1969, 2nd edit., pp. 141-168.

3. *Ibid.*

4. *Ibid.*

5. Feldman, D., *Birth Control in Jewish Law*, 1968, New York Univ. Press, pp. 322.

6. *Ibid.*

7. *Ibid.*

8. Feinstein, M., *Igrot Mosheh, Even Hoezer*, No. 65, and Waldenberg, *Tzitz Eliezer*, Vol. 9, No. 51. Talmud, Tractate (*Shabbat* 110b-111a) and based upon the Biblical phrase *that which has its stones bruised or crushed or broken or cut, ye shall not offer unto the Lord; neither shall ye do thus in your land* (Levit. 22:24).

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- 8a. Jakobovits, I., *Jewish Medical Ethics*, New York, Bloch Publishers, 1959, pp. 389.
9. *Yam Shel Shelomoh*, *Yevamot* 1:8.
 10. *Responsa Chemdath Shlomo*, *Even Ha'ezer*, No. 46.
 11. *Responsa Shevet Sofer*, *Even Ha'ezer*, No. 2.
 12. *Responsa Mattei Levy*, Vol. 2, No. 31.
 13. *Responsa Achiezer*, *Even Ha'ezer*, No. 23.
 14. *Responsa Maharsham*, Vol. 1, No. 58.
 15. *Responsa Melamed Leho'il*, *Even Ha'ezer*, No. 18.
 16. *Responsa Akiba Eger*, No. 71.
 17. *Responsa Binyan Tziyon*, No. 137.
 18. *Responsa Chatam Sofer*, *Yoreh Deah*, No. 172.
 19. *Responsa Emek Halacha*, No. 66.
 20. *Responsa Maharsham*, Vol. 1, No. 58.
 21. *Responsa Machaneh Chayim*, *Even Ha'ezer*, No. 53.
 22. *Responsa Igroth Moshe*, *Even Ha'ezer*, No. 63.
 23. Rabbi Eliezer Waldenberg, *Responsa Tzitz Eliezer*, Vol. 9, No. 51, 2, 3.
 24. Feldman, *loc. cit.*